Vanderbilt Law Review

Volume 6
Issue 2 *Issue 2 - A Symposium on Military Justice*

Article 5

2-1953

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THE BOARDS OF REVIEW OF THE ARMED SERVICES

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To most attorneys not having been directly associated at some time with the Armed Forces of the United States, the words "boards of review" mean little. Perhaps at the outset it would serve to clarify the matter if each attorney, when thinking of "boards of review," would substitute in his mind the words "courts of appeal" as those words are understood in the federal judicial system. The boards of review can be aptly analogized to our federal courts of appeal because for the bulk of serious cases which arise in the Armed Forces, review by a board of review is automatic and, indeed, such automatic review has been declared tantamount to an appeal on behalf of the accused in each such case.[1]

Boards of review in the Armed Services are of relatively recent origin. In the Army they date from the World War I period. Early in that war some troops stationed near Houston, Texas, engaged in a riot and a mutiny. Some of the offenders were promptly brought to trial by court-martial for mutiny. The trial lasted several days and was carefully, fairly and scrupulously conducted. Each night the stenographic transcription of the day's proceedings was brought to the department judge advocate, who wrote his review as the trial progressed. On the last day several of the mutineers were found guilty and some were sentenced to death. That night the review was completed. The sentences were approved and confirmed by the department commander pursuant to his authority under Article 48 of the 1916 Articles of War[2] to confirm death sentences in time of war, and the next morning the sentences were carried into execution.

This was summary justice—but too summary for a citizen Army of the Twentieth Century. The summary disposition of the Houston riot case created quite a reaction among the public as well as in the War Department. Very promptly thereafter the War Department promulgated General Order No. 7, 1918, which required review by a board of review in the Office of the Judge Advocate General or in a branch office before any serious sentence by court-martial could be carried into execution. General Order No. 7 served as a pattern for appellate review in the Army. Its essential provisions became statutory in 1920 as Article of War 50½.[3] It was modified by Article of War 50 in the 1948 revision of the Articles of War[4] which empowered the

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1. United States v. Zimmerman (No. 261), 2 CMR 66 (U.S.C.M.A. 1952).
2. 39 STAT. 650 (1916).
3. 41 STAT. 797 (1920), 10 U.S.C.A. § 1522 (1927).
4. 62 STAT. 627 (1948).

boards of review to weigh evidence, judge the credibility of witnesses and determine controverted questions of fact. A Judicial Council for the further review of serious cases, with power to consider the propriety as well as the legality of sentences was also created by the 1948 amendment.[5]

Thus, to the Army and Air Force, (the Air Force continued with the same body of law when it became a separate service) dealing with boards of review and the use of board of review decisions as precedent are no novelty. However, for the Navy statutory boards of review are no older than the effective date of the Uniform Code of Military Justice, 31 May 1951. Essentially, a board of review is an appellate body composed normally of three or more attorneys, who review each case for legal sufficiency in fact and in law. This has been true in the Army and Air Force since the first boards of review were created in 1920. Initially, the board of review merely "examined" the case for the Judge Advocate General of the Army. With the Judicial Council we need not concern ourselves here; it is now of historical significance only. Its functions are now largely incorporated in those of the Court of Military Appeals. The greatest single change brought about in the powers and duties of the boards of review by the Uniform Code of Military Justice is the power of the board to affirm only so much of the sentence in a given case as it finds appropriate. Today, the right of a board of review to affirm only such findings of guilty as it finds correct in law and fact is not disputed. Its power and obligation in this respect is set forth in the Uniform Code of Military Justice as follows:

> "It shall affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[6]

The legislative history of this article shows clearly the intent of the Congress to grant to the board of review discretionary powers with respect to sentences. The Senate Report, in commenting on proposed Article 66, says:

> "The Board *may* set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is *inappropriate*. . . ."[7]

Professor Morgan, in his testimony before the Senate Subcommittee, states as follows:

> ". . . the board of review, now, has very extensive powers. It may review law, facts, and practically sentences; because the provisions stipulate that

5. 62 STAT. 635 (1948).
6. UCMJ art. 66(c), 50 U.S.C.A. § 653 (1951).
7. SEN. REP. No. 486, 81st Cong., 1st Sess. 28 (1949) (Italics added).

