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COMMAND CONTROL — OR MILITARY JUSTICE?

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WE AMERICANS have always prided ourselves on our system of justice. The constitutional guaranties of indictment by grand jury for infamous crime, against double jeopardy and self-incrimination, against the deprivation of life, liberty or property without due process of law are assured by the First Amendment to the Federal Constitution. The right in criminal prosecutions to a speedy and public trial by an impartial jury, the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against us, to have compulsory process to obtain witnesses in our favor and to have the assistance of counsel for our defense are made cornerstones of our liberties by the Sixth Amendment.

Yet many of these rights are lost when a citizen enters his country's Armed Services because of the provisions of Section 8 of the Constitution, which gives to Congress the power to make rules for the government and regulation of the land and naval forces. Pursuant to this authority, Congress has prescribed Articles of War for the government of the Army and Articles for the Government of the Navy which, in their original form, were mere extensions of the monarchical power to enforce discipline.¹

Little criticism was levelled at these codes of military justice until the first great citizens' army was drafted into the service of

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¹ Ansell, *Military Justice*, 5 CORN. L. Q. 1-2 (1919).

the United States. Following the close of World War I cases of tyrannical oppression, arrant miscarriages of justice and a complete absence of any means whereby the wronged individual could obtain recourse came to light. Not only was public opinion aroused, but a bitter schism developed in the ranks of the military, each side having its advocates on the floor of the Senate.² Championing a radical revision of the Articles of War were Senator Chamberlain and Major General S. T. Ansell; defending the Army's administration of justice were Major General E. H. Crowder and Secretary of War Newton D. Baker. The letters written by Ansell and Crowder as they appear in the Congressional Record are striking evidence in support of Ansell's contention that whatever may have been the effectiveness of the court-martial system, it was certainly not a system of justice as Americans understand it.³

The Chamberlain Bill⁴ which sought to provide adequate legal representation for the accused, to insure the impartiality of the court-martial by removing it from command control, which provided for the service of enlisted men on courts-martial and which further set up an adequate system of review, was killed in Committee.

Nevertheless the pressure of public opinion was such that substantial changes were effected in the system. On June 4, 1920, a new statute for the government of the armies of the United States was enacted.⁵ This statute represented a great stride forward for the Army court-martial system. *It did not however affect the Articles for the Government of the Navy.* Among other things the new Articles of War permitted enlisted men to prefer charges and provided for an impartial investigation of the charges before bringing them to trial.⁶ They set a definite minimum for the number of officers to serve on a court-martial.⁷ They provided for the appointment of a law member, who was required to be either an Officer of the Judge Advocate General's Department or an officer of some other branch of the service specially qualified to perform the duties

² 58 CONG. REC. 5384-85 (1919).

³ 58 CONG. REC. 3939-48, 6494-6503 (1919).

⁴ S. 64, H. R. 367, 66th Cong., 1st Sess. (1919).

⁵ 41 STAT. 759-812 (1920), 10 U. S. C. §§ 1471-1593 (1946).

⁶ A. W. 70 [References to "AW" refer to the numbered Articles of War set forth in 10 U. S. C. c. 36 (1946)].

⁷ AW 5 and 6.

of law member.⁸ They provided for the appointment of counsel for the accused as well as a prosecuting officer known as the trial judge advocate⁹ and set up a system of review which, if not as comprehensive as it might have been, at least was a marked advance, inasmuch as there had been no system of review up to that time.¹⁰

These Articles remained in force, unchanged, from 1920 until amended by the Elston Act which was passed in 1948 and became effective February 1, 1949.¹¹ While they functioned satisfactorily—or at least no complaint was heard as to their adequacy—in time of peace, the outcry which arose at the end of World War II was such as to compel the attention of the War Department. The abuses of the system were given official recognition by Secretary of War Patterson when, on June 9, 1945, he appointed a Clemency Board to review all cases tried by general court-martial in which the accused was still in confinement.¹² The Board reported in 1946 that it had received more than 27,500 cases and had reduced or remitted the sentence in 85% of them.¹³

Even before the close of hostilities, the services, driven by the force of public opinion, appointed committees to study the workings of the court-martial system and to recommend changes in the administration of military justice. Subsequent to V-J Day, Secretary of War Patterson, on March 25, 1946, appointed the War Department Advisory Committee on Military Justice (better known as the Vanderbilt Committee), the membership of which had been nominated by the American Bar Association. The Navy appointed the General Court-Martial Sentence Review Board, familiarly known as the Keffe Board, and by amendment to the precept convening this Board, dated June 24, 1946, the board was directed to submit a report of the cases considered and the sentences reviewed by it and to include in its report such recommendations as it deemed appropriate with respect to court-martial procedure and policies. Previous studies of Naval justice had been made at Secretary Forrestal's direction by Arthur A. Ballantine, Judge Matthew F. McGuire and Father Robert J. White.

