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THE COURT-MARTIAL: AN HISTORICAL SURVEY*

by Captain (P) David A. Schlueter**

In this article, Captain (P) Schlueter describes the development of the legal tribunal known as the court-martial. Beginning with the use of this form of trial in the armies of imperial Rome two thousand years ago, the author traces its evolution through the Middle Ages, to Britain from the Renaissance to the American Revolution. The focus then shifts to the United States, and the focus then shifts to the present day.

I. INTRODUCTION

The need for national defense mandates an armed force whose discipline and readiness is not unnecessarily undermined by the often deliberately cumbersome concepts of civilian jurisprudence. Yet, the dictates of individual liberty clearly require some check on military authority in the conduct of courts-martial. The provisions of the **UCMJ** with respect to court-martial proceed-

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ings represent a congressional attempt to accommodate the interests of justice, on the one hand, with the demands for an efficient, well-disciplined military, on the other.¹

With these closing words the United States Court of Appeals for the District of Columbia affirmed the general court-martial conviction of Private Curry. He had argued first that the present structure of the court-martial is fundamentally incompatible with the fifth amendment guarantee of due process and would be prohibited in a civilian context. Secondly, he argued that the military had failed to produce any justification for the military justice system.

Curry's arguments are not innovative; they typify the objections, past and present, to the forum of law commonly referred to as the "court-martial". As such they provide a convenient and timely catalyst for discussing the historical traces of the court-martial. A study of the historical foundations of the present system reveals the continuing threads, among others, of "due process" and the justification for a special, separate forum for administering justice in the military.

The subject is broad and deep. Time and space prevent a more thorough historical analysis here of the court-martial. In some instances the development of the court-martial during several centuries must of necessity be summarized in a few short paragraphs. Also omitted is discussion of the system of courts-martial employed by naval forces. But the flavor remains. The chief contributing factors or personalities are discussed. It is not the purpose of this article to defend the court-martial, but rather to briefly reflect on its development through literally centuries of development. The discussion is primarily three-fold and centers on the statutory changes which most affect the court-martial. We will examine first the early origins of the court-martial in the European countries, then the development of the court-martial under the British system, and finally the maturation of that forum in the American system.

¹ Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979) at 880. Curry had exhausted his military remedies through the Army Court of Military Review and the United States Court of Military Appeals. See arts. 66 & 67, Uniform Code of Military Justice, 10 U.S.C. § § 866 and 867 (1970) [hereinafter cited as U.C.M.J.].

11. THE EARLY EUROPEAN MODELS

The roots of the court-martial run deep. They predate written military codes designed to bring order and discipline to an armed, sometimes barbarous fighting force. Although some form of enforcement of discipline has always been a part of every military system, for our purposes we trace the roots only as far back as the Roman system.

In the Roman armies, justice was normally dispensed by the *magistri militum* or by the legionary tribunes who acted either as sole judges or with the assistance of councils.² The punishable offenses included cowardice, mutiny, desertion and doing violence to a superior. While these offenses or their permutations have been carried forward to contemporary settings, many of the punishments imposed upon the guilty have long since been abandoned: decimation, denial of sepulture, maiming, and exposure to the elements. Other punishments remain, such as dishonorable discharge.³

The Roman model was no doubt employed or observed by the later continental armies and is credited by most commentators as the template for later military codes. For example, the military code of the Salic chieftains, circa fifth century, contained phrases closely approximating those in the Roman Twelve Tables. By the ninth century the Western Goths, Lombards, and Bavarians were also using written military codes.⁴

The early European courts-martial took on a variety of forms and usages. Typically, the early tribunals operated both in War and in peacetime conditions, the former occupying the greater part of an army's time. The Germans, in peacetime, conducted their proceedings before a count who was assisted by assemblages of freeman, and in war before a duke or military chief. Later, courts of regiments, the "regiment" being a mace or staff serving as a symbol of judicial authority, were held by the commander or his delegate. For proceedings involving high-ranking commanders, the King formed courts composed of bishops and nobles.⁵

² See W. Winthrop, *Military Law and Precedents* 17, 45 (2d ed. 1920 reprint). See also G. Squibb, *The High Court of Chivalry* (1959).

³ Winthrop, *supra* note 2, at 17.

⁴ Winthrop, *supra* note 2, at 18. See also W. Aycock and S. Wurfel, *Military Law Under the Uniform Code of Military Justice* 4 (1955).

⁵ J. Snedeker, *A Brief History of Courts-Martial* 7 (1954).

In Germany, courts-martial, or *militargerichts*, were formally established by Emperor Frederick III in 1487, specifically provided for in the penal code of Charles V in 1533, and refined still further under Maximilian II in 1570.⁶ In France, although a military code existed as early as 1378, courts-martial, *conseils de guerre*, were not formally instituted by *ordonnance* until 1655.⁷

But the contribution of the German and French systems to the overall development of the court-martial is overshadowed by two contributions which were very different and yet very similar: the age of chivalry and the written military code of King Gustavus Adolphus.

Of elusive origins, the age of chivalry is most often linked with the middle ages—those centuries after the fall of the Roman empire and before the Renaissance. Amidst the intense rivalries for land and power and the usual accompanying dishonorable practices, “chevaliers” vowed to maintain order, and to uphold the values of honor, virtue, loyalty, and courage. The position and power of the chevalier rendered him an arbiter in matters affecting his peers, and also his dependents who held his estates under the feudal system. From this informal system arose the more formal court of chivalry.

The Duke of Normandy (William the Conqueror) vested the power and authority of his court of chivalry in his high officials; the particulars of this court will be discussed later. It was this system of military justice which he carried to England in the 11th century.⁸

The second contributing factor, the written military code of King Gustavus Adolphus of Sweden in 1621, was grounded on the need for honor, high morals, order, and discipline in a time when soldiers were generally considered barbarians and opportunists seeking the booty of war. King Adolphus was a born leader, deeply religious, and a man of modern thought. During the siege of Riga, Poland, in 1621, he issued his 167 articles for the maintenance of order.⁹ These provided for a regimental

⁶ Winthrop, *supra* note 2, at 18.

⁷ *Id.*

⁸ Aycok and Wurfel, *supra* note 4, at 4.

⁹ See Winthrop, *supra* note 2, at 19. The entire code is printed as an appendix to Winthrop's work. Winthrop points out, and other writers allude to the point,

(“lower”) court-martial. The president of this tribunal ~~was~~ the regimental commander, and the court’s members were elected individuals from the regiment.

The standing court-martial (the “higher court”) was presided over by the commanding general, and its members consisted of high ranking officers.” If a gentleman or any officer was summoned before the lower court to answer for a matter affecting his life or his honor, the issue was referred to the higher, or standing court, for litigation.”

The code provided a detailed guide for conducting the courts¹² and

that the code of Adolphus contributes in large part to later codes. He also notes that many English soldiers had served under Adolphus. *Id.*, at 19, n. 15.

¹⁰ Article 142 provided:

In our highest Marshall Court, shall our General be President; in his absence our Field Marshall; when our Generall is present, his associates shall be our Field Marshall first, next him our General of the Ordnance, Serjeant Major Generall, Generall of the Horse, Quarter-Master-General; next to them shal sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant Colonells, and these shall sit together when there is any matter of great importance in controversie.

¹¹ Article 152. In this provision we see one of many references throughout military history to a distinction between “officers” and “soldiers,” the former presumably men of “honor” and entitled to greater privileges.

¹² *See* article 143, which reads:

Whensoever this highest Court is to be holden they shall observe this order; our great Generall as President, shall sit alone at the head of the Table, on his right hand our Field Marshall, on his left hand the Generall of the Ordnance, on the right hand next our Serjeant-Major-Generall, on the left hand againe the Generall of the Horse, and then the Quarter-Master-General on one hand, and the Muster-Master-Generall on the other; after them shall every Colonell sit according to his place as here follows; first the Colonell of our Life Regiment, or the Guards of our owne person; then every Colonell according to their places of antiquity. If there happen to be any great men in the Army of our subjects, that be of good understanding, they shall cause them to sit next these Officers; after these shall sit all ~~of~~ the Colonells of strange Nations, every one according to his antiquity of service.

Further, an oath was required of the participants:

All these Judges both of higher and lower Courts, shall under the blue Skies thus swear before Almighty God, that they will inviolably keep

contained a number of provisions for due process.¹³ The regimental, lower, court tried cases of theft, insubordination, and other minor offenses, and also exercised jurisdiction over minor civil issues.¹⁴ The standing, higher, court exercised jurisdiction over treason, conspiracy, and other serious offenses.¹⁵

Those found guilty of misdemeanors were punished uniformly, without regard to status. If a regiment ran from a battle, its troops forfeited their goods or were decimated by hanging.¹⁶ Other more common methods of dealing with the recalcitrants included confinement on bread and water,¹⁷ being placed in shackles,¹⁸ riding the wooden horses,¹⁹ and forfeitures.²⁰

this following oath unto us: I.R.W. doe here promise before God upon his holy Gospell, that I both will and shall Judge uprightly in all things according to the Lawes of God, or our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty, that I finde guilty; as the Lord of Heaven and Earth shall help my soule and body at the last day, I shall hold this oath truly.

