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The United States Court of Military Appeals and Constitutional Rights in Military Justice

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THE UNITED STATES COURT OF MILITARY APPEALS

and

CONSTITUTIONAL RIGHTS IN MILITARY JUSTICE

by

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PREFACE

On May 31, 1951, new and significant changes in the field of military justice were introduced. The Uniform Code of Military Justice became effective, and with it, by executive order of President Harry S. Truman, the Manual for Courts-Martial, United States, 1951.

A unique and important feature of the new Code was the establishment of the United States Court of Military Appeals. This new Court, composed of three civilian judges, was created by Congress, as a reviewing authority for significant cases in military justice. Congress also required the Court, in conjunction with the Judge Advocates General of the armed forces, to survey the operations of the Code, to report on the status of military justice, and to make pertinent recommendations.

During the past fifteen years the Court has rendered more than two thousand opinions, and has docketed almost twenty thousand cases. It has admitted more than twelve thousand attorneys to the bar. Yet this "Court of Last Resort" in the nation's largest judicial system has received a disproportionate share of public recognition.

The purpose of this thesis is to collect pertinent information about the operation of the United States Court of Military Appeals, and to study the effects of its decisions safeguarding constitutional rights in military justice. In pursuing this objective, I have freely quoted from the Uniform Code and the Manual for Courts-Martial, United States, 1951.

Chapter I, Background, is largely based on Winthrop's Military Law and the Congressional Record. Chapter II and III, on Congressional Legislative History and reports on The Uniform Code. Chapter IV and V are based on study of cases germane to the subject of constitutional rights, and personal experience. Chapter VI is based upon reports of the Court and the Congressional Record. In a number of instances the same material is discussed in several places; this is necessary to avoid cumbersome cross-referencing. Tables have been compiled from official data.

Thanks are due to the faculty of the Political Science Department of the University of North Dakota for guidance and motivation. My personal interest in military justice (after more than twenty years diversified military assignments with intermittent duty as investigator, counsel, court member, and accuser) was sparked to unite with an academic interest in constitutional law and judicial proceedings.

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ABSTRACT

This study was undertaken to examine the operation of the United States Court of Military Appeals, and the effects of that Court's decisions upon military justice in the armed services. Of particular interest was the Court's concern for safeguarding the constitutional rights of military personnel.

Extensive study of cases revealed an improving trend in the administration of military justice at the trial and investigative level and an increasing concern at all command levels for fairness and impartiality in military judicial proceedings. Study of congressional hearings on constitutional rights of military personnel confirmed that there has been remarkable progress from the ancient condition of military servitude to the modern position of recognition of the serviceman as an individual citizen.

From the results of this study, it is apparent that the Uniform Code of Military Justice provides protections for an accused serviceman, that are equal to and in many regards superior to civilian systems of justice. Furthermore, the United States Court of Military Appeals, through its painstaking dedication to protect those accused of crime, has had a profound effect on the quality of military justice.

INTRODUCTION

The Uniform Code of Military Justice is the law designed by Congress to be uniformly applicable to the Army, the Navy, the Air Force and the Coast Guard in time of war or peace. It is a monumental piece of legislation; its passage was preceded by lengthy hearings in which the viewpoint of every interest was exhaustively considered. To reduce to an acceptable and harmonious working basis all the divergent views and practices of over 150 years was a magnificent achievement.

In this thesis I shall first refer to the historical background of military justice, the provisions of earlier codes, and the operations and effects of military justice prior to the enactment of the Uniform Code. Then, a study of the Code's legislative history, some comparisons with its predecessors, and its unique provisions. Among these provisions, by far the most revolutionary, is the United States Court of Military Appeals.

Next, I will trace the legislative history of this new Court, its composition and function, and its impact on military justice. The Court of Military Appeals, from the very first days of its operation, has been the guardian of rights for all persons subject to the Code. In its judicial function it has applied the intent of Congress, the language of the Code, and the Constitution itself in safeguarding the rights of the accused; at the same time it has recognized responsibility in adhering to the disciplinary requirements

of the military. To observe the Court in action I will refer to some of the decisions which have contributed to the case law of the military justice system.

Finally, there will be reference to significant changes in the Code since its inception, and an analysis of proposed legislation for the future.

CHAPTER I

BACKGROUND OF UNITED STATES MILITARY JUSTICE

Pre World War II

Military law is the specific law governing the armed forces as a separate community. Military justice is a system of administering military law. Of course there are other forms of control of human conduct under which the military power of a government acts. Such forms are (1) martial law, the temporary exercise of military authority over civilians, and (2) military government, the exercise of military authority by one nation over another. This thesis is primarily concerned with military justice and the individual rights of military personnel.

The ultimate purpose of military justice is to maintain military discipline and thereby strengthen national security. Command and obedience are basic elements in all military relations, and it is discipline which effectively unites these elements in the performance of a military mission. From time to time, appropriate authorities have adopted various codes, rules, regulations and articles as instruments of military justice.

While no written military codes remain from the early times of the Greeks or Romans, some of the principal military offenses familiar to present military justice, such as desertion, mutiny, cowardice and the like were recognized in their armies. Many of

the ancient forms of punishments have come down to this day. Such punishments as dishonorable discharge, servile duty, hard labor and many other penalties were known then as now. On the other hand, others such as decimation, beheading and maiming have fallen by the wayside through the years. Flogging, however, was adjudged in the United States as recently as 1862.[1]

The written military laws of Europe date from the Salic code of the fifth century. Continental military laws reached full development by the Franks in 1532 in The "Carolina," the celebrated code of Emperor Charles V. Another historic example is the code of Sweden's King Gustavus Aldolphus, promulgated by him to his army in 1521.

The first complete British military code was that of Richard II late in the 14th century. There subsequently evolved in 1689 the British Articles of War, which were considerably influenced by the code of Gustavus Adolphus. This was brought about by the service of many English officers in the armies of Aldolphus. The statutory authority for the articles was the Military Act of 1689.[2] Annually re-enacted with many alterations and amendments, the substance of the major provisions remained in effect through World War II.

In America, even before the Declaration of Independence, the Continental Congress had drawn up rules for the control of the army. Only three days before George Washington took command of the Continental Army, the second Continental Congress had adopted the first Articles

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[1]William Winthrop, Military Law (Washington: W. H. Morrison, 2 vols., 1886), Vol. 1, p. 4.

[2]Ibid., p. 7.

of War, June 30, 1775.[3] Many of the articles were copied from the Massachusetts articles of April 5, 1775.[4] Other colonies adopted similar codes. These articles were adopted, almost without change from the contemporary English articles. Experience in fighting under the British flag in four Colonial wars over a period of more than 30 years had convinced our early legislators of the soundness of the code. Washington served on the committee appointed, "to prepare rules and regulations for the government of the army."[5]

One distinctive feature in the development of our national military law has been the enactment of timely revisions. The code was first revised in 1776 after recommendations of a committee of five consisting of John Adams, Thomas Jefferson, John Rutledge, James Wilson and R. R. Livingston.[6] The revised code was largely the recasting of the British articles. John Adams also had considerable responsibility in adapting the British Naval Articles of 1749, for the early American Navy. The United States Articles for the Government of the Navy, enacted in 1862 and amended on several occasions, were originally and continued to be in theory and substance, fundamentally the British Naval Articles.[7]

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[3]Worthington C. Ford (ed.), Journals of the Continental Congress: 1774-1789 (34 vols.; Washington: U. S. Government Printing Press, 1904-37), I, p. 90.

[4]Winthrop, op. cit., p. 12.

[5]Journals of the Continental Congress, I, p. 83.

[6]Ibid., p. 365.

[7]Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," Vanderbilt Law Review, Vol. 6-169, Feb. 1953.