⁸ AW 8.

⁹ AW 11 and 17.

¹⁰ AW 50½.

¹¹ Pub. L. No. 759, 80th Cong., 2d Sess., c. 625 (June 24, 1948).

¹² War Dep't Advisory Bd. on Clemency, more familiarly known as the Roberts Board.

¹³ REP. WAR DEP'T ADVISORY BD. CLEMENCY (1946).

The Vanderbilt Committee held full committee hearings in Washington and regional public hearings in New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco and Seattle. The testimony adduced from the witnesses filled 2519 pages of transcript. The witnesses were not drawn from the ranks of the malcontent, but included the Secretary of War, the Under Secretary of War, the Chief of Staff of the Army, the Commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, general officers as well as those of lower grade and volunteer witnesses who had served as officers and enlisted men during World War II.¹⁴

The Vanderbilt Committee found that "although the innocent were not punished, there was such disparity and severity in the impact of the system on the guilty as to bring many military courts into disrepute both among the law-breaking element and the law-abiding element, and a serious impairment of the morale of the troops ensued where such a situation existed."¹⁵ The Committee made as its primary recommendation the checking of command control.¹⁶

In order to understand the Committee's recommendations it is necessary to outline briefly certain aspects of the functioning of the court-martial system. In the typical case before a general court-martial, the charges against the accused having been prepared and investigated and a recommendation for trial having been made by the staff judge advocate (the commanding general's legal adviser), the case is referred by the commanding general to the trial judge advocate, the prosecuting officer of the court which has been appointed by the commanding general from officers of his command.¹⁷ Not only has the commanding general appointed the court, but he has also appointed the trial judge advocate and the defense counsel.¹⁸ The result is that the accused, having been or-

¹⁴ REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 2 (1946).

¹⁵ *Id.* at 3-4.

¹⁶ *Id.* at 6.

¹⁷ AW 8.

¹⁸ AW 11. The accused is given the right by AW 17 to be represented before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available. Civil counsel is usually beyond the means of the accused and whether military counsel is "available" depends upon the decision of the commanding officers of the counsel requested. See *Henry v. Hodges*, 171 F. 2d 401, 403 (C. C. A. 2d 1948). As a consequence, the accused is almost invariably represented only by the regularly appointed defense counsel, *i.e.*, the officer appointed by the commanding general.

dered to trial by the commanding general, is represented by defense counsel appointed by the commanding general, and is tried before a court which consists entirely of officers who are dependent upon the commanding general for their assignments of duty, efficiency ratings, promotions and leaves. If the accused is convicted, the commanding general reviews the record of the trial and in most instances has the power to order the sentence executed. It is obvious that the commanding general has it within his power to influence defense counsel and to control the court by indicating to it, directly or indirectly, his wishes as to the findings and sentence.

It is this complete domination of the court and counsel by the commanding general which is referred to as "command control." The possibilities of so exercising this control as to deprive the court-martial of any real independence is apparent and at times command has so outrageously dominated the courts-martial¹⁹ as to cause the Federal courts to use such extreme terms as "military despotism"²⁰ and "a court . . . saturated with tyranny."²¹

¹⁹ AW 46; AW 50½.

²⁰ Shapiro v. United States, 69 F. Supp. 205, 207 (Ct. Claims 1947).

²¹ Murrah, C. J. in *Beets v. Hunter*, 75 F. Supp. 825, 826 (D. C. Kan. 1948). It is difficult for one who has not had first-hand experience with the operation of the Army and Navy court-martial systems to envisage the ease with which commanding officers can dictate the findings and sentence of the court. In *Beets v. Hunter*, *supra*, the convicted accused successfully applied for a writ of habeas corpus. The pertinent facts are stated in the following quotation from Judge Murrah's opinion (75 F. Supp. at 826):

When Captain Morgan called upon him (Beets, the accused petitioner), as the appointed defense counsel, Captain Morgan was informed that he (Beets) wished to have Lieutenant Fox represent him, whereupon Captain Morgan left him and went back, leaving the impression at least that he would have Lieutenant Fox call him. Lieutenant Fox did not see this petitioner; instead Captain Morgan returned and on the day before the trial was furnished a copy of the charges. He confesses on the witness stand that he was wholly incompetent to represent him, and he also makes it plain, manifestly plain, too plain for mistake, that he did so only on orders—acting under orders as a soldier.