> the board of review shall affirm only so much of the sentence as it finds justified by the whole record."[8]

That it was the clear intent of the Congress to vest this discretionary power in the board of review is made even more clear when the fact is considered that this discretion was granted in the face of the opposition of the then Judge Advocates General of the Army and Navy, neither of whom would have granted the board of review any power (other than perhaps advisory) over sentences.[9] It is not considered necessary to set out this testimony verbatim, it being considered sufficient to point out that, despite this opposition, Article 66 was enacted by the Congress as set forth above.

The history of this section of the Code in the House of Representatives followed an almost identical pattern.[10]

Thus, it may be seen that the board of review has, by the law itself and by the intent of the Congress expressed in the hearings before that body, discretion over sentences based upon the entire record of trial. This discretion is limited only by the provisions of the statute violated as further limited by the Table of Maximum Punishments.

The impact of this additional power and duty upon the boards can be judged only in relation to the tremendous volume of cases which come before the boards of review. This includes every case in which a punitive discharge is imposed, every case involving a general or flag officer, every case involving the death penalty and every case in which a person subject to military law has a sentence of one year or more imposed by court-martial. Additionally, the Judge Advocate General may, under Article 69[11] refer to a board of review any other case tried by a general court-martial in which a lesser penalty has been imposed but in which he deems it advisable to have the record of trial reviewed by a board of review. For many years the boards of review followed the rule of federal courts that when an accused has been convicted under several specifications, and a sentence not exceeding that legally permissible in the case of conviction under a single specification has followed, the findings and sentence, or at least the sentence, must stand if supported by a valid conviction under a single specification regardless of infirmity in the others, and regardless of whether the trial court would, in fact, have imposed that sentence had it recognized the invalidity of the other findings of guilty. In support of this proposition the boards relied on *Claassen v. United States*,[12] *Evans v. United*

8. *Id.* at 42.
9. See *id.* at 262, 271, 285.
10. H.R. REP. No. 37, 81st Cong., 1st Sess. 608, 1187, 1206 (1949) (Hearing of Subcommittee of the Committee on Armed Services); H.R. REP. No. 491, 81st Cong., 1st Sess. 31 (1949).
11. UCMJ art. 69, 50 U.S.C.A. § 656 (1951).
12. Claassen v. United States, 142 U.S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966 (1891).

States,[13] *Pinkerton v. United States*[14] and numerous other federal cases. The following excerpt from the *Claassen* case, states the general rule which has been invoked in many federal cases:

> "In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' (Citing cases.) And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."[15]

However, even the benefit of the *Claassen* rule is no longer available to the boards. The Court of Military Appeals in one of its most far-reaching decisions determined that the *Claassen* rule as such would no longer be followed in military law. The court went on to say:

> "We quite agree that if a military judicial agency empowered to do so has determined that the original sentence is appropriate for a single valid conviction in a case involving several specifications, we are powerless to disturb that determination on review.
> "Had the board of review, following its appearance before that body, disapproved the findings of guilty as to the misbehavior charge in the present case, it could have affirmed only 'such part or amount of the sentence, as it . . . [found] correct in . . . fact and . . . [determined], on the basis of the entire record, should be approved.' This Court is without statutory authority to act in such a manner. We may, however, correct a board of review in matters of law — and this we have done in the instant case with respect to board action on the charge specifying an instance of misbehavior. Accordingly, we now remand the case to The Judge Advocate General, United States Army, for reference to the board of review for the purpose of determining the adequacy of the sentence. See Uniform Code of Military Justice, Article 67(*f*), 50 U.S.C. § 674. In doing this we are not to be understood as expressing any view concerning the appropriateness to the offense of desertion of the sentence adjudged by the court-martial which tried petitioner. We merely suggest that, in the absence of a sentence exceeding maximum legal limits, we are, by the statute creating this Court, without authority to determine the question."[16]

Obviously, this decision has imposed an even greater duty upon the boards of review since they must now determine in each case in which they find one or more count legally insufficient what part, if any, of the

13. Evans v. United States, 153 U.S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839 (1894).
14. Pinkerton v. United States, 328 U.S. 640, 66 Sup. Ct. 1180, 90 L. Ed. 1489 (1946).
15. Claassen v. United States, 142 U.S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966 (1891).
16. United States v. Keith (No. 226), 3 Jan. 1952 (U.S.C.M.A.).

sentence to be appropriate, based upon the entire record of trial.