The United States Articles of War were subsequently revised in 1786, adopted by the first Congress after the adoption of the Constitution in 1789, and superceded by the articles of 1806. The next significant revisions were in 1874 following the Civil War experience. The 1916 revisions modernized court-martial proceedings, moderated some penalties and in general brought military justice into closer harmony with civil justice.

World War I had considerable impact on the administration of military justice, because of the large civilian components involved. After severe criticism of the powers of field commanders, the War Department enacted General Order number 7, in January 1918, directing that severe sentences calling for death, dismissal, or dishonorable discharge could be executed only after such cases had been reviewed by the office of the Judge Advocate General.

Critics, however, insisted that individual rights of military personnel should be comparable to the right of civilians and should be safeguarded by law. In brief they proposed a civilian appellate agency, similar to the United States Circuit Court of Appeals for military justice. The military leaders held that reviewing authorities should be free from possible political influences and thoroughly knowledgeable of the nature, cause and effect of military offenses. The military position was sustained. The amended articles of 1920 and 1928 were minor revisions only. This code remained in effect through World War II.[8]

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[8]"Articles of War," Encyclopedia Americana, 1954 ed., Vol. II, p. 356.

Post World War II

During the course of World War II approximately 11,000,000 men saw service in the United States Army, and of that number approximately 80,000 were convicted by general courts-martial.[9] Even before the cessation of hostilities it was apparent to the War Department and to the Congress that a detailed study of the Army system of justice was appropriate, if not mandatory. Accordingly, in 1944 and 1945, the War Department sent Col. Phillip McCook, former prominent New York jurist, to various theaters of operation to conduct such studies. Additional reports were submitted to the War Department from other sources.

Within a few months after the end of hostilities the matter was brought to the attention of the American Bar Association, and on March 25, 1946, the War Department Advisory Committee was established by the order of the Secretary of War. The committee, under the chairmanship of the Honorable Arthur T. Vanderbilt, and referred to as the Vanderbilt Committee, consisted of nine outstanding lawyers and Federal jurists from eight States and the District of Columbia. From March 25, 1946, until December 13, 1946, a period of almost nine months, the members of that committee engaged in studies, investigations, and hearings, and availed themselves of voluminous statistical data of the Judge Advocate General's Department and other sources.[10]

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[9] U. S., Congressional Record, 81st Cong. 2nd Sess., 1950, XCVI, p. 5795.

[10] Ibid., pp. 5795-96.

At full committee hearings in Washington, the Secretary of War and Under Secretary of War, the Chief of Staff, the Commander of the Army Ground Forces, the Judge Advocate General, the Assistant Judge Advocate General, numerous other officers, and the representatives of five veterans' organizations were heard. There were numerous personal interviews, supplemented by letters, and the digesting of 321 answers to questionaires from both military and nonmilitary personnel. Additional widely advertised regional public hearings were held at New York, Philadelphia, Baltimore, Raleigh, Atlanta, Chicago, St. Louis, Denver, San Francisco, and Seattle. The subsequent report of the committee was based on these extensive inquiries.[11]

During the Seventy-ninth Congress a Military Affairs Subcommittee devoted more than one year to detailed study of the Army System of Justice. Additional studies were conducted by special committees of the American Legion, Veterans of Foreign Wars, American Veterans, American Volunteer Corps, the Judge Advocate Generals' Association, The War Veterans' Bar Association, the New York County Lawyers' Association, and the Phi Alpha Delta law fraternity. The reports and recommendations of each of these groups were made available to the Armed Services Committee and representatives of each of the organizations appeared before the committee in public hearings in support of their recommendations. Other witnesses, who had particular knowledge of the subject by virtue of their service and experience in the recent war, were also called upon.[12] The combined efforts of

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[11] Ibid.

[12] Ibid.

these organizations and individuals represented the most comprehensive study of military justice ever conducted in the history of our country.

During the Eightieth Congress the Legal Subcommittee on Armed Services, Representative Charles Elston, Ohio, Chairman, conducted extensive hearings on the same subject. That subcommittee was in session from April 14, 1947, until July 15, 1947, and considered all of the studies to that date. As a result of these hearings, the subcommittee presented to the full committee, what is now known as Title 11, Public Law 759, Eightieth Congress. That bill, which pertained only to the Army, was included as an amendment to the Selective Service Act of 1948.[13]

This law became the basis for the Articles of War, 1949, and was made applicable to the Air Force[14] as well as the Army. This code known as the Elston Act has been stoutly defended by prominent military authorities as superior to the later Uniform Code of Military Justice, 1951.[15] A major feature was the right for enlisted personnel to have more direct representation on the court. Traditionally, court members had always been commissioned officers; now one-third of the membership could be enlisted. Actually this right was exercised in less than seven percent of courts-martial. The general feeling

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[13] Ibid.

[14] The Air Force became a separate service in 1947, but for several years maintained administrative and logistic relationship with the Army.

[15] Major General Reginald C. Harmon, USAF, in several public statements in 1958, reaffirmed before the Senate Committee Hearings on Constitutional Rights of Military Personnel, 1962.

was that officers were more lenient than enlisted men sitting on courts.[16]

During this period, prior to the implementation of the Uniform Code, 1951, the Armed Forces were continually subjected to press and public censure for their administration of Military Justice. One widely circulated article, by Arthur John Keefe, Professor of Law, Cornell University Law School and former President (1947) of a Naval General Court Martial Sentence Review Board, was especially damaging.[17] Professor Keefe stated:

> Few of us know how completely different the military judicial system is from the civilian. When a man is inducted into the armed forces he leaves behind almost all of the Constitutional safeguards which ordinarily protect him from a capricious police, or from a hasty or biased judge or jury. His commanding officer is chief of police, district attorney, jury, trial judge and judge of first appeal, all in one. If he is suspected of breaking the law he is tried in secret by men whose principal purpose is to preserve Draconic discipline.
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> After the last war more than 20,000 cases were brought before the special Navy General Court-Martial Sentence Review Board of which I was President. In almost half of these cases we found flagrant miscarriages of justice and recommended radical reductions in sentences. The Army's clemency board likewise changed many thousands of punishments.[18]

Spurred on by such denunciations and motivated by a need for uniformity in keeping with the reorganized defense establishment, additional improvements in military justice became the goal of Defense Secretary Forrestal. The realization of that goal, The Uniform Code of Military Justice, will be discussed in the next chapter.

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[16]Stanley Frank, "The G. I.'s Day in Court," Nations' Business, Jan. 1953, p. 73.

[17]Arthur John Keefe, "Drum Head Justice-A Look at our Military Courts," Reader's Digest, Aug. 1951, pp. 39-44.

[18]Ibid.

CHAPTER II

THE UNIFORM CODE OF MILITARY JUSTICE

Legislative History

At the conclusion of World War II, there was considerable discussion and criticism of the justice systems of the Army and the Navy which at that time embraced all the military services. As a result of this criticism both departments created several independent boards and committees to review war-time courts-martial cases and also to study their court-martial systems. Many eminent members of the bar served on these committees. As a result of their studies, both the War Department and the Navy Department submitted separate bills, for introduction early in the Eightieth Congress, revising their systems of military justice. The House of Representatives after lengthy hearings passed the bill, House of Representatives 2575, revising the Army courts-martial system, but no hearings were held on a companion bill in the Senate.[1]

During the first session of the Eightieth Congress the National Security Act of 1947 was enacted, unifying the armed services and creating a separate Department of the Air Force. Since the proposed revisions of the Army and Navy justice systems differed in

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[1]Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," Vanderbilt Law Review, VI (Feb. 1953), 169

many respects, and in order to avoid having a third distinct system established by the Air Force, the then chairman of the Senate Armed Services Committee suggested to the Secretary of Defense that a bill be prepared for introduction early in the Eighty-first Congress which would provide a uniform system of courts-martial for all the military service.[2]

Toward the end of the Eightieth Congress, the bill revising the Army courts-martial system, as passed by the House of Representatives, was included as an amendment to the Selective Service Act of 1948, during the debate in the Senate on the bill, and subsequently became Public Law 759, Eightieth Congress. This was the Elston Act referred to in Chapter I.[3]

In July of 1948, Secretary of Defense Forrestal appointed a special committee to draft a Uniform Code of Military Justice, uniform in substance and uniform in interpretation and construction, to be equally applicable to all of the armed forces. Professor Edmund Morgan, Jr., of the Harvard Law School was designated chairman, the remainder of the committee being Assistant Secretary of the Army Gordan Gray, Under Secretary of the Navy John Kenny, and Assistant Secretary of the Air Force Eugene Zukert. Supplementing the efforts of the main committee was a working group of approximately fifteen persons, including officer representatives of each of the services, and five civilian lawyers with service experience, under the chairmanship

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[2]Legislative History: Uniform Code of Military Justice, in U. S. Code Congressional Service, 81st Cong., 1st Sess. 1949, 2222.