Article 144.

¹³ For example, an appeal could be had to the higher court if the lower court was suspected of being partial. Articles 151, 153.

¹⁴ Article 153.

¹⁵ Article 150.

¹⁶ See articles 60, 66. Those lucky enough to survive were destined to "carry all the filth out of the Leaguer, until such time as they perform some exploit that is worthy to procure their pardon, after which time they shall be clear of their former disgrace." If any man could show through the testimony of ten men that he was not guilty of the charged cowardice, he would go free.

While punishment for minor crimes and cowardice was harsh, rewards were specifically in store for those who served honorably. *See* article 69.

¹⁷ Article 49.

¹⁸ Article 94.

¹⁹ Article 49. In this punishment, the miscreant was placed on a block or frame, with his back exposed, and was flogged. The block or frame resembled a saw-horse.

²⁰ Article 80.

One cannot help but be impressed with the details and precise formula of the code and its intent of preserving the welfare of “our Native Countrey.”²¹ In many respects, then, its foundation rested alongside the roots of the court of chivalry—a need to recognize honor, loyalty, and high morals, not just raw military discipline. In one notable respect the code of King Adolphus differed from the Norman court of chivalry. Whereas the latter sanctioned trial by combat—the innocent being the victor—the former expressly forbade dueling.²²

These two important factors, the development of the court of chivalry and the code of King Adolphus, marked significant benchmarks in the growth of the court-martial. Both recognized the need to maintain discipline and honor and both recognized the requirements of the concept now labeled “due process”.

III. THE BRITISH SYSTEM

A. INTRODUCTION

The contribution of the British to the development of the court-martial is rich with tradition. As pointed out in the preceding section, the early European models of military courts contributed in some respects to our

²¹ The closing article, which was article 167, read:

These Articles of warre we have made and ordained for the welfare of our Native Countrey, and doe command that they be read every moneth publickly before every Regiment, to the end that no man shall pretend ignorance. We further will and command all, whatsoever Officers higher or lower, and all our common souldiers, and all others that come into our Leaguer amongst the souldiers, that none presume to doe the contrary hereof upon paine of rebellion, and the incurring of our highest displeasure; For the firmer confirmation whereof, we have hereunto set our hand and seale.

²² Article 84 provided:

No Duell or Combat shall be permitted to bee fought either in the Leaguer or place of Strength: if any offereth to wrong others, it shall bee decided by the Officers of the Regiment; he that challengeth the field of another shall answer it before the Marshal's Court. If any Captain, Lieutenant, Ancient, or other inferior officer, shall either give leave or permission unto any under their command, to enter combat, and doth not rather hinder them, [he] shall be presently cashiered from their charges, and serve afterwards as a Reformado or common souldier; but if any harm be done he shall answer it as deeply as he that did it.

modern system. But it is to the British models that commentators most often turn in discussing the history of the present court-martial. Indeed, as we shall see later, the British system served as the first pattern for the American military justice system.

Because the British contribution is so complex and multi-faceted, discussion here is limited to three general points or stages: the court of chivalry (or constable's court); the era of martial law and councils of war; and the Mutiny Act. These three highlights of the British model will provide ample footing for later discussions of the American court-martial system. We turn our attention first to the court of chivalry.

B. THE COURT OF CHIVALRY: THE CONSTABLE'S COURT

In the preceding discussion on the early European court-martial model, we noted the rise of the courts of honor, the court of chivalry, *curia militaris*. With his armies, William the Conqueror carried that system of justice to England and established it as his forum for administering military justice.²³

The court is often referred to as the constable's or marshal's court the name deriving from the titles of the principle participants in the court. William's supreme court, the *Aula Regis*, included within its jurisdiction, in its early years, the jurisdiction of the court of chivalry.²⁴ The court moved with the king, and thus proved to be an awkward and bulky affair until the reign of Edward I. He subdivided the court to provide a separate forum for litigation of matters concerned primarily with military discipline.²⁵

The commander of the royal armies was the lord high constable. When he sat as the superior judge, he was assisted by the earl marshal, three

²³ See Aycock and Wurfel, *supra* note 4, at 4. For discussions of the court of chivalry, see generally S. C. Pratt, *Military Law: Its Procedure and Practice* (1915); C. Fairman, *The Law of Martial Rule* (1943); and G. Squibb, *supra* note 2. An interesting account of a court of chivalry proceeding can be found at 3 Corbett's Complete Collection of State Trials, 483 (1809). A chapter on procedure is included in Squibb's book.

²⁴ Pratt, *supra* note 23, at 6; Fairman, *supra* note 23 at 1.

²⁵ Winthrop, *supra* note 2, at 46.

doctors of civil law, and a clerk (who served *as* prosecutor. This court exercised jurisdiction over civil and criminal matters involving soldiers and camp followers. The court also exercised jurisdiction over criminal acts which were subversive of discipline.²⁶

The earl marshal was next in rank to the constable and bore the responsibility for managing the army's personnel. When he presided, the "constable's court" was considered a court of honor or military court. This arrangement survived until **1521**, when Edward, Duke of Buckingham, constable during the reign of Henry VIII, was executed for **treason**.²⁷ The office of constable reverted to the Crown and the constable's court became the "marshal's court." The office of marshal derived from royal appointment until **1533** when it became hereditary.²⁸

The court was much more mobile than the *Aula Regis* and during periods of war followed the Army. In its early forms, the court became somewhat of a standing or permanent forum, rendering summary punishment in accordance with the existing military code or articles of **war**.²⁹

The court's supposed strength, that is, its jurisdictional powers over a wide range of civil and criminal matters, eventually became its Achilles' heel. At several points in its history, limitations, both royal and legis-

²⁶ Fairman, *supra* note 23, at 2 to 4.

²⁷ Aycock and Wurfel, *supra* note 4, at 6.

²⁸ *Id.*

²⁹ See Pratt, *supra* note 23, at 6. The various articles of war promulgated by the crown during conflicts were drawn with the advice of the constable and marshal. For example, the preamble to Richard II's articles reads:

These are the Statutes, Ordinances, and Customs, to be observed in the Army, ordained and made by good consultation and deliberation of our Most Excellent Lord the King Richard, John Duke of Lancaster, Seneschall of England, Thomas Earl of Essex and Buckingham, Constable of England, and Thomas de Mowbray, Earl of Notingham, Mareschall of England, and other Lords, Earls, Barons, Banneretts, and experienced Knights, whom they have thought proper to call unto them; then being at Durham the 17th day of the Month of July, in the ninth year of the Reign of our Lord the King Richard II.

The whole of Richard II's articles are reprinted in Winthrop, *supra* note 2, at 904.

lative, were imposed to restrict its growing infringements upon the common law courts.³⁰ The court eventually fell into disuse and by the 18th century ceased to exist as a military court.³¹

C. THE "COUNCIL OF WAR"

With the decline of the court of chivalry (the constable's court or the marshal's court), the martial courts or councils held under the various articles or codes of war became more prominent.³² Long before the court

³⁰ Fairman notes that it was inherent in the nature of the military court to expand its jurisdiction whenever possible. Civil jurisdiction was restricted in **1384**:

And because divers Pleas concerning the Common Law, and which by the Common Law ought to be examined and discussed, are of late drawn before the Constable and Marshal of England, to the great Damage and Disquietness of the People; it is agreed and ordained, that all Pleas and Suits touching the Common Law, and which ought to be examined and discussed at the Common Law, shall not hereafter be drawn or holden by any Means before the foresaid Constable and Marshal, but that the court of the same Constable and Marshal shall have that which belongeth to the same Court, and that the Common Law shall be executed and used and have that which to it belongeth, and the same shall be executed and used as it was accustomed to be used in the Time of King Edward.

8 Richard 11, stat. 1, c. 2. See Fairman, *supra* note 23, at 4, n. 13.

Criminal jurisdiction was limited in **1399** by 1 Henry IV, c. 14 and in **1439** punishment for desertion was also limited to the common law courts. 18 Henry VI, c. 19. See Fairman, *supra* note 23, at 4.

