

1-1971

Courts-Martial Practice: A View from the Top

Robert Emmet Quinn

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Robert Emmet Quinn, *Courts-Martial Practice: A View from the Top*, 22 HASTINGS L.J. 201 (1971).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol22/iss2/1

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

Courts-Martial Practice: A View from the Top

By ROBERT EMMET QUINN*

HISTORY, it has been said, does not disclose its alternatives. Art curator and historian, Marian McNaughten, has speculated that if "just one of the two art academies in Vienna had accepted young Adolph Hitler as a student, we might not have had WW II."¹ Whatever one may think of the present state of general and special courts-martial,² it would certainly have been different from what it is, had it not been for the contributions to military practice which were made by the United States Court of Military Appeals, the civilian "Supreme Court" of the military justice system, the establishment of which was described by Congress as the most "revolutionary" part of the 1950 Uniform Code of Military Justice.³

In the twenty years that have passed since the Uniform Code was enacted, both military law and the thinking of military personnel in the administration of the military justice system have undergone a transformation of principle and attitude. The size and composition of the armed forces undoubtedly contributed to the change. Further, the frequent interactions between the civilian and the military communities, by way of the draft and reserve programs, certainly have played a part. The Court of Military Appeals provided the constitutional underpinning for the entire structure of change. It rejected the idea that early military practice represented the "original" understanding of the framers of the Constitution that courts-martial were "instruments of command," and that servicemen had no rights but those conferred by leg-

* Chief Judge, United States Court of Military Appeals.

1. Rigg, *A Safe Here Houses Four of Hitler's Paintings*, The Washington Post, May 17, 1970 (Potomac Magazine), at 19.

2. The courts-martial system also includes the summary court-martial, a one-officer court. By and large, the summary court has been outside the main stream of critical review by the legal profession. This may be true because of the limited punitive powers of the summary court-martial, which are materially less than those prescribed in the Federal Criminal Code for "petty" offenses. Compare 18 U.S.C. § 1 (3) (1964) with 10 U.S.C. § 820 (1964), UNIFORM CODE OF MILITARY JUSTICE art. 20 [hereinafter cited as UCMJ]. As early as 1953, however, it was noted that a conviction by summary court-martial is no "petty" matter, because it can increase the punishment for a later "petty" offense to include a punitive discharge. Feld, *The Court-Martial Sentence: Fair or Foul*, 39 VA. L. REV. 319 (1953).

3. H.R. REP. No. 491, 81st Cong., 1st Sess. 6 (1949).

islative or executive favor.⁴ The court recognized that military service necessarily imposed restrictions upon individual freedom so that servicemen did not have the same liberty of individual judgment and conduct as civilians, but it also recognized that in assuming the military status, the serviceman did not lose his status as an American citizen. "The time is long since past," it said, "when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto*, deprived of all protections of the Bill of Rights."⁵

Currently, established values and long-followed customs are undergoing rigid testing throughout American society. The issues are monumental, to the individual as well as to the country; and servicemen and women are as much affected by these issues as civilians. Their minds and their emotions, their consciences and their wants, are as intensely stirred as those of civilians by the Vietnam war, the conflict between blacks and whites, the reexamination of our morals and our social institutions, the reshaping of the electoral processes, and the functional relationship between the individual and government. Their personal convictions about these issues may be incompatible with a particular military duty or with the maintenance of good order and discipline within the armed services, but personal conviction or conscience which results in conduct not protected by a constitutional right may constitute a violation of military law, and subject the individual to prosecution by court-martial. If convicted, he may be separated from the service with a punitive discharge.⁶ The difference between what was, and what is now, is that today the test of the legality or illegality of conduct and the standard of rights and safeguards in prosecution begin with the Constitution, not statute, military regulation, or military custom.

Below the level of constitutional protection, substantial changes have been made in a number of important areas of procedure. Many of these resulted from decisions of the Court of Military Appeals, and

4. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959); Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, pts. 1-2, 72 HARV. L. REV. 1, (1958).