[3]U. S., Congressional Record, HR 81st Cong., 2nd Sess. 1950, XCVI, 5796.

of Mr. Felix Larkin, assistant general counsel in the Office of the Secretary of Defense.[4]

During the seven month study, the Morgan committee and the working group considered the revised Articles of War, the Articles for the Government of the Navy, the Federal Code, the penal codes of various States, and voluminous reports on military and naval justice which have been made in recent years by various distinguished persons. The end result of this combined effort was Senate 857, a bill to provide a Uniform Code of Military Justice, and companion bill to House of Representatives 4080, as amended and passed by the House of Representatives.[5]

A subcommittee of the Armed Services Committee held extensive hearings on this bill, at which time representatives of the Morgan Committee, veterans' associations, bar associations, Reserve Officers associations, the Judge Advocates General of the armed services, and other qualified witnesses appeared.

The difference of opinion of those who appeared before the committee, or made known their views by other means, pointed for the most part to the particular provisions of the bill discussed below. These opinions were carefully considered by the committee and, where desirable, changes were made.

Article 2, subdivision 1, provides the general jurisdiction of the Uniform Code over persons in the regular omponents of the armed services, including volunteers, inductees, and reservists called into Federal service. In order to leave no doubt as to the point where an inductee will be subject to the code, this subsection

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[5] Ibid.

is now consistent with the Selective Service Act of 1948 to provide that jurisdiction will not be obtained over those who attempt to avoid selection or induction. Jurisdiction over these persons will continue to reside in the Federal courts.

Article 2, subdivision 3, was objected to by reserve associations on the ground that it would be used to subject reserves to the code when they are engaged in all types of inactive duty training. Although the committee made no change in this subdivision, it expressed the view that military departments should issue orders subjecting reserves to the code only when they are engaged in inactive duty training involving the use of dangerous or expensive equipment.

Article 3 provides a continuing jurisdiction over certain persons who have left the service and who heretofore have been immune from prosecution. Under this section, however, such persons are subject to this code, whenever the Federal courts do not have jurisdiction, and when the offense is serious enough to call for at least five years' sentence and was committed within the statute of limitations.

Article 15 provides for commanding officers' non-judicial punishment and combines the practices of mast punishment in the Navy and Coast Guard and the disciplinary punishment imposed by commanding officers in the Army and Air Force. This punishment consists of withholding of privileges, restriction to specified limits, forfeiture of limited amounts of pay, and is not imposed pursuant to trial by court martial, but enables commanders to impose limited punishments for disciplinary purposes. In the past, the punishments authorized have differed in the Army, Navy, and

Air Force. The Army and Air Force have never used confinement, or confinement with bread and water, as a disciplinary punishment, while such punishments were traditional in the Navy and Coast Guard. This article limits, as a disciplinary punishment imposed by commanding officers, confinement to seven days. It further limits confinement with bread and water to three days, and this punishment can only be used when the recipient is attached to or embarked on a vessel.

The composition of the three types of courts-martial is provided in Articles 22, 23, and 24. These articles continue, in general, procedures already in effect in all services and provide for the appointment of the members of the courts and counsel, the convening of the courts and the referral of charges by the President, Secretaries of Departments, and certain commanding officers. A number of witnesses, principally representing bar associations, urged the amendment of these articles to provide a different method of selection of court members. They conceded that the commanding officers should retain the right to refer the charges for trial, select the trial counsel, and review the case after trial. These witnesses contended, however, that the authority to appoint the court presented the opportunity to the commander to influence the verdict of the court. They proposed that members of a court be selected by a staff judge advocate from a panel of eligible officers and enlisted men made available by commanding officers.

Departmental witnesses opposed these amendments and supported the existing method of selecting court members, on the ground that the military has a legitimate concern with military justice and the responsibility for operating it, and that it is not

inappropriate for the President, the Secretaries of the Departments, or selected commanding officers to appoint the members of a court. It was their position that to have the court members selected by judge advocates from among panels of eligibles submitted by the commanders was impracticable and unwieldy, would hamper the utilization of persons on the panels on normal military antics, and could not operate efficiently in time of war. A number of added protections, not found in either the Articles of War or the Articles for the Government of the Navy, were included in this bill, such as a supreme civilian Court of Military Appeals, boards of review removed from the commander, and provisions that the law officer, trial and defense counsel of a general court must be trained lawyers. As an additional feature, the bill included strong penalties against any authority who attempted to influence a court. With these safeguards, the committee adopted the provisions recommended by the National Military Establishment.

Article 26 provides the authority for a law officer of a general court-martial. Under previous law the Navy had no law officer. The Army and the Air Force have had a law officer for general courts-martial who, in addition to ruling upon points of evidence, retires, deliberates, and votes with the court on the findings and sentence. Officers of equal experience on this subject are sharply divided in their opinion as to whether the law officer should retire with the court and vote as a member. In view of the fact that the law officer is empowered to make final rulings on all interlocutory questions of law (except on a motion to dismiss and a motion relating to the accused's sanity), and under this code

would instruct the court upon the presumption of innocence, burden of proof, and elements of the offense, it was not considered desirable that the law officer should have the voting privileges of a member of the court. This is consistent with the practice in civil courts where the judge does not retire and deliberate with the jury.

Article 67 of the Uniform Code provides for a Court of Military Appeals, which is an entirely new concept in the field of military law. This court, composed of three civilians, appointed by the President and confirmed by and with the advice and consent of the Senate, is the supreme authority on the law and assures uniform interpretation of substantive and procedural law. The committee believed it desirable to have the judges of the Court of Military Appeals serve for a term of eight years rather than hold office during good behavior.[6] Provision is made for staggering the expiration of terms of the judges. This Court of Military Appeals will be discussed in chapter III.

Under provisions of Public Law 759, Eightieth Congress, a separate Judge Advocate General's Corps was established for the Army. No such separate legal corps exists for the Navy or the Air Force. The Secretaries of the Navy and the Air Force opposed the creation of a separate legal corps within their departments at this time. Since the legal corps in the Department of the Army had been in operation only since February 1, 1949, and the advantages of such a corps are speculative, it was believed desirable to postpone the

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[6]The term of office was finally set at fifteen years at the last conference as a compromise measure. The House wanted lifetime appointments.

creation of separate legal corps within the Air Force and the Navy until further experience is available on the operation of the corps in the Army. The operation of this Code will not be hampered by lack of uniformity in this respect. Restrictive qualifications were included with respect to the appointment of future Judge Advocates General of the military departments.[7]

Identical bills based on the Department of Defense draft, were introduced in both Houses of the first session Eighty-first Congress early in 1949 (S 857, HR 2498). After extensive hearings the House Committee on Armed Services reported out a revised version April 28, 1949, HR 4080 (Rep. 491). HR 4080 passed after debate with some amendments May 5, 1949.[8]

The Senate Committee on Armed Services after further hearings reported out an amended version of HR 4080 on June 10, 1949 (S. Rep. 486).[9] This passed the Senate with additional amendments February 3, 1950.[10] The report of the Conference Committee (HR Rep. 1946), was adopted by the Senate April 15, 1950 and by the House the next day.[11] The President signed the bill May 5, 1950. In order to provide time

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[7]Morgan, op. cit.