³¹ After the fall of the Constable's Court in **1521**, the Marshal's Court normally consisted of deputies assigned to hear cases. In **1640** Parliament resolved that the Marshal's Court was a "grievance". No formal act ended the Court; it simply, as Fairman notes, suffered from atrophy. Winthrop notes that the last case was apparently tried in **1737**. Winthrop, *supra* note 3 at 46, n. 9 (Chambers v. Sir John Jennings, 7 Mod. 127). However, one writer states that the Court of Chivalry (court of honor) was used as recently as **1954**, in the case of Manchester Corporation v. Manchester Palace of Varieties Ltd. [1955] p. 133. See Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. Rev. 478 (1969). The case is discussed in detail in Squibb, *supra* note 2 at 123.

³² The more commonly cited articles of war, under a variety of titles, are those of Richard I, Richard 11, Henry V, Henry VII, Charles 11, and James 11. See generally Winthrop, *supra* note 2 at 18, 19. Several of these codes are included as appendices in his work and are noted elsewhere in this article. The individual codes are thoroughly discussed in Clode, *Military and Martial Law* (London 1872).

of chivalry had faded, the problem of maintaining military discipline in a widely dispersed army had prompted the formation of military courts by issuance of royal commissions, or through inclusion of special enabling clauses in the commissions of high-ranking commanders.³³ These tribunals, which eventually became the modern courts-martial, were convened by a general who also sat as presiding judge or president. The courts' powers were plenary, and were limited to wartime. Sentences were carried into execution without confirmation by higher authorities.³⁴

As with the court of chivalry, the emerging councils of war or courts-martial frequently fell into abuse. More than once, royal prerogative expanded, or attempted to expand, the jurisdiction of these tribunals over civilians or over soldiers in peacetime armies. For example, during the reigns of Edward VI, Mary, Elizabeth I, and Charles I, certain offenses, normally recognized only at common law in the civilian courts, could be punished under military law before courts-martial similar to those employed during times of war.³⁵ Parliament was rightfully very sensitive about these and other attempted encroachments upon the civilian populace. The struggle over court-martial jurisdiction simply fueled the fires. The only legislative aid to enforcing military discipline was found in various statutes which could be enforced only before civil courts.

From 1625 to 1628, Charles I attempted to use court-martial jurisdiction as a lever on the populace in hope of obtaining supplies. He failed and, in seeking the needed money from Parliament, he was forced to

³³ See generally Pratt, *supra* note 23 at 7; Aycock and Wurfel, *supra* note 4 at 5. One of these "commissions" cited often is that given to Sir Thomas Baskerville, June 10, 1597: ". . . to execute marshall law, and, upon trial by an orderly court, . . . to inflict punishment. . . ." Cited in Aycock and Wurfel, *supra* note 4 at 6, and Fairman, *supra* note 23 at 6. A good discussion of the workings of the British courts-martial during this period is found in Clode, *supra* note 32 at chapter 11.

³⁴ The exact origin of the term "court-martial" is open to some interpretation. Pratt states:

The true derivation of the word 'martial' opens out an interesting field of inquiry. Simmons and others hold that courts-martial derive their name from the Court of the Marshal; but there is a good deal to be said against this view, as the words 'martial' and 'military' are in some of the old records synonymous.

Pratt, *supra* note 23, at 7.

³⁵ See generally, Fairman, *supra* note 23, at 6.

assent to a Petition of Rights (1628), which, among other things, dissolved the commissions proceeding under military law. Charles agreed to imprison no one except with due process of law, and never again to subject the people to **courts-martial**.³⁶

From the continuing struggle for control of the military, Parliament slowly gained a foothold on control of the conduct of military trials. In **1642** the first direct legislation affecting military law authorized the formation of military courts. A commanding general and 56 other officers were appointed as “commissioners” to execute military law. Twelve or

³⁶ 3 Charles I, c. 1. The petition provided in part:

Sec. VII. And whereas also by Authority of Parliament, in the five and twentieth Year of the Reign of King Edward the Third, it is declared and enacted, That no man should be forejudged of Life or Limb against the Form of the Great Charter and the Law of the land; (2) and by the said Great Charter and other the Laws and Statutes of this your Realm, no Man ought to be adjudged to Death but by the laws established in this your Realm, either by the Customs of the same Realm, or by the Acts of Parliament: (3) And whereas no Offender of what Kind soever is exempted from the Proceedings to be used, and Punishments to be inflicted by the Laws and Statutes of this your Realm: Nevertheless of late Time divers Commissions under your Majesty's Great Seal have issued forth, by which certain Persons have been assigned and appointed Commissioners, with Power and Authority to proceed within the land, according to the Justice of Martial Law, against such Soldiers or Mariners, or other dissolute Persons joining with them, as should commit any **Murther**, Robbery, Felony, Mutiny or other Outrage or Misdemeanor whatsoever, and by such **summary** Course and Order as is agreeable to Martial Law, and as is used in Armies in Time of War, to proceed to the Trial and Condemnation of such Offenders, and them to cause to be executed and put to Death according to the Law Martial:

Sec. VIII. By Pretext whereof some of your Majesty's Subjects have been by some of the said Commissioners put to Death, when and where, if by the Laws and Statutes of the Land they had deserved Death, by the same Laws and Statutes also they might, and by no other ought to have been judged and executed.

Sec. X. . . . (5) And that the aforesaid Commissions, for proceeding by Martial Law, may be revoked and annulled; and that hereafter no Commissions of like Nature may issue forth to any Person or Persons whatsoever to be executed as aforesaid, lest by Colour of them any of your Majesty's Subjects be destroyed, or put to death contrary to the Laws and Franchise of the Land.

more constituted a quorum and the body was empowered to appoint a judge advocate, provost marshal, and other necessary **officers**.³⁷

Beginning in 1662 with articles of war issued by Charles II, there was a general recognition that a standing **army** needed power to maintain peacetime discipline. There was also an increased interest in military due process **as** evidenced in various provisions of the myriad articles of war. For example, the 1686 code of “English Military Discipline” of James II included the following description of the procedure to be followed in conducting a “Council of War”:

If the Council of War, or Court-martial be held to judge a Criminal, the President and Captains having taken their places and the Prisoner being brought before them, And the Information read, The President Interrogates the Prisoner about **all** the Facts whereof he is accused, and having heard his Defence, and the Proof made or alleged against him, He is ordered to withdraw, being remitted to the Care of the Marshal or Jaylor. Then every one judges according to his Conscience, and the Ordinances or Articles of War. The Sentence is framed according to the Plurality of Votes, and the Criminal being brought in again. The Sentence is Pronounced to **him** in the name of the Council of War, or Court Martial.

When a Criminal is Condemned to any Punishment, the Provost Martial causes the Sentence to be put in Execution; And if it be a publick Punishment, the Regiment ought to be drawn together to see it, that thereby the Souldiers may be deterred from offending. Before a Souldier be punished for any infamous Crime, he is to be publickly Degraded from his Arms, and his coat stript over his ears.

A Council of War or Court Martial is to consist of Seven at least with the President, when so many Officers can be brought to-

³⁷ The act, Lord Essex's Code, established a Parliamentary Army. See D. Jones, Notes on Military Law (London 1881) at 15. See *also* Snedeker, *supra* note 5 at 16, and Fairman, *supra* note 23 at 12.

³⁸ The Parliament of the Restoration (1660) allowed Charles II to maintain an armed force of some 8,000 at his own expense. Parliament for fear of being bound to support the army declined to legislatively create courts-martial. Thus Charles was left to govern his troops. See Clode, *supra* note 32; See *also* Jones, *supra* note 37, at 14.

gether; And if it so happen that there be no Captains enough to make up that Number, the inferior Officers may be called in.³⁹

More detailed rules were set out two years later in the Articles of War of James II (1688), which also placed a limitation on certain punishments:

All other faults, misdemeanours and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial; Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War.⁴⁰

It was this closing phrase of the 1688 Articles of War, concerning limited punishments during peacetime, that in some part no doubt led to the enactment of the Mutiny Act.

D. THE MUTINY ACT

The scene was set. Parliament had a firm hold on the conduct of court-martial. In 1689, while William and Mary were asking the House of Commons to consider a bill which would **allow** the army to punish deserters and mutineers during peacetime and thereby insure some degree of **discipline**,⁴¹ there was a massive desertion of 800 English and Scotch dragoons who had received orders to proceed to Holland. Instead, they headed northward from Ipswich and sided with the recently deposed James II, who had recruited them.

No further royal pleading was required. Parliament quickly passed the bill known as the **First Mutiny Act**.⁴² The bill added teeth to military

³⁹ Reprinted as an appendix to Winthrop's book, *supra* note 2, at 919.

⁴⁰ Article LXIV, in the Rules and Articles for the Better Government of His Majesties Land Forces in Pay (1688), *reprinted in* Winthrop, *supra* note 2, at 920.

⁴¹ Jones notes that at this point the soldiers were considered citizens and subject only to civil tribunals. *Supra* note 37, at 15. *See also* Clode, *supra* note 32.