The trial of this case in the eyes of both the prosecution and the defense was wholly obnoxious and repulsive to their fundamental sense of justice, and that is the test by which this Court should judge it.

The Court has no difficulty in finding that the court which tried this man was saturated with tyranny; the compliance with the Articles of War and with military justice was an empty and farcical compliance only, and the Court so finds from the facts and so holds as a matter of law.

He could not have received due process of law in a trial in a court before men whose judgments did not belong to them, who had not the will nor the power to pass freely upon the guilt or innocence of this petitioner's offense, the offense for which he was charged. It cannot stand the test of fundamental justice. It may have been prompted by the exigencies of war, but it can't stand in the light of cold reason and justice as we love it and for which this petitioner was fighting when he was arrested.

In *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Claims 1947), the plaintiff was appointed to defend before a court-martial an American soldier of Mexican

In demanding the checking of command control, the War Department Advisory Committee said:²²

The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its prevalence was not denied and indeed in some instances was freely admitted. The close association between the commanding general, the staff judge advocate, and the officers of his division made it easy for the members of the court to acquaint themselves with the views of the commanding officer. Ordinarily in the late war a general court was appointed by the major general of a division from the officers in his command, and in due course their judgment was reviewed by him. Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas.

Although the Keffe Board which was composed of commissioned officers of the Naval services, with the exception of its presi-

dent who was charged with assault with intent to commit rape. In order to demonstrate the mistake in identification by the prosecuting witnesses, the plaintiff substituted for the accused at the court-martial trial, another American soldier of Mexican descent. This substitute was identified by the prosecuting witnesses as the attacker and was convicted. The plaintiff thereupon informed the court of the deception that he had practiced, whereupon the real defendant was brought to trial, was also identified as the attacker and was convicted and sentenced. Several days later Lieutenant Shapiro, the plaintiff, was arrested. A day or two after at 12.40 p.m., he was served with charges of effecting a delay in the orderly progress of the general court-martial. He was then notified that he would be tried at 2:00 p.m. on the same day, and was actually brought to trial at that time, at a place thirty-five to forty miles from the place where he had been served with the charges. Shortly after his arrest, plaintiff requested the services of Captain James J. Mayfield to represent him, but this officer was named, in the order preferring the charges, as the trial judge advocate. There being but one hour and twenty minutes in which to select counsel and prepare for trial, Lieutenant Shapiro thereupon selected as his defense counsel, two lieutenants, neither of whom was a lawyer. When the court-martial convened, the plaintiff moved for a continuance of seven days on the ground that his counsel had not had sufficient time to prepare his defense. The motion was denied. He was convicted at 5:30 that afternoon and was sentenced to be dismissed from the service.

Judge Whitaker characterized the proceedings as follows (69 F. Supp. at 207):

A more flagrant case of military despotism would be hard to imagine. It was the verdict of a supposedly impartial judicial tribunal; but it was evidently rendered in spite against a junior officer who had dared to demonstrate the fallibility of the judgment of his superior officers on the court—who had, indeed, made them look ridiculous. It was a case of almost complete denial of plaintiff's constitutional rights. It brings great discredit upon the administration of military justice.

²² REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 6-7 (1946).

dent and vice-president, refused to go so far as to say that a naval court appointed in like manner was "a mere creature of the convening authority, appointed to do his bidding,"²³ it nevertheless suggested that

. . . convening authorities would not detail named officers to specific courts for particular trials, but would detail qualified personnel within their command to court-martial panels from which members of the court would be taken from time to time to fill vacancies and to replace relieved members on some impersonal method.²⁴

All this had a familiar ring. On September 15, 1919, even before the adoption of the 1920 Articles of War, the following colloquy took place on the floor of the Senate between Senator Norris and Senator Chamberlain:²⁵

MR. NORRIS: One of the evils, as I understand it, is that all the men, not only the members of the court but the prosecuting officer as well as the attorney for the defense, are selected by the man who makes the charge in reality, and from whom every one of these officials, if they get a promotion, must secure it. Is that right?

MR. CHAMBERLAIN: Absolutely.

MR. NORRIS: Of course, that surrounds the young man with an air of injustice to begin with.

MR. CHAMBERLAIN: There is no question about that. The commanding officer appoints the court, he appoints the prosecutor, he appoints the counsel for the defendant, . . . he approves or disapproves the sentence when it is rendered.