[8]U. S., Congressional Record, XCV, 5818-5843.

[9]Letter from Louis Johnson to Senator Tydings. Appendix A.

[10]U. S., Congressional Record, XCVI, 1321-1339, 1381-1398, 1458-1475.

[11]Ibid., 5791, 5825-5827. The conference committee included for the Senate: Millard E. Tydings, Estes Kefauver, Leverett Saltenstall, and Wayne Morse. For the House: Overton Brooks, Philip J. Philbin, Edward DeGraffenreid, Paul W. Shafer, and Charles H. Elston.

for adjustment, the Uniform Code of Military Justice was not to take effect until May 31, 1951.

> The purpose of the Uniform Code is to provide a single unified, consolidated and modified system of criminal law and judicial procedure equally applicable to all of the armed forces of the United States.[12]

Provisions Of The Code

The Code is uniformly applicable in all of its parts to the Army, the Navy, the Air Force, and the Coast Guard in time of war and peace. It covers both the substantive and the procedural law governing military justice and its administration in all of the armed forces of the United States. It supercedes the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard and is the sole statutory authority for:

1. The infliction of limited disciplinary penalties for minor offenses without judicial action;

2. The establishment of pre-trial procedure;

3. The creation and constitution of three classes of courts-martial corresponding to those formerly in existence;

4. The eligibility of members of each of the courts and the qualifications of its officers and counsel;

5. The review of findings and sentence and the creation and constitution of the reviewing tribunals; and

6. The listing and definition of offenses, redrafted and re-phrased in modern legislative language.

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[12]Public Law 506, 81st Cong., 2nd Sess. (May 5, 1950). 64 Stat. 108 (1950) 50 U. S. C. The Code was amended in 1956, 1959, 1960, 1961, and has become Chapter 47, Title 10, U. S. Code. Amendments are introduced in almost every session of Congress.

The Code, while based on the Revised Articles of War and the Articles for the Government of the Navy, is a consolidation and a complete recodification of the former statutes. Under it, personnel of the armed forces, regardless of the Department in which they serve, are subject to the same law and will be tried in accordance with the same procedures. The provisions of section 1 of the Code provide, for the first time in the history of this nation, a single law for the administration of military justice in the armed forces.

Among the provisions designed to secure uniformity are the following:

1. The offenses made punishable by the code are identical for all the armed forces;

2. The same system of courts with the same limits of jurisdiction of each court is set up in all the armed forces;

3. The procedure for general courts-martial is identical as to institution of charges, pretrial investigation, action by the convening authority, review by the Board of Review, and review by the Court of Military Appeals in all the armed forces;

4. The rules of procedure at the trial including modes of proof are equally applicable to all the armed forces;

5. The Judge Advocates General of the three Departments are required to make uniform rules of procedure for the boards of review in each Department.

6. The required qualifications for members of the court, law officer, and counsel are identical for all of the armed forces;

7. The Court of Military Appeals, which finally decides questions of law, is the court of last resort for each of the armed

forces; it also acts with the Judge Advocates General of the three Departments, as an advisory body with a view to securing uniformity in policy and in sentences, and in discovering and remedying defects in the system and its administration.

Among the provisions designed to insure a fair trial in a general court-martial are the following:

1. A pretrial investigation at which the accused is entitled to be present with counsel to cross-examine available witnesses against him and to present evidence in his own behalf;

2. A prohibition against referring any charge for trial which does not state an offense or is not shown to be supported by sufficient evidence;

3. A mandatory provision for a competent, legally trained counsel at the trial for both the prosecution and the defense;

4. A prohibition against compelling self-incrimination;

5. A provision for equal process to accused and prosecution for obtaining witnesses and depositions, and a provision allowing only the accused to use depositions in a capital case;

6. A provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case;

7. A provision whereby voting on challenges, findings, and sentences is by secret ballot of the members of the court;

8. A provision requiring the law officer to instruct the court on the record, concerning the elements of the offense, presumption of innocence, and the burden of proof;

9. A provision for an automatic review of the trial record for errors of law and of fact, by a board of review, with the right of the accused to be represented by legally competent counsel;

10. A prohibition against receiving please of guilty in capital cases;

11. A provision for the review of the record for errors of law by the Court of Military Appeals. This review is automatic in cases where the sentence is death or involves a general or flag rank officer. A review may be requested by petition on the part of the accused in any sentence involving confinement of one year or more.

Among the provisions designed to insure a fair trial in special and summary courts-martial are the following:

1. Under former law and procedure there was great variation in the nomenclature, composition, procedure, and powers of the intermediate military courts; this code completely eradicates all of those differences and establishes complete uniformity;

2. In special courts-martial it is not required that the defense counsel be a lawyer unless the prosecuting counsel is; both must be equally qualified, however; enlisted men may have enlisted men as members of the court; if a bad-conduct discharge is imposed, a full stenographic transcript must be made, and the case reviewed in the same manner as a general court-martial record;

3. Peremptory challenge of a member of a special court-martial is provided, as in a general court-martial. Voting is by secret ballot; review by the judge advocate or legal officer is required;

4. Provision is made for permitting an accused person to refuse trial by a summary court (trial by a designated officer) if he prefers to be tried by a special court-martial; he then would have the privilege of counsel and of having enlisted men on the court

if he were an enlisted man; review by a judge advocate or legal officer is required.

Among the provisions to prevent interference with due administration of justice are:

1. The convening authority may not refer charges for trial until they are found legally sufficient by the staff judge advocate or legal officer;

2. The staff judge advocate or legal officer is authorized to communicate directly with the Judge Advocate General;

3. All counsel at a general court-martial trial are required to be lawyers, and to be certified by the Judge Advocate General as qualified to perform their legal duties;

4. The law officer (a competent lawyer), rules on all questions raised at the trial, except on a motion for a directed verdict and on the issue of the accused's sanity;

5. The commander, who is the convening authority, must not act on a finding or sentence of a general court-martial without first obtaining the advice of his staff judge advocate or legal officer;

6. The board of review, located in the office of the Judge Advocates General and removed from the convening authority, is composed of legally trained men and reviews the trial record for errors of law and fact;

7. The Court of Military Appeals is composed of civilians and passes finally on all questions of law;

8. When counsel appear before the board of review and the Court of Military Appeals, both parties must be represented by qualified lawyers;

9. Censure by a commanding officer of a court-martial or any member or officer thereof, because of any judicial action of the court or any member or officer is forbidden; any attempt improperly to influence official action in any aspect of a trial or its review is prohibited.