The board of review as an intermediate appellate court has finality of decision only in those cases which are referred to it by the Judge Advocate General of a service under Article 69, and even in those cases, although the accused may not appeal from the decision of the board of review, the Judge Advocate General may certify questions of law from such a case to the Court of Military Appeals. In every other case, the decisions of the board of review are subject to further review by the Court of Military Appeals. In all cases in which the death penalty has been affirmed or in which any sentence involving a general or flag officer has been affirmed, further review by the Court of Military Appeals is mandatory.[17] The Judge Advocate General of each service may, of course, certify any case to the Court of Military Appeals. In this respect, he is not bound by the decision of the board, that is to say, he may certify a case in which the decision of the board is favorable to the Government as well as a case in which the decision of the board of review is adverse to the Government. The certification rule, however, provides the only method for appeal to the Court of Military Appeals which is available to the Government. If the Judge Advocate General does not certify a case in which the ruling is adverse to the Government, that ruling is final. However, by far, the bulk of the cases handled by the boards of review are subject to further review after petition by an accused to the Court of Military Appeals. In the first year of operation of the Court of Military Appeals, 755 such petitions were docketed from all the services, of which a total of 113 were granted. It is contemplated that as the new body of law under the Uniform Code becomes more settled and better known, the percentage of petitions for reviews granted will be somewhat less.

Of course, the question which arises in the mind of every attorney who has occasion to deal with an intermediate appellate court of any type is how useful are the decisions of that court as precedent for other cases. Generally speaking, it may be safely stated that in the absence of a ruling by the Court of Military Appeals to the contrary, a decision of the board of review of a given service will be likely to be accepted as stare decisis by other boards of review of the same service, at least, and will be given great weight by boards of review of all the other services. Board of review decisions as precedents to be cited to the Court of Military Appeals are useful, but not binding. However, in the field of purely military law (taken in the narrowest sense of that term), the Court of Military Appeals has tended to follow the decisions of the boards of review and the Judicial Council as precedent, as this illustration from the case of *United States v. Sperland* will show:

17. UCMJ art. 67, 50 U.S.C.A. § 654 (1951).

"A recent army case, *White v. United States*, 10 BR-JC 117, reaches the conclusion that fear or cowardice is not the only measure by which you test whether a soldier 'runs away' but that leaving with an intent to avoid combat service or duty so closely related thereto as to involve physical danger is sufficient to meet the standards. The Judicial Council in that case held:

" 'The only question presented by the evidence is whether the four accused or any of them 'ran away' in the sense of Article of War 75. It is apparent to us that the expression 'run away' as used in Article of War 75 imports not only absenting oneself from his unit without authority, but also an accompanying intent to avoid either combat service or duty so directly related thereto as to involve physical danger to the individual concerned. Such is the implication of the provision in the Manual for Courts-Martial, 1949, that 'Misbehavior is not confined to acts cowardice. . . . Running away is but a particular form of misbehavior specifically made punishable by this article' (par. 163*a*, p 216). . . .

" 'An examination of the numerous cases involving the charge of running away in violation of Article of War 75 confirms this view (See, for example, CM ETO 1404, Stack, 4 BR (ETO), 279, 281; CM ETO 1659, Lee, 5 BR (ETO) 173, 174; CM 285209, Ison, 5 BR (ETO) 185, 188; CM 290632, Skovan, 13 BR (ETO) 321, 325). . . .'