And Professor Edmund M. Morgan of the Harvard Law School, Chairman of the Forrestal Committee on a Uniform Code of Military Justice, made the comment in 29 *Yale Law Journal* 52, 60 (1919):

The control of appointing and other superior military authority over the court and its findings is to the civilian the most astonishing and confusing characteristic of the court-martial system.

A poll made in 1947 of the members of the Judge Advocates Association, an organization comprising in its membership nearly

²³ REP. GEN. COURT-MARTIAL SENTENCE REV. BD. 62 (1945).

²⁴ *Id.* at 68-69.

²⁵ 58 CONG. REC. 5384-85 (1919).

2200 of the some 2700 lawyers who served as officers in the Judge Advocate General's Department during World War II, showed a complete concurrence in the conclusion that the primary requirement of a court-martial system which could be said to administer justice was the total separation of appointing and reviewing authority from command. Of the 774 members who answered the questionnaire, 703 recommended a total separation of the courts from command control.²⁶ In order to appreciate the significance of this vote, it must be realized that the members of the Judge Advocate General's Department were the military personnel most closely associated with the administration of the court-martial system.

Despite this uniformity of opinion among those best qualified to pass judgment, the court-martial reform legislation, as introduced and as passed, did not contain provisions which would divorce the court-martial system from command control. It is not without significance that the bill as introduced had been framed by the War Department, which had ignored the primary recommendations of its own Advisory Committee on Military Justice by retaining the old method of appointing courts and counsel and placing the initial power of review in the commanding officer who was vested with appointing authority. This legislation, known as the Elston Act, had a stormy history and resolved itself into a tug of war between the Secretary and Under Secretary of War and certain high ranking officials in Washington on one side and, on the other, various bar associations and veterans' organizations which had made a study of the actual operation of the court-martial system, and the members of which had had far better opportunity than the higher echelons of the Army and the War Department to view the court-martial system in the field at division level and lower.

The House Committee on Armed Services submitted a report²⁷ and its Sub-committee on Military Justice held full hearings. The provisions of the Elston Bill setting up the Judge Advocate General's Department as a separate corps with its own promotion list and responsibility for performance of duty through its own chain of command was the focal point of attack by the opponents of basic reform. As the bill contained no provisions for the sepa-

²⁶ *Hearings of House Sub-Committee on Armed Services on H. R. 2575, No. 125, 80th Cong., 2d Sess. 2002 (1947).*

²⁷ H. R. REP. No. 1034, 80th Cong., 1st Sess. (1948).

ration of the courts from command there was no necessity for attack on that fundamental reform.

Despite the opposition to the creation of a separate Judge Advocate General's Corps, this provision was retained when the bill was reported out of committee and the Elston Bill was passed by the House virtually without opposition. It was then brought to the floor of the Senate as an amendment to the Selective Service Act of 1948 and, upon the assurances of Senator James Kem that it incorporated all the recommendations of the Vanderbilt Committee and had been approved by the American Bar Association,²⁸ it was passed by the Senate.

These statements were entirely incorrect and in view of the questions concerning the bill which arose during the short Senate debate, it is questionable whether the Elston Bill would have passed in its present form had not the Senate been misinformed as to the scope of the bill and as to its approval by the American Bar Association. The Elston Bill was approved by the President on June 24, 1948 and became effective February 1, 1949.

Notwithstanding its defects, the Elston Act represents a step forward. By amendment to Section 8 of the National Defense Act, an independent Judge Advocate General's Corps with a separate promotion list is set up.²⁹ It provides that all members of the Judge Advocate General's Corps shall perform their duties under the direction of the Judge Advocate General.³⁰ It provides that all members of the Corps will be assigned as prescribed by the Judge Advocate General, after appropriate consultations with commanders on whose staffs they may serve, and it authorizes the staff judge advocate of any command to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.³¹

Although it continues the vices of the existing system with respect to the appointment of the courts, the trial judge advocate and the defense counsel by the commanding general and the review of the findings and sentence of the courts by him, it forbids the censure or reprimand of any member of a court-martial with re-

²⁸ 94 CONG. REC. 7754 (June 9, 1948).

²⁹ Pub. L. No. 759, 80th Cong., 2d Sess., § 246 (June 24, 1948).

³⁰ *Id.* § 248.