Among command functions the Code retains are:

1. Commanding officers refer the charges in general, special, and summary courts-martial and convene the courts;

2. Commanding officers appoint the members of the courts;

3. Commanding officers appoint the law officer and counsel for the trial;

4. Commanding officers retain full power to set aside findings of guilty and to modify or change the sentence, but are not permitted to interfere with verdicts of not quilty nor to increase the severity of the sentence imposed;

5. The powers of commanding officers at mast and company punishment are retained, for minor offenses which require prompt action, and for which comparitively light punishments can be imposed. The procedural safeguards in this type of non-judicial punishment are considerably less than in the courts-martial, but are believed to be reasonably adequate.[13]

Reaction

The new Uniform Code of Military Justice was greeted with enthusiastic acclaim by most legal authorities. But some were still

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[13]This power was increased by major changes in Article 15, UCMJ, effective Feb. 1, 1963.

concerned that the reforms over command control had not gone far enough "questionably supported" constitutional rights.[14] Others deplored the "lack of assurances of constitutional guarantees."[15] Professor Keefe stated:

> All this sounds fine. The new code is a step in the right direction, but unfortunately a short one. The codes' Punitive Articles are as sweeping and harsh as the old Articles of War which John Adams copied almost verbatim from the British military code of 1749. One new Article expressly forbids the commanding officer who convenes a court to exert any influence over its decision. But the commanding officer still draws the charge, elects the judges, appoints the law officer, names the prosecution and defense counsel, and himself reviews the results of the hearing. Lawyers or not, the officers will continue to avoid the "old man's" displeasure.
>
> As for the Court of Military Appeals, it will hear automatically only cases involving generals, admirals and the death penalty. The ordinary officer or enlisted man must ask for permission to appeal. This is a complicated process and the average soldier or sailor will have a hard time setting it in motion. And at that, the high court will be empowered to probe only for errors in law, not in fact.[16]

The well known ex-military attorney, Frederick Bernays Wiener, in commenting on doubtful benefits said:

> . . . civilian Court of Military Appeals-as to which all concerned, in service and out, will have to hold their breaths. Given qualified personnel with vision and breadth of understanding, it might work.[17]

The Association of the Bar, City of New York reported:

> In an interim report on the nations new Uniform Code of Military Justice, which becomes effective May 31, 1951, a committee praised establishment of a three justice civilian Court of Military Appeals to review military court-martial

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[14] George Washington Law Review, XX (1951), 2

[15] Georgetown Law Journal, XXXVIII (May, 1950), 521.

[16] Arthur John Keefe, "Drum Head Justice-A Look at Our Military Courts," Leaders Digest (August, 1951), 44.

[17] Frederick Bernays Wiener, "The Uniform Code of Military Justice," Army (1950).

sentences. First appointees to this court, the report said, would set its standard of prestige and policy and only men outstandingly qualified should be appointed by President Truman.

While the code represented a considerable advance in the standard of military justice, the committee regretted that "last ditch opposition," by high ranking officers had defeated efforts to remove from the commanding officer of an accused military prisoner the power to appoint the court that would try him. However, it was pointed out that the code would subject to court-martial any commander who should attempt to coerce or influence a court.[18]

A series of editorials in the press showed continued anxiety about command control:

. . . it is a good Bill, as far as it goes, but it doesn't go far enough. What it does to provide like procedures in the various service arms is an essential part of unification and should be supported and approved. What it does not do is to meet fairly the challenge of the command role in the whole court-martial set up.[19]

Its provisions for a civilian Court of Appeals, for cross examination at pre-trial hearings and for the presence of enlisted men on the courts-martial will win wide applause.[20]

This command control goes to the heart of military justice. But the new civilian judges on the Court of Military Appeals are empowered to make recommendations to improve the code, and undoubtedly one of the provisions they will study closely is command control. The new code, nevertheless, is a vast improvement over the old Articles and Disciplinary Laws of the Services.[21]

Despite these criticisms the general consensus was favorable. On the day the code became effective, Overton Brooks proudly addressed the House of Representatives:

Mr. Speaker, last year this Congress passed the bill entitled "A Uniform Code of Military Justice: and today this law takes effect throughout the armed services. It is a monumental piece of legislation and is intended to correct

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[18]New York Times, Oct. 18, 1950, p. 36.

[19]New York Times, May 6, 1949, p. 24.

[20]New York Times, May 8, 1950, p. 22.

[21]New York Times, May 25, 1951, p. 26.

> the inequalities, inefficiencies and injustices of the old archaic system-or lack of system I should say-prevailing in the armed services.
>
> The subcommittee of which I was chairman worked for 4 months almost daily, including many Saturdays, on this piece of legislation. We reviewed every article in the Uniform Code of Military Justice carefully, made many changes and made rewrites of it. When this bill left us in the House, I felt that it was as perfect as we could write such a measure at that time. I am grateful to the members of the subcommittee for having applied themselves most diligently and tirelessly, without fanfare or publicity whatsoever, to the extremely important job of guaranteeing justice to be done within the uniformed services.
>
> Mr. Speaker, the public has not had confidence in justice as administered in the armed services. Rightfully or wrongfully comparisons, to the hurt of military justice, have been made with our civilian system of justice and invariably military justice has come out the loser. I believe the new Uniform Code of Military Justice will go far toward bringing the faith, confidence and esteem in our military courts to the level of that of civilian courts. Certainly fair, conscientious and wholehearted support of this program will go far toward eliminating the evils of the past.[22]

The background, legislative history, provisions and initial reactions concerning the Uniform Code of Military Justice have been described above. The actual operation of the code will be explained in chapter V. The following table[23] portraying the scope of the three types of courts-martial is included in an attempt to simplify the language of the code itself. The next chapter will be devoted to those provisions of the Code which were the most revolutionary changes, which have ever been incorporated in our military law - The United States Court of Military Appeals.

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[22] U. S., Congressional Record, 82nd Cong., 1st Sess., 1951, XCVII, 6013.

[23] Table I - Based on Morris O. Edwards and Charles L. Decker, The Serviceman and the Law, (Harrisburg: The Military Service Publishing Company, 1951), pp. 54-59.

TABLE 1

TABLE SHOWING SCOPE OF SUMMARY, SPECIAL, AND GENERAL COURTS-MARTIAL

	Summary	Special	General
Appointing Authority	Anyone who may convene general or special court; The CO of detached company, other detachment of Army; The CO of detached squadron or other detachment of Air Force; The CO or OC of any other command when empowered by Sec. of Dept. (Art. 24)	Anyone who may convene general court; The CO of a district, garrison, fort, camp, station, Air Force base, auxiliary airfield, or other place where members of Army or Air Force are on duty; The CO of brigade, regiment, detached battalion, or corresponding unit of the Army; The CO of a wing, group, or separate squadron of the Air Force; The CO of any vessel, shipyard, base, or station; the CO of any Marine brigade, regiment, detached battalion, or corresponding unit; the CO of any Marine barracks, wing, group, separate squadron, station base, auxiliary airfield, or other place where members of the Marine Corps are on duty; The CO of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; The CO or OC of any other command when empowered by the Sec. of a Dept. (Art. 23)	Pres. of U. S., Sec. of a Dept., CO of a Territorial Dept., an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps; The C-in-C of a fleet, the CO of a naval station or larger shore activity of the Navy beyond the continental limits of the U. S.; The CO of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps; Such other CO's as may be designated by the Sec. of a Dept.; Any other CO in any of the armed forces when empowered by the Pres. of the U. S. (Art. 22)

TABLE 1--Continued

	Summary	Special	General
Minimum Members	1 (An officer)	3	5 (Plus a law officer)
Persons Triable	Enlisted persons only who do not object (unless they have been permitted to elect and have refused non-judicial punishment under Art. 16).	Any person subject to Code. (Par 15 MCM)	Any person subject to Code. (Par 14 MCM)
Offenses	Non-capital (same exception as for special courts). (Par 16 MCM)	Non-capital, (except general court-martial authority may cause certain capital cases to be tried by special court-martial). (Par 15 MCM)	Any offense made punishable by the Code. (Art. 18)
Maximum Punishment	Confinement 1 mo., or hard labor without confinement, 45 days, or restriction, 2 mos., and Forfeiture 2/3 of 1 month's pay. Reduction in grade (Art. 20; Par 16b MCM)	Confinement 6 mos., and forfeiture of 2/3 pay per month for 6 mos. Reduction in grade. Hard labor without confinement, 3 mos. (on enlisted persons only). Bad conduct discharge (complete record must be kept). (Art. 19)	Any authorized punishment (including death, dismissal, dishonorable discharge, bad conduct discharge). (Art. 18)

TABLE 1--Continued

	Summary	Special	General
Supervisory Authority	Officer exercising general court-martial jurisdiction (or other designated authority). (Par 91c MCM)	Officer exercising general court-martial jurisdiction (or other designated authority). Judge Advocate General's office in case of those involving bad conduct discharges. (Par 91b MCM)	Judge Advocate General's Office (Art. 65a)

CHAPTER III

THE UNITED STATES COURT OF MILITARY APPEALS

Legislative History

The earliest legislative reference to a Court of Military Appeals appears in Senate 64, a bill "To establish Military Justice," introduced by Senator Chamberlain in the 66th Congress, 1st Session. This bill, in Article 52, provided for a Court of Military Appeals consisting of three judges appointed by the President. However, the amended bill, as reported out of committee and enacted into law (known as the 1920 Articles of War),[1] did not contain the provision for a Court of Military Appeals. On the other hand it did provide statutory authority for the appointment of Boards of Review in the Office of The Judge Advocate General, in Article 50½.[2] After World War II, in March 1946, the Secretary of War appointed the War Department's Advisory Committee on Military Justice. This committee, commonly known as the Vanderbilt Committee, in December 1946 specifically recommended that The Board of Review Authority be revised.