"Following these authorities we adopt the principle that the phrase 'runs away' must be interpreted as an absence under conditions from which it may be reasonably inferred that the leaving was with intent to avoid some form of combat action by or with the enemy. With this rule as a guide we look to the record to determine whether there is evidence to sustain a finding that the accused ran away."[18]

At least as important from the point of view of counsel in a given case, however, is the question of what weight the decision of the board of review in a given case in which he is appearing as counsel. In this connection, it must be observed that on the question of determination of facts, the board of review has a status unlike that of most of the intermediate appellate tribunals with which we are familiar. The Code provides that boards of review have the power to weigh the evidence, judge controverted questions of fact and the credibility of witnesses, recognizing that the trial court saw and heard the witnesses.[19] Thus, although the Congress has given the boards the power to determine from a cold record questions of fact and to judge the credibility of witnesses even contrary to the decisions of the trial court, nevertheless boards of review have been cognizant, as shown by the decisions, of the wisdom indicated by the language of Congress of recognizing the fact that the trial court in which was heard and seen the witnesses may well have been in the better position to judge these questions. However, boards have not hesitated in appropriate cases to use these powers and to set aside all or parts of convictions which appear to the

18. United States v. Sperland (No. 366), 3 Sep. 1952 (U.S.C.M.A.).
19. UCMJ art. 66, 50 U.S.C.A. § 653 (1951).

board to be contrary to the weight of the credible evidence. In view of these powers, the Court of Military Appeals has said:

> "We cannot, by our judgment, determine what relationship we might have found were we permitted to make the first determination; rather, we can only determine whether there is some evidence in the record to support the finding made by the board of review that there was a common-law marriage. We, therefore, review the evidence solely for that purpose, and in doing so, we must view it in a light favorable to the findmg made by the board of review."[20]

This does not mean, of course, that the Court of Military Appeals will not test a record for sufficiency of evidence to sustain the conviction. But the test imposed by the Court of Military Appeals is more clearly akin to that with which we are familiar in all appellate tribunals and has been so stated on numerous occasions by the Court of Military Appeals.[21] Therefore, if the board of review has determined a question of fact in your favor, that determination will be final in almost all cases.

Practice before the boards of review is governed by the Uniform Rules of Procedure for Proceedings in and before the Boards of Review, dated 8 June 1951, and put out jointly by the Army, Navy, Air Force and the Treasury Department (U. S. Coast Guard).[22] Generally speaking, these rules will not seem unfamiliar to the attorney with any experience before an appellate tribunal. They are clear, simple, concise and, as a matter of practice, a copy thereof is sent to each civilian attorney who makes an entry of appearance on behalf of an accused whose case is pending before a board of review. The bulk of the appellate advocacy before the boards of review falls on the shoulders of military lawyers assigned to the Offices of the Judge Advocates General of the services. The Army, for example, has organized two separate divisions, known as the Government Appellate and Defense Appellate Divisions. Their functions may easily be determined from their title. A large percentage of accused request appellate defense counsel. This costs the accused nothing and he is advised of his right to have such representation in every case by defense counsel in the field immediately after announcement of conviction. Accused are availing themselves of this representation in ever-increasing numbers. A far smaller percentage of accused choose to have private civilian attorneys represent them. Such representation is fully provided for in the Rules of Procedure, but is, of course, at the expense of the individual accused. Regardless of whether or not an accused requests appellate defense counsel, either military or civilian, his case will be reviewed by a

20. United States v. Richardson (No. 429), 8 Aug. 1952 (U.S.C.M.A.).
21. See United States v. O'Neal (No. 25), 2 CMR 44 (U.S.C.M.A. 1952); United States v. McCrary (No. 4), 1 CMR 1 (U.S.C.M.A. 1951).
22. DA Bull. 9, NAU EXOS P-932 and AF Bull. 24.

board of review if it falls within the categories listed above. This practice is no novelty. Before the effective date of the Code there was no requirement of representation by counsel in proceedings before boards of review. It was the duty of the members themselves to give each case referred to them a thorough and searching review for detection of error, and that duty continues as to each case under the present procedure in which the accused is not represented.