⁴² 1 William and **Mary**, c. 5, *reprinted in* Winthrop, *supra* note 2, at 929.

discipline. The death penalty was allowed for the offenses of mutiny or desertion, with the proviso that:

And noe Sentence of Death shall be given against any offender in such case by any Court Martiall unlesse nine of thirteene Officers present shall concur therein. And if there be a greater number of Officers present, then the judgement shall passe by the concurrence of the greater part of them soe sworne, and not otherwise; and noe Proceedings, Tryall, or Sentence of Death shall be had or given against any Offender, but betweene the hours of eight in the morning and one in the **afternoone**.⁴³

Interestingly, the existing articles of war, which had been promulgated under James 11, were not abrogated. Nor was any change made in the Crown's prerogative to issue articles of war or to authorize the death penalty for offenses committed **abroad**.⁴⁴ The act, at first limited to seven months' effective duration, simply provided for the death penalty for mutineers and deserters at home.

Until **1712**, the successive Mutiny Acts did not cover offenses committed abroad. In the years that followed, the Act was extended to Ireland, and to the colonies. In the **1717** Mutiny Act, the Parliament approved the practices of the crown in issuing articles of war to extend the jurisdiction of the court-martial within the Kingdom.⁴⁵ In **1803** the Mutiny Act and the Articles of War were broadened to apply both at home and abroad.⁴⁶ A general statutory basis of authority was thus given to the Articles of War, which had to that point existed only by exercise of the royal prerogative. With the exception of a brief interval from **1698** to **1701**, annual Mutiny Acts were passed until they, along with the Articles of War, were replaced in **1879** by the Army Discipline and Regulation Act, and finally, in **1881**, by the Army Act.⁴⁷

⁴³ Winthrop, *supm* note 2, at 930.

⁴⁴ Aycock and Wurfel, *supm* note 4, at 8.

⁴⁵ See *generally*, Jones, *supra* note 37, at 17.

⁴⁶ Aycock and Wurfel, *supm* note 4, at 8.

⁴⁷ For discussions of the act, see Jones, *supra* note 37, at 18, and Clode, *supm* note 32, at 43.

We leave the development of the British system at this point to briefly summarize some key themes that have run through the British court-martial system.

First, the struggle between the Crown on the one hand, and the **Parliament** on the other, over control of the military justice system, was classic. The British model typifies the reluctance of a populace to vest, or allow to be vested, too much control in the military courts. In the British model we see the metamorphosis from a forum serving under total royal prerogative, the court of chivalry, to one acting pursuant to a legislative enactment—a blessing, of sorts, from the populace.

Second, over a period of approximately seven hundred years, the British court-martial developed a system of military due process. From the court of chivalry with its trial by combat, the system evolved to one which accorded more sophisticated rights to an accused, the rights to receive notice, to present his defense, and to argue his cause.

Third, the jurisdiction of the court-martial was gradually restricted to exercising its powers over soldiers only, as opposed to the general populace. When expansion of those powers was attempted, at least in later years, legislative limiting action was taken.

The formative years, actually centuries, in the British system served as a **firm** stepping stone for the American system which thereby got a running start in **1775**.

IV. THE AMERICAN COURT-MARTIAL

A. INTRODUCTION

We must give great credit to the British military system for the development of the court-martial in America. In its inception, the American court-martial drew from centuries of proud tradition, trial and error, and a keen sense of **justice**.⁴⁸

⁴⁸ Not all would agree. Note the language from an article written by Brigadier General Samuel T. Ansell in 1919:

I contend—and I have gratifying evidence of support not only from the public generally but from the profession—that the existing system of Military Justice is un-American, having come to us by inheritance and

In this section we will briefly examine several key periods in the development of the American court-martial. These are, first, the period from 1775 to 1800; second, the period from 1800 to 1900; and last, the period from 1900 to the present. As in the preceding sections, the discussion here will center on the court-martial system for the land forces. We turn our attention first to the inception of the American court-martial.

B. THE FORMATIVE YEARS: 1775 to 1800

The British system of military justice was an unwitting midwife to the American court-martial. At the outbreak of the Revolutionary War, the British soldiers were operating under the 1774 Articles of War. Ironically, even as American troops were fighting for independence—a break from British rule—, colonial leaders were embracing the British system of rendering military justice.

In April 1775, the Provisional Congress of Massachusetts Bay adopted, with little change, the 1774 British Articles of War, a detailed prescription for conducting courts-martial and for otherwise maintaining military dis-

rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it.

S.T. Ansell, *Military Justice*, 5 Cornell L.Q. (Nov. 1919), reprinted at Mil. L. Rev. Bicent. Issue 53, 55 (1975).

General Ansell was acting judge advocate general from 1917 to 1919, and campaigned vigorously for extensive revision of the Articles of War of 1916. His views were a generation ahead of their time; only minor changes were made in the military justice system until the present Uniform Code of Military Justice came into being with the Act of 5 May 1950, ch. 169, § 1, 64 Stat. 108. For accounts of General Ansell's struggle for reform, see T. W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1 (1967); U.S. Dep't. of the Army, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975*, at 114-15 (1975).

cipline.⁴⁹ The American military was thus presented with its first written military code—the Massachusetts Articles of War.”

This code provided for two military courts: the “general” court-martial, to consist of at least 13 officers,⁵¹ and a “regimental” court-martial, to consist of not less than five officers “except when that number cannot be conveniently assembled, when three shall be sufficient”.⁵² Other provisions included an eight-day confinement rule, a limitation on the number of “stripes” to be meted out as punishment,⁵³ and an admonition that “all the Members of a Court-Martial are to behave with calmness, decency, and impartiality, and in the giving of their votes are to begin with the youngest or lowest in commission.”⁵⁴ Also included was a provision which survives, in form at least, to this day, that “No Officer or Soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a Court-Martial can be conveniently assembled.””

The Continental Congress appointed a committee in June 1775 to author rules for the regulation of the Continental Army.⁵⁶ The committee

⁴⁹ See Aycock and Wurfel, *supra* note 4, at 9; S. T. Ansell, *supra* note 48.

⁵⁰ Similar articles were adopted within the following months by the Provincial Assemblies of Connecticut, and Rhode Island, the Congress of New Hampshire, the Pennsylvania Assembly, and the Convention of South Carolina. See Winthrop, *supra* note 2, at 22, n. 32. The Massachusetts Articles of War are printed in Winthrop, *supra* note 2, at 947.

⁵¹ Article 32.

⁵² Article 37.

⁵³ Article 50. The number was limited to thirty-nine.

⁵⁴ Article 34.

⁵⁵ Article 41. The current U.C.M.J. provides:

Art. 33. Forwarding of charges. When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or Confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

⁵⁶ The committee was composed of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes. It was tasked with preparing “rules and regulations for the government of the Army”. Winthrop, *supra* note 2, at 21.

presented its report, and on June 30, 1775, the Congress adopted 69 articles based upon the British Articles of War of 1774 and the 1775 Massachusetts Articles of War.⁵⁷ In November of that same year, the articles were amended.⁵⁸ And again in 1776 the Articles of War were revised to reflect the growing American tradition of military justice.⁵⁹ The 1776 Articles of War were arranged in a manner similar to the British Articles of War, by sections according to specific topics.⁶⁰ These articles continued in force, with some minor amendments, until 1786, when some major revisions were accomplished.

The section dealing with the composition of general courts-martial was changed to reflect the need for smaller detachments to convene a general court with less than 13 members, the requisite number under the 1776

⁵⁷ See Aycock and Wurfel, *supra* note 4, at 10.

⁵⁸ *Id.*

⁵⁹ The revision in 1776 resulted from a suggestion by General Washington. The revising committee included John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R.R. Livingston. S.T. Ansell, acting Judge Advocate General of the Army from 1917 to 1919, harshly criticized the American system of military justice. See note 48, *supra*. According to Ansell, discussing the articles of War of 1776, John Adams "was responsible for their hasty adoption . . . to meet an emergency." Ansell also offers the following illuminating quotation from the writings of John Adams:

There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British Articles of War totidem verbis****. So undigested were the notices of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried. They were adopted, however, and they have governed our armies with little variation to this day.

3 J. Adams, *History of the Adoption of the British Articles of 1774 by the Continental Congress: Life and Works of John Adams* 68–82, *quoted in* S.T. Ansell, *supra* note 48, at 55–56.

⁶⁰ For the first time in the American articles, no mention was made of the "Crown".

