

cial limitations as to number of lots sold, holding period, and improvements made on the tract. H.R. 8300, 83d Cong., 2d Sess. § 1238 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. 84 (1954); CCH Fed. Tax Rep. No. 25, Part I, p. 1-2 (June 2, 1954). See, *e.g.*, Daniel W. Ellis, 5 CCH 1954 Fed. Tax Rep. ¶ 7206 (M) (T.C.M. 1954).

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## REVIEWS

**MILITARY LAW.** By Daniel Walker. New York: Prentice-Hall. 1954. Pp. xiv, 748. \$9.75.

Two events not long past lend special timeliness to a book on military law, and especially to one so well-prepared as the instant casebook by Mr. Daniel Walker. One of these events was the inception of Korean hostilities in June 1950; the other, the enactment on May 5, 1950 of the Uniform Code of Military Justice,<sup>1</sup> which took effect on May 31, 1951.

The Korean struggle touched off an expansion of American Armed Forces. As in World War II, military law, and especially the military justice segment of such law, became a subject of great public interest because of the large numbers who were becoming subject to it. The public concern with military law was heightened by the circumstance that many persons had been subjected thereto involuntarily through the draft. In short, the impact today of military law on innumerable lives is too great to permit relegating it to the limbo it once occupied in the eyes of the bar, the law schools, and even of the public generally.

Unfortunately, however, the increased desire to know more about military law has been impeded in fulfillment by the current inadequacy of books in this field. That inadequacy is especially observable as to the topic of military justice, where it stems largely from the second event originally mentioned — the passage of the Uniform Code of Military Justice. This Code was the posthumous offspring of World War II, the fruit of numerous complaints about the “justice” meted out then to members of our citizen armies. Whether the Uniform Code sufficiently answered those complaints is for the reader of Mr. Walker’s casebook to judge for himself; but there can be no doubt that its drastic revamping of military justice

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<sup>1</sup>50 U.S.C. §§ 551-741 (Supp. 1952).

did thoroughly out-mode the then-existing books and precedents on military law.

Of this statute's innovations, perhaps the most fundamental was the requirement that each service dispense military justice within the same framework.<sup>2</sup> Another Code novelty was replacement of the general court-martial's law member with a new functionary, the law officer, whose role is modelled on that of a civilian judge, and who sits apart from court members, instructs them on the law applicable to the offense charged, and rules finally on the admissibility of evidence. Also the Code gave new emphasis to shielding courts-martial from the influence of the commanding officer who appointed the court—such influence having been a "sore spot" during World War II. As a headstone for its edifice of reform, Congress created the Court of Military Appeals, consisting of three judges, including former Dean Paul W. Brosman of the Tulane Law School. This civilian tribunal was intended by Congress to review court-martial records with a detachment unimpaired by occupancy of any military status or by subjection to any possibility of military "command control."<sup>3</sup> As a former Commissioner of this Court, Mr. Walker is peculiarly qualified to write authoritatively and understandingly of military law.

At the time the Uniform Code took effect in 1951, it was clear that its impact would depend greatly on its subsequent interpretation by the Court of Military Appeals. Moreover, one could even then have predicted that many of the Code's ambiguities and defects would take time to show themselves. Accordingly, a casebook written on military law at that point would have been premature and have had but limited utility. Now, however, the Code has been in effect for three years, during which period the Court of Military Appeals has created a wealth of judicial opinions and has outlined the "new look" in military justice. Enough experience has been accumulated, much of it under combat conditions, to permit a rational appraisal of whether the abuses of World War II have been corrected by the Uniform Code and of whether any such correction of abuses has sacrificed military efficiency. Thus, the moment seems in every way propitious for this casebook.

Concededly the field of military law is still developing. Even since the preparation of Mr. Walker's book, the Court of Military Appeals has rendered several significant opinions, and a Federal

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<sup>2</sup>Previously the Army and Air Force were operating under the Articles of War, the Navy under the Articles for Government of the Navy, and the Coast Guard under its own Disciplinary Laws.