5. *United States v. Tempia*, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249, 253 (1967). See also *United States v. Manos*, 17 U.S.C.M.A. 10, 37 C.M.R. 274 (1967); *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

6. See, e.g., *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969); *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); *United States v. Levy*, 39 C.M.R. 672 (1968), *petition denied*, 18 U.S.C.M.A. 627 (1969).

almost all of the changes have been subjected to critical analysis by military personnel and civilians interested in courts-martial. The area of military law that has probably received the greatest amount of attention is that dealing with the relationship between the authority convening the court-martial and the court-martial, an area popularly termed "command control." The Court of Military Appeals has dealt with this subject in a variety of forms. The problem of command control is, however, essentially one of the human factor in the administration of the law, not one of change in court-martial functioning.

More indicative of the special influence of the court on current practice are the decisions in two areas: (1) those dealing with the role of the *Manual for Courts-Martial* in military law, and (2) those concerned with the status of the military judge. If no other changes had been made, these alone would have imparted a different look to the military courts.

The Role of the Manual for Courts-Martial in Military Law

Article 36 of the Uniform Code of Military Justice⁷ confers authority upon the President of the United States to prescribe the "procedure, including modes of proof" for courts-martial. Pursuant to this grant of authority, President Truman promulgated the *Manual for Courts-Martial, United States*, in 1951.⁸ This *Manual* replaced separate manuals of practice that were in use in the several services. The legislative grant of power and the President's execution of the power were consistent with earlier law. Nevertheless, it is somewhat surprising that Congress should have continued the pattern considering that it had created a new civilian supreme court for the military justice system. Since a decade earlier Congress had granted authority to the United States Supreme Court to establish criminal rules of procedure for the federal district courts,⁹ it would have been appropriate to confer the rule-making power for military courts upon the newly created United States Court of Military Appeals.¹⁰

Although promulgated by the President, the *Manual* was drafted by a committee of military officers from the Army, Navy, and Air Force.

7. UCMJ art. 36, 10 U.S.C. § 836 (1964).

8. Exec. Order No. 10,214, 3 C.F.R. 408 (1970).

9. Act of June 29, 1940, ch. 445, 54 Stat. 688.

10. As early as 1956 it was proposed that the rule-making power be transferred from the President to the United States Court of Military Appeals. Feld, *Courts-Martial Proceedings: Some Phases of Pretrial Procedure*, 23 BROOKLYN L. REV. 25, 26 (1956). A similar proposal was made in 1959 by the American Legion. See Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 52 (1970).

The final draft of the committee was "reviewed and cleared by the office of the Attorney General."¹¹ There is no published record of the nature and scope of that review, but subsequent decisions by the United States Court of Military Appeals, which invalidated various provisions of the *Manual*, tend to indicate that the review was neither critical nor extensive.

Military practice before the Uniform Code had established the respective service manuals as the "Bible" for courts-martial proceedings.¹² This tradition was carried forward into proceedings under the Uniform Code. It was soon apparent, however, that the *Manual* had been drafted with too narrow a focus, and, as a result, it was materially deficient in providing the essential rules of procedure. Indeed, the deficiency was so great that one of its staunchest supporters was constrained to describe the interstitial areas of the *Manual* as an "un-chartered sea."¹³ Equally apparent was the fact that the *Manual* went beyond prescription of rules of procedure and modes of proof to define the scope and effect of the provisions of the Uniform Code and the nature and elements of particular offenses. A curious paradox was thus presented. On the one hand, in the area in which the *Manual* was authorized and expected to speak with completeness and clarity, it was frustratingly silent; on the other hand, in areas in which it had no magistracy, it made sweeping pronouncements of principle. This duality of approach produced two lines of decisions which altered both the character of the *Manual* and the attitude of military practitioners toward it.

The first line of cases dealt with the limited nature of the grant of authority to the President. As noted earlier,¹⁴ the grant extended only to promulgation of rules of "procedure, including modes of proof." Neither procedure nor modes of proof include definition of the elements of an offense. It is not surprising, therefore, that soon after the court began to hear appeals, it determined that the instructions to the court members as to the elements of an offense in the form and language of the *Manual*, did not, in several instances,¹⁵ comply with

11. LEGAL AND LEGISLATIVE BASIS FOR THE MANUAL FOR COURTS-MARTIAL UNITED STATES at VI (U.S. Gov't Print. Off. 1951).

12. *United States v. Drain*, 4 U.S.C.M.A. 646, 648, 16 C.M.R. 220, 222 (1954); *United States v. Hemp*, 1 U.S.C.M.A. 280, 285, 3 C.M.R. 14, 19 (1952).

13. *United States v. McMahan*, 6 U.S.C.M.A. 709, 719, 21 C.M.R. 31, 41 (1956) (Latimer, J.).