Articles. The new provision, Section 14, Administration of Justice, allowed a minimum of five officers.⁶¹

These early courts-martial were of three forms: general, regimental, and garrison. The general court-martial could be convened by a general officer or an “officer commanding the troops”.⁶² No sentence could be carried into execution until after review by the convening authority. In the case of a punishment in time of peace involving loss of life, or “dismissal” of a commissioned officer or a general officer (war or peace), congressional review was required.⁶³

The “regiment” (or *corps*) court-martial could be convened by any officer commanding a regiment or *corps*.⁶⁴ Likewise, the commander of a “garrison, fort, barracks, or other place where the troops consist of different *corps*” could convene a “garrison” court-martial.⁶⁵ The membership of these two latter courts consisted of three officers, and the jurisdictional limits were as follows:

No garrison or regimental court-martial shall have the power to try capital cases, or commissioned officers; neither shall they inflict a fine exceeding one month’s pay, nor imprison, nor put

⁶¹ Article 1, sec. XIV. See Aycock and Wurfel, *supra* note 4, at 11, and Winthrop, *supra* note 2, at 23. The preamble to the resolution adopting the revisions stated:

Whereas, crimes may be committed by officers and soldiers serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war, in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and the public service;

Resolved, That the 14th Section of the Rules and Articles for the better government of the troops of the United States, and such other Articles as relate to the holding of courts-martial and the confirmation of the sentences thereof, be and they are hereby repealed;

Resolved, That the following Rules and Articles for the administration of justice, and the holding of courts-martial, and the confirmation of the sentences thereof, be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the armies of the United States.

⁶² Article 2, sec. XIV.

⁶³ *Id.*

⁶⁴ Article 3, sec. XIV.

⁶⁵ *Id.*

to hard labor, any non-commissioned officer or soldier, for a longer time than one month.⁶⁶

A judge advocate (lawyer) or his deputy was assigned to the court to prosecute in the name of the United States *and* to act *as* a counsel for the accused, object to leading questions (of any witness), and object to questions of the accused which might incriminate *him*.⁶⁷ And no trials were to be held except between the hours of “8 in the morning and 3 in the afternoon, except in cases which, in the opinion of the officer appointing the court, require immediate *example*.”⁶⁸

It was *this* system of courts-martial that was in existence when the framers of the Constitution met to decide the fate of the military justice system itself. Congress did not create the court-martial—it simply permitted its existence to continue. In effect, the court-martial is older than the Constitution and predates any other court authorized or instituted by the Constitution.

Of significance here is the point that the Constitution’s framers provided that Congress, not the President, would “make rules for the Government and Regulation of the land and naval *forces*”.⁶⁹ The President was named *as* “Commander in Chief of the Army and Navy of the United States. . . .”⁷⁰ With these parameters drawn, the framers avoided much of the political-military power struggle which typified so much of the early history of the British court-martial *system*.⁷¹ And in 1797 the sep-

⁶⁶ Article 4, sec. XIV.

⁶⁷ Article 6. Winthrop discusses the dual role of counsel in these early proceedings and points out that the judge advocate could not act in a “personal” capacity *as* counsel for the accused—that would be inconsistent with his role *as* a prosecutor. Rather, the relationship *was* “official”. Winthrop, *supra* note 2, at 197. This provision *was* carried forward to the 1874 Articles of War, under which the role of counsel *was* to exercise “paternal-like” *care* over *an* accused. See S. Ulmer, *Military Justice and the Right to Counsel* at 28 (1970).

⁶⁸ Article 11, sec. XIV.

⁶⁹ U.S. Const., art. 1, § 8, cl. 14.

⁷⁰ U.S. Const., art. 2, § 2, cl. 1.

⁷¹ *An* early Supreme Court decision noted the effect of these Constitutional provisions:

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then

arateness of the military system of justice was further recognized in the fifth amendment provision which drew a distinction between civil and military offenses.⁷²

C. THE PERIOD FROM 1800 TO 1900: QUIET GROWTH

The articles of ~~War~~ of 1776 (with amendments in 1789) remained in effect until 1806, when 101 articles were enacted by the Congress.⁷³ The composition and procedure for the court-martial changed little with the revised articles. The three courts, general, regimental, and garrison, remained, but some minor changes affected the power to convene a general court. Whereas the 1786 amendment had allowed a general or other officer commanding the troops to convene a general court, the 1806 articles established the more particular requirement that "[a]ny general officer commanding an army, or [c]olonel commanding a separate department" could convene a general court.⁷⁴ The composition and jurisdictional limits of the three courts remained without change.

Further developments included a clause barring double jeopardy,⁷⁵ a two-year statute of limitations,⁷⁶ a provision allowing the accused to challenge members of the court-martial,⁷⁷ and a provision that a prisoner standing mute would be presumed to plead innocent.⁷⁸ Admidst these

and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

Dynes v. Hoover, 61 U.S. 65, 79 (1851).

⁷² The fifth amendment states in part: "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

⁷³ 2 Stat. L. 359 (1806). Reprinted *in* Winthrop, *supra* note 2, at 976.

⁷⁴ Article 65.

⁷⁵ Article 87.

⁷⁶ Article 88.

⁷⁷ Article 71.

⁷⁸ Article 70.

progressive procedural and substantive safeguards, one finds the provision: "The President of the United States shall have power to prescribe the uniform of the **army**."⁷⁹

The next seven decades were marked with relatively little change to the composition of the court-martial or the procedures to be employed.⁸⁰ The relatively quiet movement of the court-martial as a tribunal was in contrast to the lusty growth of the United States and the attendant tensions which led in part to the Civil War.

1. Courts-Martial in the Confederacy.

Having established a government and army, the Congress of the Confederate States in October 1862 promulgated "An Act to organize Military Courts to attend the Army of the Confederate States in the Field and to define the Powers of Said Courts."⁸¹ The court-martial under the Con-

⁷⁹ Article 100.

⁸⁰ As we shall see in later discussion, periods of war during the 1700's and 1900's usually spurred prompt and major revisions to the Articles of War. Such was not the case in the 1800's, at least prior to 1874, when the country went through the War of 1812, the Mexican War, the Civil, and part of the Indian Wars. During that century, only minor changes were made to the governing articles.

⁸¹ Act of Oct. 9, 1862, *reprinted in* Winthrop, *supra* note 2, at 1006, and also in 2 Journal of the Congress of the C.S.A. 1861-1865, at 452 (1905). For a very good discussion of courts-martial within the Confederate system, see Robinson, Justice in Grey 362-82 (1941).

See also J.D. Peppers, Confederate Military Justice: A Statutory and Procedural Approach (May 1976) (unpublished M.A. thesis in library of Rice University, Houston, Texas). Mr. Peppers was concurrently pursuing a J.D. degree at the University of Houston College of Law when he wrote this master's thesis.

Mr. Peppers notes that the officer corps of the Confederate forces included many professional soldiers and sailors who had served in the United States Army or Navy. Because of this, the organization of the Confederate Army and Navy, including the Confederate system of military justice, for the most part was like that of the Union Forces. *Id.*, at 7.

The Confederate constitution, like that of the United States, empowered the congress "to make rules for the government and regulation of the land and naval forces." *Id.* The Confederate congress exercised this power in its Act of March 6, 1861, establishing "Rules and Articles for the Government of the Confederate States." *Id.* at 17.

federate States model was a permanent tribunal, not like the traditional (and modern) temporary forum which was formed only for a specific case.

Each court consisted of three members, two constituting a **quorum**, a judge advocate,⁸² a provost marshal, and a clerk. Initially, a **court** accompanied each army **corps** in the field and by later amendments courts were authorized for **military** departments,⁸³ “North Alabama”,⁸⁴ any di-

⁸² Trial judge advocates in the field were supposed to have knowledge of the law and also of military life. They were not explicitly required to be attorneys. J.D. Peppers, note 81, *supra*, at 48.

The Confederate forces had no judge advocate general’s corps, nor even a judge advocate general. President Jefferson Davis recommended to the Confederate congress the creation of both, but no action was taken. The work of reviewing records of trial was performed by an assistant secretary of war, and other work was handled by a “judge advocate’s office” created within the office of the adjutant general, and headed by an assistant adjutant general. *Id.*, at 57–59.

⁸³ Act of May 1, 1863, Winthrop, *supra* note 2, at 1007, and 3 Journal of the Congress of the C.S.A. 1861–1865, at 417 (1905).

The original creation of the new permanent courts-martial by the Act of Oct. 9, 1862, *supra* note 82, and subsequent expansions of their jurisdiction, were necessary to strengthen the military justice system of the Confederacy. J.D. Peppers, *supra* note 82, at 40. Although the Confederate military tactical leadership was very able, the Union army as a whole was better disciplined, better equipped, and better organized by far than the Confederate forces. *Id.*, at 37. In the geographic areas of active military operations, the civil courts, intended to supplement the work of the military courts, often were not functioning, and the high mobility required of the Confederate forces made it difficult to convene courts-martial. Moreover, when courts-martial were convened, they apparently were prone to be very lenient toward accused, which was displeasing to senior commanders. *Id.*, at 38–40.