A. The checking of command control

> The final review of all general court-martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by The Judge Advocate General or by the Assistant Judge Advocate General for a

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[1] 4 Stat. 787.

[2] Ibid.

> theater of operations, or by such a board or boards as shall be designated by The Judge Advocate General or the Assistant. The reviewing authority shall have the power to review every case as to the weight of the evidence, to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentence and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of disparity between sentences.
>
> In order to make this recommendation effective, Article of War 50½ should be amended. In its present form it is almost unintelligible. It should be rewritten and the procedure prescribed should be made clear and more definite. There seems to be no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended.[3]

As a result of this recommendation, the Elston Bill, which was enacted in 1948 as amendments to the Articles of War,[4] repealed Article 50½. This bill provided for review of all courts-martial cases involving a general officer or sentences of death, dismissal, dishonorable, or bad-conduct discharge. It also provided, in Article 50, for a Judicial Council composed of three general officers of the Judge Advocate General's Corps. At the time of the enactment of the Elston Bill there was considerable activity and agitation by veterans' organizations and bar associations for Congress to take some action to preclude "Command control" in courts-martial proceedings.

In June 1948 the Secretary of Defense appointed a committee on a Uniform Code of Military Justice, with Professor Edmund M. Morgan, Jr. as chairman.[5] It should be noted that Professor Morgan had in 1919 testified before the Senate Subcommittee on Military Affairs which was considering Senate 64, a bill "To establish military justice." In his

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[3]U. S., Congressional Record, 81st Cong., 2nd Sess., 1950, XCVI, 5795-96.

[4]62 Stat. 627.

[5]Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," Vanderbilt Law Review, VI (Feb. 1953), 169.

testimony he was in favor of and recommended the passage of Article 52, establishing a Court of Military Appeals. At that time he had strong feelings that such a court should be separate and apart from the military.[6]

The Morgan Committee in its recommendations for a Uniform Code of Military Justice, which was submitted to Congress by the Department of Defense on February 4, 1949, provided for a Judicial Council within the National Military Establishment of not less than three members appointed by the President from civilian life. The Uniform Code of Military Justice, act of May 5, 1950, as amended, and now codified in title 10, United States Code, subsequently provided for a Court of Military Appeals, located for administrative purposes in the Department of Defense, and composed of three members appointed from civil life.[7]

During both the Senate and House hearings on the proposed Bill there was considerable discussion as to (1) The number of persons to be appointed to the Judicial Council (later amended to read Court of Military Appeals), (2) Whether there should be a requirement that the members have had military experience, and (3) other qualifications and tenure. Extensive hearings were held by the House of Representatives, Committee on Armed Services, Subcommittee No. 1. The Senate committee after studying the proposed legislation, reported the Bill to the Senate, making the following comments pertaining to the Court of Military Appeals:

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[6]U. S., Congress, Senate Subcommittee of the Committee on Military Affairs, Hearings, on S. 64, Articles of War, 66th Cong. 1st Sess., 1919, p. 1381.

[7]Public Law 506, 81st Cong., 2nd Sess. (May 5, 1950). 64 Stat. 108. Revised to Chapter 47, 10 U. S. C. 867.

Article 67 of the Uniform Code provides for a court of military appeals, which is an entirely new concept in the field of military law. This court, composed of three civilians, appointed by the President and confirmed by and with the advice and consent of the Senate, will be the supreme authority on the law and assure uniform interpretation of substantive and procedural law. The committee believed it desirable to have the judges of the court of military appeals serve for a term of 8 years rather than hold office during good behavior. Provision is made for staggering the expiration of terms of the judges.

. . . . . .

Article 67. Review by the Court of Military Appeals.

This article is new although the concept of a final appellate tribunal is not. Proposed AGN, Article 39 (g) provides for a board of appeals while AW 50 (a) provides for a judicial council. Both of these tribunals, however, are within the Department. The Court of Military Appeals provided for in this article is established in the National Military Establishment for the purpose of administration only, and will not be subject to the authority, direction, or control of the Secretary of Defense. The terms of the judges are fixed at 8 years. The judges are to be highly qualified civilians and for this reason the compensation has been made the same as that of a judge of the United States Court of Appeals.

Paragraph (2) of subdivision (a) provides for the staggering of the terms of the judges.

Paragraph (3) provides for removal of a judge for cause.

Grounds for removal are generally similar to those available against a judge of the Tax Court, except that mental or physical disability is made a ground for removal. (See 26 U. S. C. 1102.)

Paragraph (4) follows the retirement provisions applicable to judges of courts in Territories and possessions. (See 28 U. S. C. 373.)

Paragraph (5) provides authority on a temporary basis to fill any vacancy caused by the illness or disability of a judge of the Court of Military Appeals. The provision is adopted so that statutory authority will exist to keep the Court of Military Appeals at full strength during periods when the case load is very heavy. Such authority is desirable because of the provision in subdivision (c) requiring that the Court of Military Appeals act upon a petition for review within 30 days of its receipt.[8]

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[8] U. S., Congress, Senate, Report no. 486, Uniform Code of Military Justice, 81st Cong., 1st Sess., 1949, p. 6, p. 81

Comments pertaining to the Court of Military Appeals made on the floor of the Senate appear in the Congressional Record of February 2, 1950, and are extracted as follows:[9]

> MR. KEFAUVER... Following this review (by a board of Review), there is a review for errors of law by a single Court of Military Appeals composed of three civilians. It is apparent that such a tribunal is necessary to insure uniformity of interpretation and administration throughout the armed services. Moreover, it is consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians. The result of this pattern for an appellate system will be that the appellate procedure will be strengthened by a greater centralization of authority in tribunals, rather than in individuals as at present. This appellate system also has the virtue of being less complex than the present systems and should result in greater protection for an accused. In general, it is patterned after the appellate system of the Federal courts, with the court of military appeals closely following the procedures of the Supreme Court of the United States.
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> While some differences of opinion were expressed by the witnesses on the merits of the court of military appeals, the preponderance of opinion was favorable. Several individuals and some of the reserve associations criticized the court as too civilian in nature and as accomplishing an unnecessary amount of unification. There was also a difference of opinion between the Services themselves, with the Department of the Army registering a dissent to this type of court. On the other hand, the Navy, the Air Force, Professor Morgan, the bar associations, the AMVETS, the American Veterans Committee and a number of other witnesses strongly favor such a supreme civilian court of military law. The position of the proponents of this court is that it is necessary if the substantive and procedural law of the uniform code-which applies to all persons in the Service-is to be uniformly interpreted. In addition, they see a need for a final authority on the law and feel that the present system-whereby the Secretaries of the Departments of the President are called upon to decide questions of law-is completely inadequate. In addition, they believe that a court of this character, with the prestige of a United States Court of Appeals will do great deal to insure public confidence in the fairness of military justice. The House committee and our committee feel

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[9]U. S., Congress, House, Report no. 1946 Conference UCMJ, 81st Cong., 2nd Sess., 1950, p. 4.

that a court of this character will result in major improvements in the trial of courts-martial.