If appellate counsel is requested by an accused, a copy of the record of trial is furnished to the appellate counsel when the case is referred to a board of review. This copy is in addition to the one given the accused after trial. Appellate counsel examines the record and files an assignment of errors which may be accompanied by a supporting brief if desired. Rule VII provides that such assignment of errors shall be filed within ten days. However, for good cause shown, an extension of time may be secured. The Government then has ten days in which to file a reply to the assignment of errors and/or a reply brief, after which the case is put on the docket for oral argnment. This all seems simple enough and, indeed, in practice works out with little or no friction. Generally speaking, the granting of extensions of time for good cause shown has been extremely liberal, especially to civilian counsel who because of distance or lack of familiarity with military procedure frequently require more than the allotted ten days. Most such civilian counsel take advantage of Rule V(g) which enables them to have the services of military appellate defense counsel to assist them in the preparation of their appeal on behalf of the accused. The administrative problem involved may readily be seen from the fact that the Army alone in the first year of operation received a total of 7,261 cases for review by a board of review.[23] The Navy received 4,661 such cases[24] and the Air Force 2,504 cases.[25] This, it must be remembered, was for a period of only partial mobilization and limited national emergency. The possibilities and probabilities in the event of full-scale mobilization or all out war are staggering. It may be safely estimated that at the very minimum we should have to quadruple our boards of review and appellate staffs.

The Act of May 5, 1950, the first step in the creation of a truly uniform system of military justice is the result of the collective study and painstaking effort of many learned individuals both civilian and military. As was said by Professor Edmund M. Morgan, Chairman of the Committee appointed to prepare the new code:

23. Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces 19 (1952). (This report covers a period from May 31, 1951 to May 31, 1952).
24. *Id.* at 25.
25. *Id.* at 31.

"It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian criminal court was impractical.

"We were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but were equally determined that it must be designated to administer justice.

"We, therefore, aimed at providing functions for command and appropriate procedures for the administration of justice. We have done our best to strike a fair balance, and believe that we have given appropriate recognition to each factor."[26]

As is the case with any legislative enactment, no matter how well drafted, the administration thereof provides the acid test which sheds light upon inevitably required improvements. The Judges of the Court of Military Appeals and the several Judge Advocates General of the Armed Services recognized this inherent development in the first report rendered to the Congress and Departmental Secretaries pursuant to Article 67 (g) of the Uniform Code, and said, *inter alia*:

"Many important questions and controversial matters concerning the administration of military justice are the heritage of the Code Committee. Others have been suggested by the members of the Court, The Judge Advocates General, and interested civilian agencies. The members of the Code Committee are aware that the following are some of the important matters which have been advanced as suggested improvements to the present military code: A procedure for appropriate appellate review in the event of the increased work load which would result from a war or national emergency; the creation of a separate Judge Advocate General's Corps for the Navy and Air Force or the abolition of the separate promotion list of the Judge Advocate General's Corps of the Army and restoration of Army judge advocates to their proper positions on the Army promotion list; an appropriate non-command channel for processing efficiency or effectiveness reports; the convening of courts by others than commanding officers; a further limitation on command control over the administration of military justice; a return to the prior law member procedure; a limitation on the jurisdiction of special courts-martial to adjudge punitive discharges; a provision for the Court to review questions of fact; an authorization for the Court to reduce sentences when they are considered excessive as a matter of fact or when a part of the findings only are affirmed; revision of service personnel regulations; and, the elimination of time-consuming and costly procedures which are not material to the substantial rights of an accused person.

"It is well known to those familiar with the history of military justice that the items above enumerated have, for the most part, been the subject of intense controversy for many years. With but few exceptions all were argued before Congressional Committees during the consideration of the present Uniform Code of Military Justice. Those which are outlined

26. Report of the Code Committee to Secretary of Defense Forrestal (1949).

> and presented to the Congress were not adopted. Undoubtedly, action on some of them was reserved to await a recommendation by this Committee. Some of the members of this Committee testified during the Congressional hearings and have opinions as to the merits of suggested changes. . . . The services have encountered some other difficulties in readjusting their procedures to comply with the Code, but many of the problems are being corrected by the decisions of the Court, The Judge Advocates General, and the boards of review. More readjustments should be accomplished in the future and the corrective measures taken might be sufficient to avoid the necessity of legislation by the Congress."[27]

Thus it may be seen that the administration of the system of American Military Justice includes a continuous search for progress and improvement. At the focal point stand the boards of review, entrusted with the duty of appellate examination of all serious cases. Upon them rests the responsibility of the proper application of existing law in keeping with the spirit of the American legal tradition so as to insure the maintenance of a high standard of discipline in our armed services.

27. Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces 3-4 (1952).