³¹ *Id.* § 223.

spect to the findings or sentence adjudged by the court and provides that no person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial in the performance of its duties.³²

The Elston Act further provides that the officer appointing a general court-martial shall detail as one of the members a law member who shall be an officer of the Judge Advocate General's Department or an officer who is a member of the bar of a Federal court or of the highest court of a State of the United States and certified by the Judge Advocate General to be qualified for such detail.³³

Its provisions tend to promote the appointment of better qualified personnel both as trial judge advocates and as defense counsel.³⁴ For the first time, it is required that, upon the request of an accused enlisted man, there shall be appointed as members of the court-martial enlisted men to the number of at least one-third of the total members of the court.³⁵

The Elston Act further attempts to improve the system of review of the findings and sentences of courts-martial and provides for the creation of a Judicial Council to consist of three general officers of the Judge Advocate General's Department to act as a kind of Army Supreme Court.³⁶ Unfortunately, the new provisions respecting review pile chaos upon confusion with the result that they are even less understandable and more complicated than those which had previously existed under Article 50½ of the 1920 Articles of War. Finally, the Elston Act provides a procedure for petitioning the Judge Advocate General for a new trial, the grounds for which have been limited by regulation to jurisdictional error, substantial injustice at the trial or newly discovered evidence sufficient to affect the result of the trial.³⁷

Despite the fact that the Elston Act was hailed in some quarters as an effective reformation of the Army court-martial system, it was immediately attacked by the bar associations as reform in name only and it was pointed out in no uncertain terms that so

³² *Id.* § 233.

³³ *Id.* § 206.

³⁴ *Id.* § 208.

³⁵ *Id.* § 203.

³⁶ *Id.* § 226.

³⁷ *Id.* § 230; MANUAL FOR COURT-MARTIAL ¶¶ 101, 102 (1949).

long as the power remained in command to appoint the courts, the trial judge advocate and the defense counsel, to refer cases for trial and to review the findings and sentences of the courts, the reforms were illusory.³⁸ It should further be noted that the Elston Bill affects the Army alone and that neither the Navy, the Marine Corps nor the Air Force are afforded even the inadequate reforms which it embodies.

Partly to extend the provisions of the Elston Act to the Air Force, the Navy and the Coast Guard, and to set up uniform court-martial procedures for all the Armed Services, and partly to meet certain criticisms already directed at the Act, in August, 1948, Secretary of Defense Forrestal appointed a special committee, headed by Professor Edmund M. Morgan of the Harvard Law School,³⁹ to prepare a code, uniform in substance, interpretation and application, that would protect the rights of those subject to it and increase public confidence in military justice without impairing performance of military functions.

The "Uniform Code of Military Justice" prepared by the Forrestal Committee was introduced in the House and Senate on February 8, 1949, as S. 857 and H. R. 2498. This Code embodies further improvements in the system of military justice, but incredible as it may seem, maintains intact the old system criticized by Senators Norris and Chamberlain as far back as 1919,⁴⁰ whereby the commanding general appoints from his command the members of the court, the trial judge advocate and defense counsel, refers cases to the court and thereafter reviews the court's findings and sentences.⁴¹

Before analyzing the basic premises which account for the

³⁸ 34 A. B. A. J. 702-03 (1948); 6 N. Y. COUNTY LAWYERS ASS'N BAR BUL. 5-12 (1949); 4 REC. ASS'N B. CITY N. Y. 28-31 (1949).

³⁹ Cf. 29 YALE L. J. 52, 60 (1919).

⁴⁰ 58 CONG. REC. 5384-85 (1919).

⁴¹ At the time the proposed Uniform Code was introduced in the Senate and House, Secretary of Defense Forrestal issued a press release which emphasized the enormous powers retained by command. The release read in part:

Among command functions the proposed code would retain are:

1. Commanding officers refer the charges in general, special, and summary courts-martial and convene the courts;
2. Commanding officers appoint the members of the courts;
3. Commanding officers appoint the law officer and counsel for the trial;
4. Commanding officers retain full power to set aside findings of guilty and to modify or change the sentence, but are not permitted to interfere with verdicts of not guilty nor to increase the severity of the sentence imposed. [95 Cong. Rec. 966 (Feb. 8, 1949)].

survival of a system which lends itself so readily to tyranny and oppression, it would be well to consider the accomplishments of the Forrestal Committee.

The Act framed by the Committee, for the first time states in clear and readily understandable language the procedure to be followed, commencing with the apprehension of the accused and the placing of charges against him and ending with the final review of the record of trial. The substantive law is made more explicit and restated in laymen's language. A new terminology is employed which will be uniform throughout the services.