The new military courts were permanent in the sense that they were required to be open for business continuously, not merely case by case. *Id.*, at 41. Jurisdiction of the new courts as to persons accused and as to punishments authorized apparently was similar to that of general courts-martial. The major difference was that jurisdiction extended not only to offenses recognized under military law, but also to all offenses defined as crimes by the laws of the Confederacy and of the various Confederate states, as well as certain common-law offenses committed outside the boundaries of the Confederacy. *Id.*, at 42–43.

The old *ad hoc* courts-martial were not abolished by the act creating the new permanent courts, however, and the Confederate congress later had to define the boundaries between the courts’ jurisdiction more precisely.

vision of cavalry in the field, and one for each State within a **military department**.⁸⁵ The legislative foundation also provided:

Said courts shall attend the army, shall have appropriate quarters within the lines of the army, shall be always open for the transaction of business, and the **final** decisions and sentences of said courts in convictions shall be subject to review, mitigation, and suspension, **as** now provided by the Rules and Articles of war in cases of **courts-martial**.⁸⁶

With the conclusion of the war, the short-lived era of the permanent court-martial faded.

2. *Post-Civil War Developments.*

The next major contribution to the development of the court-martial occurred in the American Articles of War of **1874**.⁸⁷ The original three courts (general, regimental, **garrison**) were expanded to include a “field officer” court:

In time of war a field-officer may be detailed in every regiment, to try soldiers thereof for offenses not capital; and no soldier serving with his regiment, shall be tried by a regimental or garrison court-martial when a field-officer of his regiment may be so **detailed**.⁸⁸

The authority to convene a general court-martial was further delineated. A general officer commanding an “army, a Territorial Division or a Department, **or** colonel commanding a separate Department,” could

This was done in the Act of Oct. 13, 1862, 2 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series IV, at 1003–1004 (1880–1901); and also in the Act of May 1, 1863, 3 *Journal of the Congress of the C.S.A. 1861–1865*, at 417 (1905).

⁸⁴ Act of Feb. 13, 1864. Winthrop, *supra* note 2, at 1007.

⁸⁵ Act of Feb. 16, 1864, Winthrop, *supra* note 2, at 1007, and 3 *Journal of the Congress of the C.S.A. 1861–1866*, at 754 (1906).

⁸⁶ Section 5 of the original Act. See note 81, *supra*.

⁸⁷ 18 Stat. 228 (1874).

⁸⁸ Article 80.

appoint a general court.⁸⁹ In time of war, the commander of a division or of a separate brigade could likewise convene a general court.⁹⁰

In addition to new and expanded jurisdictional bounds applicable to certain offenses in time of war,⁹¹ procedural changes included a provision allowing for the appointment of a judge advocate to any court-martial,⁹² and a provision allowing for continuances:

A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often as may appear to be just: Provided, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.⁹³

These 1874 changes marked to some extent an increased realization by Congress that due process considerations should apply. But the court-martial, at least to this point, was considered primarily as a function or

⁸⁹ Article 72. However, that article also placed a restriction on the authority to appoint a general court:

But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.

⁹⁰ Article 73.

⁹¹ Article 58 provided:

In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or district in which such offense may have been committed.

⁹² Article 74. But the role of the counsel remains unchanged from that espoused in the 1806 Articles. See Article 90, See also note 67, *supra*.

⁹³ This provision originated with the Act of March 3, 1863, ch. 75, sec. 29. See Winthrop, *supm* note 2, at 239.

instrument of the executive department to be used in maintaining discipline in the armed forces. It was therefore not a "court", as that term is normally used. There seemed to be a general reluctance to expand the accused's rights liberally. A feeling prevailed, and still prevails, that discipline would suffer as a result of any such expansion. If the court-martial were viewed as a judicial body, this would certainly have raised the problem of implementation of burdensome procedural and substantive rules. The truth is that, viewed in their entirety over time, the regulations and general orders were slowly converting the court-martial into a proceeding convened and conducted with meticulous care, sensitive to the individual's rights as well as to the need for discipline. The statutory language looks barren but, in practice, the court-martial during this period seems to have been considered by observers to be a fair and just means of litigating guilt and assessing appropriate punishment."

A few statutory changes to court-martial practice between 1879 and 1900 are worthy of note. First, in 1890, Congress established the "summary" court-martial, which in time of peace was to replace the regimental or garrison court-martial in the trial of enlisted men for minor offenses.⁹⁵ Within twenty-four hours of arrest the individual was brought before a one-officer court which determined guilt and appropriate punishments. But this trial was a consent proceeding. The accused could object to trial by summary court and as a matter of right have his case heard by a higher level court-martial where greater due process protections were available.

Another important step was taken in 1895 when, by executive order, a table of maximum punishments was promulgated.⁹⁶ Specific maximum sentences were made applicable to each punitive article or offense. Other specific guidance was given for considering prior convictions, assessing punitive discharges, and determining equivalent punishments.

⁹⁴ See generally Winthrop, *supra* note 2. See also Benet, *A Treatise on Military Law and the Practice of Courts-Martial (1862)*; J. Regan, *The Judge Advocate Recorder's Guide (1877)*. Both of these sources provide fascinating reading and insight into the court-martial practice of the late 1800's.

⁹⁵ Act of October 1, 1890. Reprinted in Winthrop, *supra* note 2 at 999. Traditionally, officers could be tried only by general court-martial.

⁹⁶ The Executive Order (by President Cleveland) was published as General Orders No. 16. Reprinted in Winthrop, *supra* note 2, at 1001.

C. THE PERIOD FROM 1900 TO THE PRESENT:

A TIME OF RAPID CHANGE

If the nineteenth century was a time of relatively quiet changes in the American court-martial, the innovations marked by the twentieth century are by comparison revolutionary. Periods of drastic change occurred in 1916, 1920, 1948, 1951, and 1968.

Congress undertook a major revision of the Articles of War in 1916,⁹⁷ and for the first time we see the three courts-martial which exist today: the general court-martial; the special court-martial, which replaced the regimental or garrison court; and the summary court,⁹⁸ which replaced the field officer's court which had been established in 1874.

The authority of a commander to convene a court was expanded. For example, a general court could be convened by the President and commanding officers down to the level of brigade commanders.⁹⁹ However, only commanding officers could convene special and summary courts.¹⁰⁰ Other important changes included:

1. Mandatory appointment of a judge advocate to general and special
2. The right of the accused to be represented by counsel at general and special courts;¹⁰²
3. Explicit prohibition of compulsory self-incrimination;¹⁰³ and
4. Addition of a speedy trial provision, according to which the accused was to be tried within ten days,¹⁰⁴ and no person could be tried over

⁹⁷ 39 Stat. L. 619 at 650-670 (1916).

⁹⁸ Article 3.

⁹⁹ Article 8.

¹⁰⁰ Articles 9, 10.

¹⁰¹ Article 11.

¹⁰² Article 17.

¹⁰³ Article 24.

¹⁰⁴ Article 70. The provision stated that the accused was to be served with a copy of the charges within eight days of his arrest, and tried within ten days thereafter, unless the necessities of the service prevented such. In that case, trial was required within 30 days after the expiration of the ten-day period. Compare this with present speedy trial rules. See note 134, *infra*.

objection (in peacetime) by a general court-martial within a period of five days subsequent to service of charges. ”

The 1916 revisions did not wholly stand the testing fires of the global World War 1. Troops, officers and soldiers alike, returned with bitter complaints about military justice. In the heated debates which followed in the press, in the halls of Congress, and in the War Department,¹⁰⁶ the whole system **was** re-examined. **As** a result, in 1920 the Congress enacted a new set of 121 articles of **war**.¹⁰⁷ Key features included the following:

1. A general court-martial would consist of any number of officers not less than **five**.¹⁰⁸

2. A trial judge advocate and defense counsel would be appointed for each general and special court-martial. (An accused could be represented by either a civilian counsel, reasonably available military counsel or appointed counsel).¹⁰⁹

3. A general court-martial convening authority could send the case to a special court-martial if it **was** in the interest of the service to do **so**.¹¹⁰

4. A thorough pretrial investigation was to be conducted. The accused was to be given **full** opportunity for cross-examination and to present matters in defense or mitigation.”

5. A board of review, consisting of three officers assigned to the office of the judge advocate general, was tasked with reviewing courts-martial, subject to presidential confirmation.¹¹²

Notwithstanding these charges, which most agreed represented a fair effort to improve military due process, a troublesome aspect remained. A single commander could prefer charges, convene the court, select the members and counsel, and review the **case**.¹¹³ The spectre of unlawful

¹⁰⁵ *Id.*

¹⁰⁶ See generally, Ulmer, *supra* note 67, at 39 to 45; Ansell, *supra* note 60.