<sup>3</sup>However, the judges appointed had sufficient military background so as not to be "babes in the woods" of military justice. Judge Brosman had been an Air Force Colonel; Chief Judge Quinn, a Navy Captain; and Judge Latimer, an Army Colonel.

Court of Appeals has decided *Talbott v. Toth*,<sup>4</sup> an important and controversial case dealing with military jurisdiction over civilians for misdeeds committed while they were in uniform. Indeed, Mr. Walker might have been well-advised to have provided his casebook with a slot for insertion hereafter of pocket supplements. Yet in view of the great void in up-to-date books on military law which has existed since the enactment of the Uniform Code, it seems highly fortunate that Mr. Walker did not wait for more precedents before publishing his book.

The book's cases are excellently selected, well-edited, and presented in an appropriate sequence. The most interesting section of the first chapter, "Nature and Sources of Military Law," concerns the relationship of the Constitution to military law and the powers of the military. Therein are presented the *Japanese Relocation Cases*<sup>5</sup> and *ex parte Milligan*.<sup>6</sup> It was obviously in the interest of balancing the length of his chapters that the author delayed until Chapters 13 and 14 in printing *Duncan v. Kahanamoku*<sup>7</sup> and *ex parte Quirin*,<sup>8</sup> which, respectively, reaffirm and delimit the *Milligan* case. This reviewer would urge that all these cases be read together.

Chapter 2 deals with "The Armed Forces" and seeks to clarify the status of various components of the Armed Services, like the Reserves and the National Guard. The most interesting cases in the Chapter are those relating to the operation of Selective Service.<sup>9</sup>

The author devotes Chapters 3-10 to military justice. These chapters represent the casebook's chief contribution, for it is in this area that the recent changes in military law — and, consequently, the deficiencies of prior books on the subject — have been centered. A desire for completeness seems the chief motive for including Chapter 11, "Courts of Inquiry and Official Investigations," in its present form.

Chapter 12 affords material on the reviewability of court-martial judgments in Federal courts. For comparison purposes readers of the casebook might wish to examine some of the decisions defining the reviewability of state court convictions by Federal tribunals.<sup>10</sup> In Chapters 13 and 14 the author treats martial

<sup>4</sup>.... F.2d ..., 22 U.S.L. Week 2449 (Mar. 30, 1954) (D.C. Cir. 1954), *reversing*, 113 F. Supp. 330, 114 F. Supp. 468 (D.C. 1953).

<sup>5</sup>*Hirabayashi v. United States*, 320 U.S. 81 (1943); *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>6</sup>4 Wall. 2 (U.S. 1866).

<sup>7</sup>327 U.S. 304 (1946).

<sup>8</sup>317 U.S. 1 (1942).

<sup>9</sup>*E.g.*, *Estep v. United States*, 327 U.S. 114 (1946); *Billings v. Truesdell*, 321 U.S. 542 (1944); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946).

<sup>10</sup>*E.g.*, *Brown v. Allen*, 344 U.S. 443 (1953).

law, military government, and the law of war. As previously suggested, portions of these chapters could appropriately be considered in connection with the first Chapter's treatment of constitutional limits on the military's power. Chapters 15-19 vividly reveal the amplitude of *Military Law*, for they cover such varied subjects as enlistments and discharges, the status of officers, liability of servicemen in civilian courts, and the Soldiers and Sailors Civil Relief Act. Many of the cases in these five chapters may be new even to the experienced military lawyer.

Mr. Walker's own discussions in this casebook are exceedingly lucid. Indeed, their clarity and quality are such that this reviewer is inclined to wish that the author had presented more such material.<sup>11</sup> Admittedly the writer of a casebook should zealously avoid furnishing so much textual explanation that a reader is not provoked to make his own independent analysis of the cases. On the other hand, there may be instances where obtaining certain background will expand rather than constrict the scope for a reader's analysis of cases. After all, judges do not decide cases solely as abstract problems of logic. In addition, they are influenced by various factual considerations associated with the individual case and the parties thereto, and by the effect of a prospective decision on certain important institutions and social objectives. Analysis will hardly be hindered by presenting in textual form to the reader of a casebook some of the information that would undoubtedly have been in the minds of the judges who decided the cases.