The summary court-martial, the lowest court, which consists of a single officer and before which neither the prosecution nor the accused may be represented by counsel, has been deprived of all power to try an accused except with his consent unless he has first been given the opportunity to accept limited non-judicial punishment.⁴² As the summary court has few if any characteristics of a court, the change is salutary. In order to obviate the necessity for trials by courts-martial where minor offenses are involved, the punishments which a commanding officer may impose without trial have been considerably extended.⁴³ It should be made explicit by amendment to the Code that the Army's previous practice of permitting the accused to demand trial by court-martial in lieu of non-judicial punishment is to be preserved. This option should be extended to Naval personnel, upon whom non-judicial punishment may now be imposed without trial and without the accused's consent.⁴⁴ The Code should likewise be amended to provide that if such punishment is refused the accused may be tried only before a special or general court-martial.

As to the general court-martial, the Uniform Code requires the appointment of a law officer who shall sit with the court in open sessions, but who shall not retire with the court when it closes to consider its findings and sentences. The law officer is required to be a member of the bar of a Federal court or of the highest court of a State of the United States and must be certified to be qualified for such duty by the Judge Advocate General of the Armed Force of which he is a member.⁴⁵ He is charged with

⁴² UNIFORM CODE, art. 20.

⁴³ *Id.*, art. 15.

⁴⁴ ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 24.

⁴⁵ UNIFORM CODE, art. 26.

the duty of ruling on all questions which may arise during the course of the trial, except challenges and interlocutory motions for a finding of not guilty or relating to the sanity of the accused—and these rulings, for the first time in the history of our court-martial system, are not subject to being overruled by majority vote of the members of the court.⁴⁶ It is also his duty to instruct the court as to the applicable law,⁴⁷ but he has no part in the considerations or the voting of the court on the findings and sentence.⁴⁸ In other words, the judge and the jury in civilian courts are paralleled by the law officer and the members of the court in the court-martial system.

The provisions for review are greatly simplified and for the first time in the history of this country, if the Code becomes law, the final appellate court of the Armed Services will consist of civilians. This court is denominated the Judicial Council and it is provided that it shall be composed of not less than three members, each to be appointed by the President from civilian life, each of whom shall be a member of the bar admitted to practice before the Supreme Court of the United States and each of whom shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.⁴⁹ It is provided that the Judicial Council shall review the record in the following cases:

1. All cases in which the sentence, as affirmed by a Board of Review (the intermediate reviewing authority), affects a general or flag officer or extends to death.

2. All cases reviewed by a Board of Review which the Judge Advocate General orders forwarded to the Judicial Council for review; and

3. All cases reviewed by a Board of Review in which, upon petition of the accused and on good cause shown, the Judicial Council has granted a review.

Provision is made for the representation of the United States and the accused by appellate counsel.⁵¹

⁴⁶ *Id.*, art. 51b.

⁴⁷ *Id.*, art. 51c.

⁴⁸ *Id.*, art. 26.

⁴⁹ *Id.*, art. 67a.

⁵⁰ *Id.*, art. 67b.

⁵¹ *Id.*, art. 70.

For the first time, also, a continuous surveillance and review of the workings of the court-martial system is provided in this Code and the Judicial Council and the Judge Advocates General of the Armed Forces are charged with this duty.⁵²

With all the excellent work of the Forrestal Committee it has not, as has been pointed out, touched the fundamental problem of command control and, as has been well stated:⁵³

Only by withdrawing from command the power to influence the court can we be sure that it will not be exercised in the future as it has been in the past.

What are the arguments advanced in justification of the retention of this power? The primary contention dates back to the publication in 1886 of Winthrop's *Military Law and Precedents*, which was for many years the Army's bible with respect to military law. Colonel Winthrop said:⁵⁴

Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact, simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

Thus indeed, strictly, a court-martial is not a court in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the "courts of the United States" have any application to it; nor is it embraced in the provisions of the VIth Amendment to the Constitution. It is indeed a creature of *orders*, and except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person. (Italics in original.)

⁵² *Id.*, art. 67g.

⁵³ Letter dated November 22, 1948 from the Chairmen of the Committee on Military Justice of the American Bar Association, The Association of the Bar of the City of New York, the New York County Lawyers Association and the War Veterans Bar Association, addressed to the Committee on a Uniform Code of Military Justice.

⁵⁴ 1 WINTHROP, MILITARY LAW AND PRECEDENTS 53-54 (1886).