14. See text accompanying note 7 *supra*.

15. *E.g.*, *United States v. Ginn*, 1 U.S.C.M.A. 453, 4 C.M.R. 45 (1952); *United States v. Welch*, 1 U.S.C.M.A. 402, 408, 3 C.M.R. 136, 142 (1952).

the mandate of article 51(c) of the Uniform Code, which required that the court-martial be instructed "as to the elements of the offense."¹⁶ Since the *Manual* provisions were inconsistent with the Uniform Code, they could not be sustained. Yet, even while rejecting the *Manual's* authority to define the scope of required instructions, the court acknowledged the reverence of the services for the *Manual*; and it specifically refrained from disapproving the then practice of allowing the court members to refer to the *Manual* during their deliberation on the accused's guilt or innocence. In *United States v. Gilbertson*,¹⁷ the court said: "We have no disposition to criticize referral [of the court members] to the *Manual* for pertinent amplifying material after full instruction on the elements [of the offense charged] has been given."¹⁸ This policy of benign tolerance, however, did not long endure.

Within the next half-dozen years a substantial number of provisions in the *Manual* were determined to be in conflict with, or an inaccurate statement of, a requirement of the Uniform Code.¹⁹ By 1957, in *United States v. Boswell*,²⁰ the Court of Military Appeals concluded that the number of misstatements of law in the *Manual* and the number of statements in it dealing with matters unrelated to procedure and modes of proof were too numerous to permit use of the *Manual* by the court members during deliberation upon the accused's guilt or innocence. A few months later, in *United States v. Rinehart*,²¹ the court expanded *Boswell* to bar completely use of the *Manual* in the courtroom by the court members. The reasons given by the court for this momentous reversal of traditional practice merit quotation:

We cannot sanction a practice which permits court members to rummage through a treatise on military law, such as the *Manual*, indiscriminately rejecting and applying a myriad of principles—judicial and otherwise—contained therein. The consequences that flow from such a situation are manifold. In the first place, many of the passages contained therein have been either expressly or impliedly invalidated by decisions of this Court. [Citing cases.] Secondly, we have consistently emphasized the role of the law of-

16. UCMJ art. 51(c), 10 U.S.C. § 851(c) (1964).

17. 1 U.S.C.M.A. 465, 4 C.M.R. 57 (1952).

18. *Id.* at 468, 4 C.M.R. at 60.

19. *See, e.g.,* *United States v. Haynes*, 9 U.S.C.M.A. 792, 27 C.M.R. 60 (1958); *United States v. Price*, 7 U.S.C.M.A. 590, 23 C.M.R. 54 (1957); *United States v. Kelley*, 7 U.S.C.M.A. 584, 23 C.M.R. 48 (1957); *United States v. La Grange*, 1 U.S.C.M.A. 342, 3 C.M.R. 76 (1952); B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL app. 1, at 164 (1957).

20. 8 U.S.C.M.A. 145, 23 C.M.R. 369 (1957).

21. 8 U.S.C.M.A. 402, 24 C.M.R. 212 (1957). It should be noted that the president of a special court-martial is the presiding judge; as such he is authorized to use the *Manual* in connection with procedural matters. *Id.* at 408, 24 C.M.R. at 218.

ficer in the instructional area. In *United States v. Chaput*, 2 USCMA 127, 7 CMR 3, we said that, "It is fundamental that the only appropriate source of the law applicable to any case should come from the law officer." . . . Thirdly, the great majority of court members are untrained in the law. A treatise on the law in the hands of a non-lawyer creates a situation which is fraught with potential harm, especially when one's life and liberty hang in the balance. We have absolutely no way of knowing whether a court-martial applied the law instructed upon by the law officer or whether it rejected such instructions in favor of other material contained in the *Manual*. . . .

In civilian practice it would constitute a gross irregularity to permit jurors to consult outside legal references. . . .

We are fully aware that the change in the system of military law occasioned by this decision represents a substantial departure from prior service practices. However, we cannot but feel that such change was imperatively needed if the system of military law is to assume and maintain the high and respected place that it deserves in the jurisprudence of our free society.²²

The second strand of decisions, which affected the image of the *Manual*, dealt with the very area in which the *Manual* was intended to be supreme, that is, procedure including the modes of proof. The problem arose because the *Manual* was both deficient and inefficient in effectuation of its purpose. Its principal fault was that it tried to be an encyclopedia of military law, rather than a rule book of practice. In the grant of authority to the President to promulgate appropriate rules, Congress had suggested that the rules conform, as far as the President deemed "practicable," to the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.²³ The rules of evidence received a fair degree of attention, but important principles in other areas of procedure were barely noticed or completely disregarded.