As originally drafted, the judges of this court were to be appointed by the President, after confirmation by the Senate for life. Our committee carefully considered this provision and felt that, since the court represents a new concept in military law, it was advisable to provide the appointment of the judges for a term of years, rather than for life. Accordingly, our committee amended the provision relating to tenure and has made them similar to the tax court of the United States and some of the Territorial courts.

MR. KEM. I should like to ask the Senator whether his committee has made a study of the business which would come before the Court of Military Appeals which is established by the bill, as provided at page 161.

MR. KEFAUVER. Yes; the committee has considered that problem and has made some study of it.

MR. KEM. In the course of a normal year in time of peace, how many cases would the court have to consider?

MR. KEFAUVER. Considering the number of courts-martial, the witnesses who testified before our committee, the Morgan committee, and the House committee, including those representing the three armed services, as I understand, were of the opinion that this court would be sufficient to handle cases which would come before it.

MR. KEM. I had no doubt that it would be sufficient; but my question was predicated on whether the court would have enough to do to keep its members busy, whether the bill would give the court jurisdiction sufficiently broad to keep three men busy throughout the year, in time of peace.

MR. KEFAUVER. I may say that was one of the questions which arose and which caused the Senate committee to recommend that the terms of the three judges be not for life, but for a certain number of years, the idea being that after a certain amount of experience we would know fairly well whether there should be additional judges or fewer judges.

But the general feeling was that there would be sufficient work, or perhaps a little more than sufficient, for them to do, to keep them very busy; that probably 2,000 or 3,000 cases a year would come to them.

MR. KEM. Of course there is no way to estimate the number of writs of certiorari which would be granted.

MR. KEFAUVER....Mr. President, one very worthwhile section of the proposed code is that which requires the Court of Military Appeals to make to the Congress an annual report in which it will state the number of cases it has tried, the disposition of the cases and its recommendations for improvement of the system. At the

present time Congress does not receive annual recommendations or reports about military justice.[10]

MR. MORSE. The purpose of House Bill 4080 which is now before the Senate is, of course, to create a Uniform code of Military Justice for all the services. While there is a common agreement upon the need for uniformity in the administration of the judicial system of the armed forces, there is considerable divergence of opinion concerning the propriety of bringing to military justice certain concepts of civilian justice, and an even greater difference of opinion as to the advisability of creating a court of appeals for the Military Establishment, the members of which shall be appointed from civilian life. I refer, of course, to article 67 of the pending bill which creates a Court of Military Appeals consisting of three judges appointed from civilian life by the President, by and with the consent of the Senate, located for administrative purposes in the National Military Establishment.

This court is a direct outgrowth of the Judicial Council constituted by section 226 of the Elston Act, Public Law 759, in the Office of the Judge Advocate General of the Army....[11]

MR. MORSE. Two objections have been interposed to the enactment of article 67. The first is that it places appellate power of cases tried by military courts in a civilian body, the members of which are not familiar with problems peculiar to the maintenance of dicipline in the armed services. The powers of review of the proposed court of military appeals are limited to matters of law. It would seem therefore, that the court would not be required to pass upon questions which involve technical military knowledge....[12]

The report of the Senate and House Conference contained the following comments pertaining to the Court of Military Appeals:

2. In section 1, article 67, the House had provided for the Establishment of a Court of Military Appeals, consisting of three judges appointed from civilian life by the President, by and with the consent and advice of the Senate, for life tenure. The House further provided that such judges were to receive the same compensation, allowances, perquisites, and retirement benefits as judges of the United States court of appeals. The Senate amended this provision by reducing the tenure of the judges from

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[10] Ibid., p. 1391.

[11] Ibid., p. 1469.

[12] Ibid., p. 1470.

life to a term of 8 years, providing that the first appointees should have staggered appointments with one expiring on March 1, 1953, a second on March 1, 1955, and a third on March 1, 1957, after which all successive appointments would be for a term of 8 years. While the Senate amendment left the salaries of these judges at $17,500 a year, it discarded the retirement benefits accorded judges of the United States court of appeals and substituted the same retirement benefits as those provided for judges of Territorial courts.

The conference agreement provides that the judges of the Court of Military Appeals shall be appointed for a term of 15 years, respectively, the first of which will expire on May 1, 1956, the second on May 1, 1961, and the third on May 1, 1966, with the terms of office of all successors to be for a full 15 year term.

The conference agreement also terminated the retirement provisions provided by the Senate amendment and substituted therefor contributory civil-service retirement. It will be noted that, as a result of the conference agreement, the bill makes no reference to retirement privileges. However, it is a well settled principle of law that employees of the executive, legislative, and judicial branches of the government for whom no other retirement system is provided will, as a matter of law, come within the provisions of contributory civil-service retirement. It is the intent of the conferees that this be the type of retirement for the judges of the Court of Military Appeals.

The House recedes and agrees to the Senate amendment with an amendment.[13]

Although there have been technical amendments to the Uniform Code of Military Justice, the composition of the Court or the qualifications of its members has not been changed since the court was established. By the act of March 2, 1955 the salary of each judge was increased from $17,500 to $25,500 a year.[14] The act also provided for the payment of travel expenses and reasonable maintenance expenses, not to exceed fifteen dollars a day, when outside the District of Columbia on official business.

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[13]U. S., Congress, House, Report no. 1946 Conference UCMJ, 81st Cong., 2nd Sess., 1950, p. 4.

[14]69 Stat. 10.

Functioning

The United States Court of Military Appeals (hereafter called the Court or USCMA) is a civilian tribunal. It is entirely independent of the military in the review of courts-martial cases under its jurisdiction, but is the highest appellate body in the military judicial system. It may be aptly called the supreme court of military justice. It has been nicknamed, "The GI Supreme Court" or "The Military Court of Last Resort". Its decisions establish precedents which are binding upon the services. It is a legislative rather than a constitutional court because it was established by Congress under authority implied from constitutional provisions other than Article III.[15] For administrative purposes, which extend to such matters as acquisition of supplies and security clearance of the court's staff, it is located in the Department of Defense.[16] The Court itself is physically situated in its own courthouse on 5th and E Streets, N. W., Washington, D. C.

The three judges of the Court must be appointed from civilian life. They may, however, hold a reserve commission in any of the Armed Forces. Appointment is by the President, by and with the advice and consent of the Senate. They may be removed by the President for neglect of duty, malfeasance, or upon the ground of mental or physical disability. In case of temporary disability, the President may designate a U. S. Court of Appeals judge to fill the office during the

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[15]Rocco J. Tresolini, American Constitutional Law, (New York: The MacMillan Company, 1959), p. 30.

[16]Uniform Code of Military Justice, Article 67. Henceforth cited as UCMJ 67.

period of disability.[17] The judges serve staggered terms of fifteen years at salaries of $25,500 a year.[18] The present fixed term of office will probably be changed to life tenure which would make tenure as well as salary equivalent to the U. S. Court of Appeals.[19] A bill, H. R. 3179, incorporating these features and provisions for retirement privileges and survivor benefits, was passed by the House of Representatives July 9, 1963.[20] There has been some consideration for increasing the membership to five.[21] The Court has a staff of approximately forty civilian employees, and has an annual budget of approximately $500,000.

The original members of the Court, who were appointed by President Harry S. Truman, were Chief Judge Robert E. Quinn, formerly Governor of Rhode Island and state Superior Court Judge, Judge George W. Latimer, formerly a justice of the Supreme Court of Utah, and Judge Paul W. Brosnan, Dean of Tulane University Law School. Brosnan, who died in office, in December 1955, was succeeded by Judge Homer Ferguson, appointed by President Dwight D. Eisenhower. Ferguson was formerly Judge of the Circuit Court of Michigan, U. S. Senator from Michigan, and Ambassador to the Philippine Government. Latimer, whose term expired in May 1961, was succeeded by Judge Paul J. Kilday, appointed by President John F. Kennedy; Kilday had been a Congressman from Texas

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[17]UCMJ 67 (a) (4).