Many of the readers of Mr. Walker's casebook may lack experience with the Armed Forces. It would not have been amiss to have provided text material designed to induce greater familiarity on their part with military mores and organizational structure and function. Similarly, the section in Chapter 15 concerning discharge would have had more value for the reader had it included an explanation of the types of discharges from the service that can be given today, the circumstances under which each such discharge can be furnished, the effect of such discharges on veterans' rights and reenlistment, and the methods, if any, available for getting a discharge changed. The brevity of the author's text in Chapter 8, "Trial Procedure," is compensated for by the circumstance that the 1951 edition of the *Manual for Courts-Martial*, which every user of any book on military law should keep handy, outlines almost verbatim in its Appendix 8 the procedure used in general and special courts-martial. Also a teacher who adopts this casebook for a course on military law — a step which most teachers would be well-advised

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<sup>11</sup>After writing the above, this reviewer learned indirectly that Mr. Walker's original manuscript had contained much more text. The deletion of the text seems to have been unfortunate.

to take — could profitably seek to arrange for his students to see the training films produced by the Army and Navy which portray the proceedings of a court-martial.

Obviously Walker's *Military Law* will have its greatest utility in courses on military law, for which it was specially designed. Such courses, in various forms, have been installed by numerous law schools in recognition of the present importance of military law and in response to the demands of law students who foresaw the early performance of military service. This reviewer would suppose that in very few such courses will there be time available for an intensive study of the entire casebook. Accordingly, he would suggest that the course be confined to a brief examination of basic constitutional limitations on military authority followed by an intensive study of military justice.

In addition to its value for the law student, the Walker casebook will have utility for the practising civilian attorney, to whom it offers well-selected material from which, with a minimum expenditure of time, he can gain a comprehensive picture of today's military law. Some lawyers may wish to see this picture to determine whether the Uniform Code has really remedied the abuses present earlier, when they were in the military service.<sup>12</sup> Other attorneys may desire knowledge of military law because they have found it impinges on their practice; for instance, they may frequently have encountered problems related to the Soldiers and Sailors Civil Relief Act. Still others may feel that, by reason of the tremendous importance of military law to so many Americans today, they bear a duty as members of the bar to be conversant with this field of law and to keep the general public informed about its present status.<sup>13</sup>

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<sup>12</sup>It is possible that the injustices perpetrated by courts-martial during World War II were in fact fewer than is commonly supposed, even by attorneys. For instance, it is reported that only one-third of one percent of the persons tried in the Army and Air Force after December 7, 1941, felt so strongly that they were the victims of injustice that they applied for a new trial. The number of meritorious petitions has been described as "infinitesimal." Among the novel "injustices" complained of was the trial of a case on Friday the thirteenth, following a tornado, and a week after the death of President Roosevelt. See Legal and Legislative Basis, Manual for Courts-Martial 157-159 (1951).

<sup>13</sup>It is important that the public be informed that there have been some changes made in military law — and especially in military justice. Many persons, including some lawyers, have prejudged the efforts at reform made by the services and have assumed that military justice is necessarily "drumhead justice." The deepseated distrust of military justice at times reaches neurotic proportions and apparently is grounded in anti-militarism and recollection of reports about abuses once present in military law. The unreasoning nature of this distrust was revealed in many circles in connection with the recent *Toth* case, *supra* note 4. Toth, once an airman, had been honorably discharged by the Air Force. Thereafter evidence was uncovered which tended to implicate him in a murder in Korea, committed prior to the time of his discharge. When the Air Force sought to bring Toth to trial before a court-martial, its action