Sensitive to the congressional preference for comparability of the courts-martial system with the civilian practice, the Court of Military Appeals bridged the large procedural gaps in the *Manual* pattern with the rules applicable in the federal district courts. By 1954, the court had propounded as dictum for general guidance the doctrine

22. *Id.* at 406-08, 24 C.M.R. at 216-18. It would be a mistake to conclude from *Rinehart* that *Manual* discussions of substantive law were erroneous or useless. Many of these were valuable aids to an understanding of the nature of military-type offenses. See, e.g., *United States v. Hemp*, 1 U.S.C.M.A. 280, 3 C.M.R. 14 (1952). The 1951 *Manual* statement on the test for mental responsibility for conduct constituting a crime has survived redefinitions of the test in the federal courts. See *United States v. Kunak*, 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954); *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

23. UCMJ art. 36, 10 U.S.C. § 836 (1964).

that "[f]ederal practice applies to courts-martial procedures if not incompatible with military law or with the special requirements of the military establishment."²⁴ From then on, the *Manual* was not the omniscient and omnipotent source of courts-martial practice. In fact, in a number of instances, practices approved by the *Manual* were found to be contrary to the Uniform Code of Military Justice.²⁵ Forms of relief available in the civilian courts, but unmentioned in the *Manual*, were incorporated into the military practice. These included the declaration of a mistrial,²⁶ a motion for a change of venue,²⁷ and a motion to dismiss the charges for denial of the right to speedy trial.²⁸

Enlargement of the number and the nature of motions available to an accused materially qualified the *Manual* statement that, with two specified exceptions, "the burden rests on the accused to support by a preponderance of evidence a motion raising a defense or objection."²⁹ Actually, the burden of proof applied by the court for a particular motion was the same as that applied in the federal district courts. Thus, a motion to dismiss for denial of speedy trial imposed upon the Government the burden of establishing that proceedings previous to trial had moved with reasonable dispatch.³⁰ Similarly, a disputed question of fact as to the existence of military jurisdiction over the accused or the offense cast upon the Government the burden of establishing jurisdiction beyond a reasonable doubt.³¹ A defense objection to withdrawal of the law officer (now the military judge) or a court member after the accused's arraignment required the Government to show good cause for the excuse.³²

As the power to prescribe rules of procedure is reposed in the President, the *Manual for Courts-Martial* continues to be the single, most important source for the rules of practice. The 1969 *Manual* made numerous changes and additions to the original rules promul-

24. *United States v. Knudson*, 4 U.S.C.M.A. 587, 590, 16 C.M.R. 161, 164 (1954); *cf. United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

25. *United States v. Jones*, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956); *United States v. Drain*, 4 U.S.C.M.A. 646, 16 C.M.R. 220 (1954).

26. *United States v. Schilling*, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957).

27. *United States v. Gravitt*, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954).

28. *United States v. Lamphere*, 16 U.S.C.M.A. 580, 37 C.M.R. 200 (1967); *United States v. Hounshell*, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956).

29. *Manual for Courts-Martial, United States* ¶ 67(e) (1951).

30. *United States v. Tibbs*, 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965); *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).

31. *United States v. Ornelas*, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952).

32. *United States v. Boysen*, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960); *United States v. Grow*, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953); UCMJ art. 29, 10 U.S.C. § 829 (1964).

gated in the 1951 *Manual*. These changes directly reflect the influence of the Court of Military Appeals. In fact, the assigned mission of the "working group" of the Army, Navy, and Air Force personnel designated to draft a new *Manual* "was to make necessary and desirable revisions occasioned by decisions of the United States Court of Military Appeals and other . . . applicable Federal authority."³³ Commenting on the scope of the alterations of practice effected by decisions of the court, one student of the military justice system remarked that these "accomplished more reform in the field of procedural due process than all the prior congressional military codes put together."³⁴ To the extent the statement implies that the court acted independently of Congress and the Uniform Code, it is unjustified. The court acted within the framework of the code and in furtherance of congressional intent. A more appropriate comparison of influence would have been in regard to the *Manual*. The 1969 *Manual* reflects more the results of the court's decisions than it reflects the original handiwork of the service personnel who drafted it.