¹⁰⁷ 41 Stat. L. 787 (1920).

¹⁰⁸ Article 4.

¹⁰⁹ Articles 11, 17.

¹¹⁰ Article 12.

¹¹¹ Article 70.

¹¹² Article 50.

¹¹³ See *e.g.* Articles 70, 8, 11, 17, and 46.

command influence lingered. But in the quiet, peacetime years which followed the 1920 revision, this caused little concern. The citizen soldier returned to his work, the regular forces were involved in no major discipline problems, and the 1920 Articles of War seemed to function smoothly. With only minor amendments, these articles were those used by courts-martial during World War 11.

Again, the massive influx of citizens into the armed forces, the widely scattered courts-martial, inexperienced leaders, and many reported instances of military "injustice," greatly concerned Congress. Again, there were hearings and reports of advisory committees.¹¹⁴ Again, there was a major revision, this time as an amendment to the Selective Service Act of 1948.¹¹⁵ A number of changes, designed to rectify the growing complaints about the court-martial, were enacted.

For the first time, under the new provisions, the accused was entitled to be represented by counsel at all pretrial investigations.¹¹⁶ To insure that at least one member of the general court-martial was familiar with the judicial process, a provision was inserted which required that a member of the judge advocate general's department or an officer who was a member of the federal bar, or the bar of the highest court of a state, certified by the judge advocate general, be appointed to all general courts-martial."¹¹⁷ For the first time, enlisted men and warrant officers were authorized to serve as members of general and special courts-martial."

But before the new act could cool, a move was under way to establish a code of military justice to apply to all the services, not just the Army.

¹¹⁴ A War Department Advisory Committee on Military Justice noted that under the system of military justice ". . . the innocent are almost never convicted and the guilty seldom acquitted." The committee, known as the Vanderbilt Committee, included in its membership, Chief Justice Arthur T. Vanderbilt (New Jersey), Judge Morris A. Soper of the United States Court of Appeals (4th Cir.), Justice Holtsoff (District of Columbia), and Judge Frederick Crane (New York). See Aycock and Wurfel, *supra* note 4, at 14, n. 78.

¹¹⁵ 62 Stat. L. 604 at 627-644 (1948) (The "Elston Act").

¹¹⁶ Article 46.

¹¹⁷ Article 8.

¹¹⁸ Article 4. The accused had to specifically request in writing, prior to the convening of the Court, that enlisted soldiers be appointed to the Court. The provision has been carried forward as a jurisdictional prerequisite in the present U.C.M.J. See note 133 *infra* and art. 25(e)(1), U.C.M.J.

Under the leadership of Professor Edmund M. Morgan, Jr.,¹¹⁹ the “Uniform Code of Military Justice” was approved by Congress in 1950.¹²⁰ With some amendments, made in the Military Justice Act in 1968,¹²¹ the U.C.M.J. is the current statutory template for military justice and the conduct of courts-martial.¹²²

¹¹⁹ See generally, Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169 (1953). A biographical sketch of Professor Morgan appears at 28 Mil. L. Rev. 3 (1965).

¹²⁰ 64 Stat. 108 (1950).

¹²¹ 82 Stat. 1335 (1968). The provisions of the U.C.M.J. had been earlier codified at 10 U.S.C. § 801–940. Thus, article 1 of the U.C.M.J. is 10 U.S.C. § 801 (1976); article 140 is 10 U.S.C. § 940 (1976); and so on. In military practice, provisions of the code are more commonly cited to the U.C.M.J. than to the United States Code. They are so cited hereafter in this article.

¹²² It should be emphasized that the U.C.M.J. provides only a statutory framework. The Manual for Courts-Martial, United States (1960) provides a detailed guide for conducting courts-martial. Where, however, the procedural guidance of the Manual conflicts with provisions in the U.C.M.J., the former will fall. The President’s authority to promulgate the Manual stems from article 36, U.C.M.J. In *United States v. Ware*, 1 M.J. 282, 285 n. 10 (1976), C.M.A. questioned the authority of the President to promulgate Manual rules of procedure. Recent legislation clarified the President’s authority. Article 36 now reads.

(a) Pretrial, trial, and post-trial procedures including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Amendments to Article 36 were passed as a part of the Defense Authorization Act, Pub. L. No. 96–107, 96th Cong., 1st Sess. (Nov. 1979). In proposing this language, the Senate Armed Services Committee noted:

The second Subsection of Section 801 amends Article 36 of the UCMJ to clarify the authority of the President to promulgate an authoritative manual of procedure for the military justice system covering not only trial procedures, but all pre- and post-trial procedures relating to an offense as well. This amendment is made necessary by a recent decision of the Court of Military Appeals. *United States v. Ware*, 1 M.J. 282

(1976), where the view was expressed in dicta that the President's authority to promulgate the *Manual for Courts Martial* was restricted by the language of Article 36 to actual trial procedures only. The committee believes that this interpretation flies in the face of history; if adopted, it would severely threaten the integrity of the military justice system and undermine the authority of the President as Commander-in-Chief. The committee's amendment clarifies what it believes Congress has always intended by enacting Article 36 and its predecessors. While Congress retains the power to amend the UCMJ to alter the military justice system, it entrusts to the President the promulgation of regulations designed to implement the Code and operate the system. The committee made a technical amendment to the legislative proposal, printed below, to clarify the intent of the amendment.

See Senate Rep. 96-197, Defense Authorizations Act, 1980 (S. 428) at 123. In a Department of Defense recommendation for amendment to Article 36, Ms. Deanne C. Siemer, General Counsel, noted in pertinent part:

In a recent case, the United States Court of Military Appeals suggested that the phrase "cases before courts-martial" in Article 36 refers to those aspects of a case concerned only with the conduct of the trial and excluded, by inference, pretrial and post-trial procedures. *United States v. Ware*, 1 M.J. 282, 285 n. 10 (1976) (dicta); *United States v. Newcomb*, 5 M.J. 4, 10 (CMA 1978) (Fletcher, C.J., dissenting opinion). See also *United States v. Larnear*, 3 M.J. 76, 80, 83 (1977); *United States v. Heard*, 3 M.J. 14, 20 n. 12 (1977); *United States v. Hawkins*, 2 M.J. 23 (1976); *United States v. Washington*, 1 M.J. 473, 475 n. 6 (1976). But see *United States v. Newcomb*, 5 M.J. 4, 7 (CMA 1978) (Cook, J., concurring opinion).

This interpretation is wrong and has no basis, but the Court might attempt to impose that limitation by judicial decision. Because the government has no avenue of appeal from a decision by the Court of Military Appeals, this interpretation could not be dislodged, even though wrong, other than by legislation. The legislation proposal is necessary to prevent the disruption that would occur if the Court imposed that limitation by judicial decision.

The proposal neither changes nor expands the existing power under which the President promulgates the Manual for Courts-Martial. The language of the present Article 36 may be traced to Article 38 of the Articles of War of August 29, 1916, Chapter 418, § 1342, 39 Stat. 656, which provided:

The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: Provided, that nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*. That all rules made in pursuance of this article shall be laid before Congress annually.

The current court-martial remains a temporary tribunal, convened by a commander to hear a specific case. It is not a part of the federal judiciary, nor is it subject to direct federal judicial review.¹²³ But it is strictly a court of criminal jurisdiction, and its findings are binding on other federal courts.¹²⁴

The present system is fair. It does provide ample due process for the military servicemember who is accused of a crime. In some points the court-martial provides greater safeguards than its civilian counterparts, and a brief survey of the U.C.M.J. and its current implementation bears this out.

Before preferring and swearing to charges, a company commander is tasked with conducting a thorough and impartial inquiry into the charged offenses.¹²⁵ This almost always involves obtaining legal advice from a judge advocate. Most commanders do not want to send a weak case to court. In an environment where law and lawyers are playing an increasingly vital role in military justice, few commanders are willing to run the risk of an acquitted servicemember returning to the unit and flaunting his "victory" over the command.

The current trend is to use administrative discharges and other remedies rather than a court-martial. But if a case goes to trial, the convening authority does select court members,¹²⁶ counsel¹²⁷ and the military

This provision has remained virtually unchanged in pertinent part through successive amendments of the Articles of War and incorporation into Article 36 of the Uniform Code of Military Justice. It has provided the statutory authority for coverage of pretrial and post-trial procedures in every edition of the Manual for Courts-Martial issued by the President since 1928.

The fair and efficient operation of the military justice system is dependent upon the authoritative legal guidance provided to members of the armed forces by the Manual for Courts-Martial. Enactment of the proposed legislation will reaffirm the power exercised by the President for more than fifty years to prescribe a comprehensive and effective Manual for Courts-Martial.

Senate Rep. 96-197, *supra* at 124.