Whether read by a law student, military lawyer, or civilian practitioner, this casebook should bring to mind a number of interesting questions, especially with respect to military justice. One question would be whether G. I. Joe enjoys under the Uniform Code a protection similar or equivalent to that granted his civilian confrere. In some ways it might be noted that the comparison favors the military. For instance, the Armed Services apparently offer more facilities than many civilian courts for psychiatric examination of an accused prior to trial; and the accused has a much lighter burden in showing insanity than he must shoulder in many state courts.<sup>14</sup> In pretrial interrogations of a suspect, a warning about self-incrimination must be given—a requirement not imposed in the federal courts and apparently by only one state, Texas. The accused is provided with free counsel to defend him, and apparently gets more choice with respect to his defense counsel than does an indigent defendant in civilian courts. The accused, if convicted, receives free appellate review of his record of trial without even requesting it. Moreover, military reviewing authorities apparently display greater willingness to consider errors not assigned at the trial level than do civilian appellate tribunals; and, if an error is discovered and a retrial ordered, the accused cannot receive a heavier sentence than at the first proceeding. Most important, the accused serviceman does not have to worry about a prosecutor who is out to make a record at his expense, since the military prosecutor, termed now the trial counsel, is not elected to office and obtains no personal profit from compiling an impressive record of convictions.

As he compares the methods by which military law and civilian law handle certain common problems, the reader of Mr. Walker's casebook may come upon ideas for improving each legal system. Moreover, as a student of comparative law might confirm, the

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was condemned as being malicious and deliberately designed to circumvent the Constitution and impose military tyranny on hapless civilians. Little public attention seems to have been given to the Air Force's side of the story: That Toth was suspected by them of a very heinous offense, that apparently he could not be tried by any American civilian tribunal, and that the Air Force's action was authorized by Article 3(a) of the Uniform Code of Military Justice. In the *Toth* case a Federal Court of Appeals held Article 3(a) constitutional. It is the special responsibility of the attorney to introduce as much rationality as possible into the public appraisal of military law.

<sup>14</sup>In Oregon a defendant must prove his insanity beyond a reasonable doubt, while in courts-martial and federal courts generally, the converse proposition holds true. Many states take an intermediate stand. See *Leland v. Oregon*, 343 U.S. 790 (1952). Interestingly, with reference to the psychiatric facilities made available for an accused serviceman, one book comments: "Although we might expect the Armed Forces to employ in courts-martial a more summary procedure than do the civil courts, the fact is that both the Army and the Navy today employ a level of scientific jurisprudence which the civilian courts have not yet attained." Guttmacher and Weihofen, *Psychiatry and the Law* 413 (1952).

reader may be led to re-examine the utility and purpose of many concepts and rules traditional to civilian law, military law or to both. By way of a minor example, in civilian courts members of a jury usually are not allowed to question a witness or to request that certain further evidence be secured; under military law the members of a court-martial—the triers of fact—may do so. Should one rule or the other be abandoned, or is each appropriate to its own system of law?

Another question that stems from a reading of the casebook is whether the procedures required by the Uniform Code of Military Justice, procedures of much greater complexity than under previous law, impose an undue burden on military operations. In brief, have the safeguards given the serviceman extorted too high a price in terms of military efficiency? Some military leaders so contend and urge return to the “good old days.” Does the experience of the last three years support their views; or instead, has military law, especially military justice as interpreted by the Court of Military Appeals, displayed appropriate adaptation to combat necessities? Moreover, would a return to the “good old days” hamper militarily desirable goals like the maintenance of good public relations and solid public support, high morale among servicemen, and large numbers of voluntary enlistments and reenlistments?

The Uniform Code of Military Justice presents complicated problems of statutory construction, problems which are excellently brought out by Mr. Walker’s casebook. A special aspect of those problems is that of the role which should have been played by the Court of Military Appeals in construing and applying the Code. Is the Court properly bound by precedents established under prior law? And to what extent did Congress intend that the Court, as the “watchdog” for the Code, be unlimited by precedents? Further, to what extent is action of this Court to be subject to the Supreme Court’s supervision; and to what extent is the Court of Military Appeals “supreme” for the serviceman?

Presentation of some of the broad questions suggested by a reading of Walker’s *Military Law* demonstrates that this book is more than a purveyor of technical rules governing a specialized field of law. Beyond peradventure, one who reads this casebook will find his time has been well-spent.

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