Conjoined, the two lines of decisions by the Court of Military Appeals achieved a fundamental change in the nature of the *Manual*. From writ, it was transformed to a compendium of rules of procedure, which could (and should) be changed as good sense and legal principle require, and which would, as nearly as practicable, conform to the rules in the federal district courts. The change transformed the "unchartered sea" of courts-martial practice to a system so significantly similar to that of the federal civilian courts as "to make a civilian practitioner feel comfortable and knowledgeable in a court-martial case."³⁵

The Military Judge and Courts-Martial

Before enactment of the Uniform Code a general court-martial, at least in appearance and organization, bore more resemblance to a criminal court in some civil law jurisdictions, in which a panel of profes-

33. ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL UNITED STATES at iv (U.S. Gov't Print. Off. 1969). The 1969 *Manual* retained several provisions of the 1951 *Manual* in unchanged form, although they were substantially affected by decisions of the Court of Military Appeals. Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 95 (1969) with *United States v. Dean*, 7 U.S.C.M.A. 121, 23 C.M.R. 185 (1957). Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 67(e) (1969) with text accompanying notes 26-28 *supra*.

34. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 51 (1970).

35. Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 15 U.C.L.A.L. REV. 1240, 1242 (1968).

sional and lay judges determined the applicable law and decided the essential facts, than it resembled an American criminal court with a judge and jury. After the reforms effected by the Elston Act in 1948, at least one member of the general court-martial was required to be a lawyer,³⁶ but the court members could still, as indicated earlier,³⁷ obtain their law from the *Manual for Courts-Martial*. The Uniform Code separated the professionally trained member from the other court members and titled him the "law officer."³⁸ Additionally, the code conferred courtroom functions upon the law officer that were similar to those of the judge in the civilian criminal court.³⁹ Some years later it was being asked, "Who Made the Law Officer a 'Federal Judge?'"⁴⁰

As far as the title itself is concerned, Congress redenominated the law officer a military judge in the Military Justice Act of 1968.⁴¹ However, in terms of function and independence at the trial, the transformation was achieved considerably earlier through the decisions of the Court of Military Appeals. In fact, as early as 1959, it was said that the court had opened the way to trying a defendant before a law officer sitting without court members, one of the major provisions of the 1968 Military Justice Act.⁴²

Practical recognition of the new role of the law officer appeared in the Army as early as 1960 when the Army established the field judiciary, an organization of officers in each of several circuits who were designated by the Judge Advocate General of the Army for formal appointment by the respective convening authorities within each circuit.⁴³ This practice was incorporated into the Uniform Code by the Military Justice Act of 1968.⁴⁴

The historical record of the change has been partially treated elsewhere.⁴⁵ A full review and analysis, from the enactment of the Uniform Code to the investiture of the law officer with the judicial title

36. Selective Service Act of 1948, ch. 625, tit. II, § 206, 62 Stat. 629.

37. See text accompanying notes 17-18 *supra*.

38. Act of May 5, 1950, ch. 169, § 1 64, stat. 117.

39. UCMJ art. 51, 10 U.S.C. § 851 (1964).

40. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MILITARY L. REV. 39 (1959).

41. UCMJ art 1(10), 10 U.S.C. § 801 (10) (Supp. V, 1970).

42. B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL 63 n.1 (1957).

43. See Weiner, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960).

44. UCMJ art 26(c), 10 U.S.C. § 826(c).

45. Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MILITARY L. REV. 39 (1959).

inherent in the office, may provide a worthwhile addition to the history of military justice. Here, it is important only to note that, along with the evolution of procedure, the evolution of the law officer into the military judge has rearranged the court-martial's structure and operation. The 1969 *Manual* still confers upon the president of the court-martial some responsibilities at trial that are not accorded any juror in a civilian court.⁴⁶ This grant of authority may be an unnecessary concession to the past; however, the overall structure and operation of general and special courts-martial, with a military judge presiding, now more nearly resembles the civilian criminal courts than ever before in the history of military law. These courts now look like and act as tribunals of the criminal judiciary of the Federal Government.