¹²³ Burns & Wilson, 346 U.S. 137 (1953); Hyatt v. Brown, 339 U.S. 103 (1950).

¹²⁴ See art. 76, U.C.M.J..

¹²⁵ Art. 30, U.C.M.J.

¹²⁶ Art. 25, U.C.M.J.

¹²⁷ Art. 27, U.C.M.J.

judge.¹²⁸ However, specific provisions within the U.C.M.J. prohibit attempts to control the proceedings.¹²⁹ At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court.¹³⁰

The government must first establish that jurisdiction exists over the person,¹³¹ and the subject matter,¹³² and that the court is properly convened.¹³³

¹²⁸ Art. 26, U.C.M.J. The "law officer" of the earlier Articles of War has been replaced by a military judge, certified by the Judge Advocate General of each service. The "president" of the court, for all practical purposes, is now the foreman of the jury. The accused may request trial before judge alone. Art. 16, U.C.M.J.

¹²⁹ Arts. 37, 98, U.C.M.J. The military judicial community is extremely sensitive to even the appearance of evil. The current military appellate courts will not hesitate to reverse a case if it appears that a superior commander has intentionally or unintentionally influenced the members of the court, the fact finders. *See, e.g.,* United States v. Howard, 23 C.M.A. 187, 48 C.M.R. 939 (1974); United States v. Jackson, 3 M.J. 153 (1977).

The role of the convening authority was in issue in *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979). The court reviewed the reports of the legislative hearings on the matter, and examined the statutory protections designed to check unlawful command influence. The court found justification to reject Curry's arguments. 595 F.2d at 880. For an historical discussion of the commander's role, see West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. Rev. 1 (1970).

¹³⁰ An exception of course would be the right to a preliminary grand jury proceeding. See note 73, *supra*. At least one experienced civilian trial attorney prefers the court-martial over the existing civilian system. Speech by F. Lee Bailey reported in *The Commercial Appeal (Memphis)*, March 29, 1979 at 34-C.

¹³¹ Art. 2, U.C.M.J.; *Coleman v. Tennessee*, 97 U.S. 509 (1897).

¹³² *O'Callahan v. Parker*, 395 U.S. 258 (1969). Provisions describing offenses which may be tried by court-martial are listed as "punitive" articles in the U.C.M.J. See arts. 77-134, U.C.M.J.

¹³³ The court-martial is considered to be a "creature of statute." If proper statutory procedures are not followed in appointing the Court, the proceedings may be declared void *ab initio*. *See e.g.* *United States v. White*, 21 C.M.A. 583, 45 C.M.R. 351 (1972). In that case, the accused failed to properly execute a written request for enlisted court-members who sat on his court. This was a violation of art. 25(e)(1), U.C.M.J.

The accused is entitled to a speedy trial¹³⁴ and carte blanche discovery rights. If the case is to be referred to a general court-martial, an intensive pretrial investigation is conducted. The accused is entitled to counsel (civilian, selected individual military counsel, or appointed counsel), to present a defense, and to cross-examine witnesses. A copy of the record of the proceedings is presented to the accused.¹³⁵

One provision of particular note is the right to defense witnesses,¹³⁶

¹³⁴ Art. 10, U.C.M.J. provides in part:

When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and try him or to dismiss the charges and release him.

To put teeth into this provision, the United States Court of Military Appeals, in *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971), imposed a “90-day” speedy trial rule on the military. Whenever the accused’s pretrial confinement exceeds 90 days, in the absence of a defense request for delays, the government bears a heavy burden of showing diligence in proceeding to trial. Failure to do so may result in dismissal of the charges. *See, e.g.*, *United States v. Henderson*, 1 M.J. 421 (C.M.A. 1976) (contract murder case dismissed). Local regulations may provide for even more stringent speedy trial provisions. For example, soldiers stationed in Europe have the benefit of a 45-day speedy trial mandate. USAREUR Supplement 2 to Army Regulation 27-10, Military Justice (1963).

¹³⁵ Art. 32, U.C.M.J. *See also* paragraph 34, Manual for Courts-Martial, United States (1969).

¹³⁶ Art. 46, U.C.M.J., provides:

Opportunity to obtain witnesses and other evidence. The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

a procedure much more liberal than found in most civilian jurisdictions.¹³⁷ And maximum limitations on punishments are specified.¹³⁸

The appellate review system is unique and usually outside the critic's gaze. If the accused is convicted and sentenced, the convening authority reviews the case. Before approving a court-martial conviction and sentence, he must be satisfied beyond a reasonable doubt that the findings are supported by the evidence.¹³⁹ If the case was tried before a general court-martial he may not act without first obtaining the written legal opinion of his judge advocate.¹⁴⁰

Certain cases are automatically forwarded for appeal to the various courts of military review, where specialized appellate counsel, at no cost to the accused, review the record for errors and present written and oral arguments.¹⁴¹ A case may be further appealed to the military's highest court, the United States Court of Military Appeals.¹⁴²

¹³⁷ See, e.g., *United States v. Daniels*, 48 C.M.R. 666 (C.M.A. 1974). In that case, the charges were dismissed because of a material defense witness, the victim, was not produced. The line of cases supporting this rule obviously expands the sixth amendment right to present a defense to limits beyond those now reached by most state and federal decisions.

¹³⁸ See para. 127, *Manual for Courts-Martial, United States (1969)*. Authority of the President to prescribe maximum punishments is found in *art. 56*, U.C.M.J.

¹³⁹ *Arts. 60, 64*, U.C.M.J.

¹⁴⁰ *Art. 61*, U.C.M.J. In all cases the accused is given a copy, without charge, of the transcript or record of proceedings of the court-martial. *Art. 54*, U.C.M.J.

¹⁴¹ *Art. 66*, U.C.M.J. The various service courts of military review are composed of senior judge advocates who exercise fact-finding powers and may approve, or disapprove, wholly or in part, court-martial findings or sentences. Until the 1968 amendments, these courts were called "boards of military review."

¹⁴² *Art. 67*, U.C.M.J. Although the United States Court of Military Appeals is the highest court in the military system of courts, it is not itself a military court, but a federal civilian court created by Congress under article I of the Constitution. *Id.*

Since its inception in 1951, the Court of Military Appeals, composed of three civilian judges, has played an expanding role in shaping the form and substance of courts-martial. Most recently, the court has acted in a manner not unlike the Supreme Court of the 1960's under Chief Justice Earl Warren. See, e.g., Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 *Mil. L. Rev.* 43 (1977).

One can readily see that throughout the entire process, lawyers are actively involved in either advising the commanders, representing the accused, reviewing records, or writing appellate opinions. On the whole, the changes in this century to the American court-martial system have kept pace with similar innovations in the civilian courts and **as** noted have often led the way for further changes.

V. CONCLUSION

So we finish where we began. ~~Was~~ the United States Court of Appeals for the District of Columbia correct when it decided, as noted in the introduction to this article, that Private Curry¹⁴³ was not deprived of due process when he was tried by a court-martial and that there is a sound justification for the present court-martial system? These two themes have run **as** a constant thread through the history of the court-martial.

Granted, that elusive and complex concept of due process today in no way compares with the minimal protections of due process recognized, for example, in the comparatively progressive military code of King Gustavus Adolphus. But the comparison should not be between what is now and what existed over three hundred years ago. Rather, the test should be directed toward comparing the contemporary civilian legal forums which have existed concurrently along with, or in competition with, the court-martial.

In all stages, the court-martial, more often than not, reflected the current view toward justice, civil and military. This point is borne out by the historical thread of struggle between the populace (parliament or Congress) and the monarch or the military itself. When the military courts stepped out of bounds or otherwise unduly infringed on individual rights, limitations, in the form of resolutions or enactments, curtailed the unwarranted excursions. Often these acts resulted in greater procedural protection for the accused soldier.¹⁴⁴

¹⁴³ Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979). See note 1, *supra*, and accompanying text.

¹⁴⁴ The revisions of the United States Articles of War of 1916, 1920, and 1948, **and** the Uniform Code of Military Justice are examples of congressional response to public reaction to injustices in the military justice system.

What of the justification for the court-martial with its unique procedural concerns? Few courts have rejected the need for a separate system of military justice. As evidenced by the Constitution itself, the system is separate, and most would agree that military discipline is necessary. History confirms this. But is a separate court, a military court, necessary to enforce that discipline? Consider the comments of Judge Tamm, writing of the military court in *Curry*, discussed above:

We begin with the unassailable principal that the fundamental function of the armed forces is “to fight or be ready to fight wars.” *Toth v. Quarles*, 350 U.S. 11, 17 (1955). Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.¹⁴⁵

The court-martial presents a viable means of implementing military justice in a “practical, efficient, and flexible” manner. To ignore that fact is to ignore history.

¹⁴⁵ 595 F.2d at 877.