This line of reasoning has been more succinctly stated in the maxim, "Discipline is a function of command," and it has been argued that, since the commanding general is responsible for the welfare and lives of his men, he must also have the power to punish them and consequently the courts appointed by him should carry out his will.⁵⁵

Yet even Colonel Winthrop recognized that courts-martial were under obligation to render justice in accordance with the fundamental principles of law and without partiality, favor or affection.⁵⁶

Notwithstanding that the court-martial is only an instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country, it is yet, so far as it is a court at all, and within its field of action, as fully a court of law and justice as is any civil tribunal. As a court of law, it is bound, like any court, by the fundamental principles of law, and, in the absence of special provisions on the subject in the military code, it observes in general the rules of evidence as adopted in the common-law courts. As a court of justice, it is required, by the terms of its statutory oath, (Art. 84) to adjudicate between the United States and the accused "without partiality, favor, or affection," and according, not only to the laws and customs of the service, but to its "conscience," i.e., its sense of substantial right and justice unaffected by technicalities. In the words of the Attorney General, courts-martial are thus, "in the strictest sense courts of justice."

Despite the origins of the court-martial system, no officer in a position of authority has been found who contends that command has or should have the power to dictate the findings and sentences of the courts. Indeed, the War Department included in the original version of the Elston Act the provision referred to *supra*, p. 271, which forbids the censure or reprimand of a court with respect to its findings or sentence and any attempt to coerce or unlawfully influence the action of a court-martial. The opponents of provisions seeking to remove command control argue, instead, that the instances of command pressure were so insignificant as to be unworthy of notice and that no change in the method of appointing courts and counsel is necessary. In an article in the *Virginia Law Review*, the present Secretary of the Army, Kenneth C. Royal said:⁵⁷

⁵⁵ REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 7 (1946).

⁵⁶ 1 WINTHROP, MILITARY LAW AND PRECEDENTS 61-62 (1886).

⁵⁷ 33 VA. L. REV. 269, 275 (1947).

The War Department feels that the Committee received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts-martial. However, there were doubtless instances where appointing authorities entirely misconceived their duties and functions and over-stepped the bounds of propriety.

The point remains that if the defense establishment is sincere in its disclaimer of any desire of command to dominate the military courts, it should have no hesitancy in removing the powers of appointment and review from the commanding general and placing them in the independent Judge Advocate General's Corps, the Army's legal arm charged with administration of the court-martial system and in similar departments which should be established in the other services.

It must not be assumed that the maintenance of discipline requires command control of the courts. On the contrary, the Army's own definition of discipline indicates that such control tends to weaken discipline by adversely affecting morale. The Army has defined discipline as ". . . an intelligent, willing obedience"⁵⁸ and, as command control of courts-martial is "subversive of morale,"⁵⁹ it is also subversive of discipline.

As one general officer stated to the War Department Advisory Committee on Military Justice:⁶⁰

Discipline is maintained by many means, outstanding among which is the proper administration of justice. There is no such thing as a choice between maintenance of discipline and proper administration of justice by the courts-martial system. Justice is administered through courts-martial in the interest of maintaining proper disciplinary standards.

A second General stated:⁶¹

The purpose is to increase an army's ability to fight successfully. It provides orderly procedure for functions of com-

⁵⁸ ARMY FIELD MANUAL 22-5, February 1946, p. 5.

⁵⁹ REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 7 (1946):

We think that this attitude is completely wrong and subversive of morale; and that it is necessary to take definite steps to guard against the breakdown of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution.

⁶⁰ REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE, COMPILATION OF ANSWERS 1 (1946).

⁶¹ *Ibid.*

mand through administering justice. This is compatible with pure justice, since an unjust application will result in loss of morale and of combat strength.

Despite the statement of Colonel Winthrop⁶² that a court-martial is not a court, the Supreme Court of the United States said as long ago as 1886, in *Runkel v. United States*, that a court-martial organized under the laws of the United States is a court of special and limited jurisdiction.⁶³ The decisions in the *Yamashita*,⁶⁴ *Grafton*,⁶⁵ and *Vidal*⁶⁶ cases reflect the view of the Supreme Court that courts-martial are true courts and are bound to observe that impartiality and independence which are the roots of due process.

In a recent television and radio program the subject matter of which was the advisability and practicability of taking control of the courts out of the power of command,⁶⁷ Colonel Frederick Bernays Weiner, one of the leading advocates of the retention of the present system, under cross-examination by Governor Gibson of Vermont, admitted that despite the prohibition against coercion of the courts it would be quite possible for a commanding general who had been displeased by the findings or sentence of a court-martial to reduce the efficiency ratings and thereby adversely affect the military careers of the officers who served on that court. Colonel Weiner's only answer to the problem was that such conduct, although probably not provable, would constitute a violation of the Articles of War and that there was no way in which individuals could be prevented from breaking the law.

The truth is that individuals can be prevented from breaking the law by putting it out of their power to do so. If the appointment of the courts is taken from command and placed in the judicial arms of the Armed Services, the Judge Advocates of the Army and Air Force and the legal specialists of the Navy, there will be little opportunity for any violation of the prohibition against coercion of the courts.