The Past as Prologue to the Future

Despite all the changes that have taken place in the military justice system during the past two decades, some remain unconvinced that courts-martial are, or truly can be, a part of the federal judiciary. In their view there is a basic and ineradicable incompatibility between justice and military discipline—neither the military judge nor the court members can be as impartial and just as a civilian judge and jury. As surprising and as inconsistent as it may seem, some of the justices of the United States Supreme Court apparently share this view. At the same time, however, the Court has rejected a contention that a jury composed exclusively of employees of the United States Government is, because of attitudes engendered by employment and the effect of an acquittal upon Government careers, likely to violate its oath of impartiality in judging the guilt or innocence of defendants charged with a federal crime.⁴⁷ The most recent expression of this attitude toward the military courts was by Mr. Justice Douglas in *O'Callahan v. Parker*.⁴⁸ He said that a "court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."⁴⁹ With equal personal conviction, others take an opposite view.⁵⁰

46. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 40 (1969).

47. See *Frazier v. United States*, 335 U.S. 497 (1948).

48. 395 U.S. 258 (1969).

49. *Id.* at 265.

50. See *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (Quinn, C.J., dissenting).

Statistics of one kind or another have been used to bolster conflicting points of view. One set of figures compared the percentage of acquittals to trials.⁵¹ Excluding prosecutions for unauthorized absence, which allow only few and mostly unusual bases of defense,⁵² the compilation indicated an acquittal rate of 4 percent in the federal district courts compared to a 15 percent rate of acquittal in courts-martial. Comparisons of this kind are, of course, meaningless. They may indicate nothing more than a difference in the amount of or in the quality of preparation by the prosecuting attorney. Equally unsatisfactory is the approach to the character and quality of courts-martial predicated upon personal experience; the test is too subjective to be more than opinion.

Two circumstances provide relatively objective bases from which to judge the essential character and quality of the current military justice system. The first was noted by Yale Law Professor James W. Bishop. He observed that, since the adoption of the Uniform Code, the United States Supreme Court "has yet to find a fatal denial of constitutional rights in a court-martial."⁵³ A second vantage point for judgment is in a comparison of the rights and the protections of the accused in a court-martial with those of the defendant in a civilian prosecution. One of the most searching critics of the military system has determined, in the light most favorable to civilian concepts, that the defendant in the civilian court has "perhaps a slight edge" over the accused in a court-martial.⁵⁴

A columnar balance of defense rights and privileges between civilian and military law does not completely determine the quality of the administration of criminal justice. In law, the prescribed procedures and roll of rights may be most impressive, but they do not necessarily insure impartiality of verdict and sentence. Established processes can be perverted. Certainly, there are persons in the military who might be willing to subordinate justice to personal advancement or to the imaginary needs of the armed forces; so are there judges and prosecutors in the civilian community who are willing to disregard the rights of a defendant to advance the supposed public

51. Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105, 138 (1970).

52. See, e.g., *United States v. Heims*, 3 U.S.C.M.A. 418, 12 C.M.R. 174 (1953); *United States v. Edwards*, 18 C.M.R. 830 (1955); *United States v. Mills*, 17 C.M.R. 480 (1954).

53. Bishop, *The Quality of Military Justice*, N.Y. Times, Feb. 22, 1970 (Magazine), at 37.

54. Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 66 (1970).

interest or their personal careers. Certainly, there are persons in the military who may desire or knowingly attempt to deprive an accused of rights to which he is entitled; so are there law enforcement officers and judges in the civilian community who may also deprive the individual of his rights. And certainly, from time to time an accused in the military may be intentionally or carelessly denied a right or protection granted him by the Constitution or other rule of law; similar deprivations of right occur in the prosecution of crime in the civilian community. In short, people contribute to the quality of a system. The nearly three million people serving in the armed forces are basically the same as the two hundred million in the civilian community. They are subject to the same human frailties and they are strengthened by the same human virtues and values.

In the twenty years that have elapsed since enactment of the Uniform Code of Military Justice and establishment of the United States Court of Military Appeals, the military justice system has undergone great change. What courts-martial once were, they no longer are. What courts-martial are now is not a mirror image of the federal civilian courts; but the procedures and the principles applicable to courts-martial are, like those of the civilian courts, calculated to assure a fair trial, a just verdict, and in the event of conviction, a sentence appropriate to the particular accused. The decisions of the Court of Military Appeals have contributed greatly to that felicitous state of administration and operation.