The present Articles of War and the provisions of the proposed

⁶² *Supra*, p. 276.

⁶³ See 122 U. S. 543, 555 (1886).

⁶⁴ See *In re Yamashita*, 327 U. S. 1, 8 (1945).

⁶⁵ See *Grafton v. United States*, 206 U. S. 333, 347 (1907).

⁶⁶ See *In re Vidal*, 179 U. S. 126, 127 (1900).

⁶⁷ "On Trial," February 10, 1949.

Uniform Code both place the power to convene general courts-martial in the President of the United States, the Secretaries of the Departments of the Army, Navy and Air Force and commanding officers down the line to the commanding officer of a separate brigade or naval station or of a separated wing of an air force.⁶⁸ In addition, there is a catch-all provision to take care of unusual situations or the exigencies of wartime by which a general court-martial may be convened by any commanding officer designated by the Secretary of a Department or the President.

A single change in the pending legislation is required to effect the divorce so urgently needed, *viz.*, the designation of the senior officer of the Judge Advocate General's Corps, or legal specialist attached to an Army or higher command, or the corresponding units of the Navy, the Air Force and the Coast Guard, to act as convening authority in lieu of the commanding officer. The power of the President and of the Secretary of a Department to convene courts-martial should be retained and, in order to preserve the same flexibility which now exists, it should also be provided that the Secretary of a Department or the President, should have the power to designate *any* officer of the Judge Advocate General's Corps and *any* legal specialist to act as convening authority.

In each instance the convening authority would appoint the law officer and the defense counsel and would appoint members of the court from a panel designated by the commanding officers of echelons at or below the level of the convening authority. In normal course the court would be appointed from officers of the division or the corresponding Navy or Air Force unit to which the accused belonged, but, where circumstances indicated that a fair trial could not be obtained from among the officers so designated, the convening authority could order a trial by a court consisting of officers assigned to a different or higher unit. The only instances in which this extraordinary procedure would be required would be those in which the convening authority believed that command was attempting to influence the court or those in which feeling in the accused's command was so strong that a fair trial might not be obtainable from a court consisting of officers of that command.

Commanding officers would retain the power to control the

⁶⁸ AW 8; UNIFORM CODE, art. 22.

prosecution by being vested with the power to refer cases to trial and to appoint the trial judge advocate. Command would also be given the right to review the record for the purpose of exercising clemency, but the reviewing power now vested in the commanding general as convening authority would be transferred to the member of the Judge Advocate General's Corps or legal specialist who appointed the court.

These are the precise recommendations made by Secretary of War Patterson's Advisory Committee on Military Justice.⁶⁹

It would probably not be practicable to extend this system of appointing courts to special courts-martial where legal officers may not be available, but it is certainly true that any court which has the power to sentence a man to death, or to confinement and hard labor for a period of years up to life, or to dismiss or discharge him in disgrace from the Armed Services should be made completely free from outside influence of any kind. In special circumstances or in time of war it may be necessary to designate temporarily a Judge Advocate or legal specialist to a distant or isolated command, but this inconvenience is small compared to the damage to morale which results from the belief held by so many military and naval personnel that the courts exist to carry out the wishes of the commanding officer and that justice is not to be expected from them.

The situation in the Armed Services is far different today than it was when professional soldiers and sailors constituted the armed forces. During the past two World Wars the United States has had a citizens' Army and Navy. The military and naval establishment now consists of upward of 2,000,000 men and women, many of whom are citizens who, though they serve their country willingly, would not voluntarily have selected the Armed Services as their sphere of occupation.

These citizens should not lose their right to a fair trial by an impartial court because they are in the service of their country. Nor is it in the interests of their country that they have no faith in the justice of its military tribunals.

It is as essential to the preservation of morale that the

⁶⁹ REP. WAR DEP'T ADVISORY COMM. MILITARY JUSTICE 9 (1946).

personnel of the Armed Forces believe the system to be fair, as that it be administered fairly.⁷⁰

The power given to the Congress by Article I, Section 8 of the Constitution to make rules for the government and regulation of the land and naval forces should be so exercised as to insure an administration of military and naval justice in accordance with the fundamental requirements of the American concept of justice.

⁷⁰ Letter of the Chairmen of the Committees on Military Justice of the American Bar Association, Association of the Bar of the City of New York, New York County Lawyers Association and War Veterans Bar Association, dated November 22, 1948, addressed to the Committee on a Uniform Code of Military Justice.