[18]Public Law 9, 84th Congress, March 2, 1955. Sec. (i), 69 Stat. 10. The original salary was $17,500.

[19]Benjamin Feld, A Manual for Court-Martial Practice and Appeal, (New York: Oceana Publications, 1957), p. 91.

[20]Annual Report of the United States Court of Military Appeals, 1963, p. 50. Henceforth cited as USCMA.

[21]Feld, op. cit., p. 126.

in the U. S. House of Representatives since 1938. Chief Judge Quinn was reappointed by President Lyndon B. Johnson in May 1966.

Under the Uniform Code of Military Justice, the Court is empowered to prescribe its own rules of procedure. Jurisdiction is prescribed by rule three and Article 67 of UCMJ. The Court reviews the record of trial in the following cases:[22]

> (a) General or flag officers; death sentences. All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer, or extends to death;
> (b) Certified by The Judge Advocate General. All cases reviewed by a board of review which The Judge Advocate General forwards by Certificate for Review to the Court; and,
> (c) Petitioned by the accused. All cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court has granted a review, except those reviewed under Article 69.

As explanation of the rule, cases are reviewed on three bases: (1) mandatory or automatic review such as (a) above, (2) Certificate of Review; only the government can appeal as a right to the USCMA; the service may forward a Board of Review case to the Court for further review upon specific issues, and (3) Petition for Grant of Review; the most frequent basis of review is on grant of the accused's petition "on good cause shown."

Since its establishment, the Court, as of June 30, 1966, had docketed 19,839 cases. Of these, 18,364 were by petition, 438 by certificate, and only 37 mandatory. A tabulation of these statistics can be found in Table 2 and Table 3 in this chapter.[23] The cases include review of almost every conceivable type of criminal action. It

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[22]USCMA Rule 3.

[23]Annual Report USCMA, 1962-1966.

is now docketing approximately 800 to 1000 cases per year.

The Court will act only with respect to the findings and sentence as approved by the convening or reviewing authority, and as affirmed or set aside as incorrect in law, by a board of review. The Court has power to act only in regard to matters of law. In those cases which the Judge Advocate General forwards to the Court by certificate for review, action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, action need be taken only with respect to issues specified by the Court in its grant of review. The Court may, and frequently does, review other matters of law which materially affect the rights of the parties.[24]

Of the thirty-seven mandatory review cases there have been two flag or general officer cases (one Army and one Navy), and thirty-five death sentence cases (thirty Army, two Navy, three Air Force).[25] Following affirmance by a board of review, a mandatory case is forwarded automatically to the Court by The Judge Advocate General and may be accompanied by any assignment of errors or petition of the accused.

The Court has docketed a total of 427 certificates for review as follows: Army, 147; Navy, 208; Air Force, 77; Coast Guard, 6.[26] A certificate for review may be filed as a matter of right by the Judge Advocate General of the service or by the General Counsel of the Department of the Treasury (Coast Guard), in any case reviewed by a board of review. Such filing is not limited by whether the decision of the

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[24]Feld, op. cit.

[25]Table 2.

[26]Table 2.

board of review is for or against the accused, or whether the Court could otherwise review the case on petition for grant of review. Normally, when such a case is forwarded to the Court for review, it is because there is a question concerning the law of the case as applied by the board or an issue concerning the sufficiency of evidence.[27] The UCMJ is silent as to the time limit for filing the certificate of review; under the rules of the Court it must be filed within thirty days after receipt by The Judge Advocate General of the decision of the board of review.[28]

The most common group of cases reviewed by the Court consists of those in which it exercises its discretion and grants an accused's petition for review on a showing of good cause. The accused has thirty days from the time he is notified of the decision of the board of review, to petition the Court for a grant of review.[29] The Court has docketed a total of 19,364 petitions for grant of review as follows: Army, 10,498; Navy, 4,442; Air Force, 4,375; Coast Guard, 49.[30] Petition has been granted for 2,042 cases; cases granted are about 100 in a typical year; cases denied are about 800.[31]

Under the current practice of the Court, the concurrence of two judges is required for either granting or denying a petition for review. Denial of a petition amounts to affirmance of the decision of

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[27]Military Justice, (Extension Course Institute, Air University, 1962), V, 25.

[28]USCMA Rule 25.

[29]USCMA Rule 26.

[30]Tables 2 and 5.

[31]Tables 4-5.

the board of review, for it serves to terminate the appellate review of the case. The granting of a petition for review does not mean that the case is reversed; it simply means that the Court will take cognizance of the case and render an opinion.[32]

As stated, the Court has power to act only in regard to matters of law; unlike the board of review, the Court has no authority to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. The Court does, however, have the power to review the evidence to determine whether, as a matter of law, it supports the findings of guilty.[33]

Although there are prescribed forms for petition for Grant of Review, the Court has never insisted on rigid adherence. Thus it has held, that a letter by the accused can properly be considered a petition (United States v. Marshall, 4 USCMA 607, 16 CMR 181). A telegram can also constitute a petition (United States v. Korzeniewski, 7 USCMA 314, 22 CMR 104). A petition is forwarded through The Judge Advocate General of the service of the accused.[34]

While the USCMA has been described as "the Supreme Court" for the military justice system, its function of review is different from that of the U. S. Supreme Court. Unlike the Supreme Court, the USCMA's principal function is to correct prejudicial errors in the proceedings below. "Good cause" therefore, consists of specific errors, not the broader issues which influence the grant of certiori by the Supreme

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[32]Feld, op. cit.

[33]Ibid.

[34]USCMA Rule 17.

Court. Not every error of law is grounds for reversal or even corrective action. Errors which do not affect a substantial right of the accused are disregarded. Error may have been waived by failure to make timely objection or by a guilty plea, or by the accused's admission of guilt in his own testimony. On the other hand, certain errors which affect fundamental elements of the court-martial procedure provide a ground for review notwithstanding a failure to raise objection at the trial.[35]

Errors considered are: (1) sufficiency of evidence, which as a matter of law can support a finding of guilty, (2) errors in admission of evidence, and (3) instruction by the law officer. Errors are further classified into three classes:[36]

> Errors which deprive the accused of substantial procedural rights and privileges (these errors will justify reversal of a conviction regardless of compelling evidence of guilt).
> Errors which prejudice the accused in some material regard (such errors require corrective action only to the extent necessary to cure the harm).
> Errors which do not present a fair risk of harm to the accused (these may be disregarded).

In considering a petition for grant of review, if the first judge to review the record grants the petition his action is sufficient to bring up the case for review. On the other hand, if he denies the petition it is sent to a second judge. Two denials will normally end the appeal, however the third judge may still request a grant if he has a special interest. A denial of petition is announced by the Clerk of the Court and no reasons are ordinarily given.

If petition for Grant of Review has been granted, the Court may ask for final briefs to be filed and consider motions. After all

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[35]Feld, op. cit.

[36]Military Justice, V, 25.

briefs have been filed the Clerk of the Court sets a date for the hearing, giving at least ten day's notice.

Hearings are normally held two weeks in every month from September or October to late June or early July. At least two judges must be present and a judge not present at the hearing cannot participate in the decision except by consent of counsel for both sides. The appellant is entitled to open and close the argument. Argument is normally limited to forty-five minutes for each side. Questions by the judges are appropriate.

From fifteen to twenty-five cases are heard during a normal two-week period. Cases are assigned to each judge by rotation at a conference held at the end of each day of hearing. Each judge then is directly responsible for five to eight decisions for the Court, and must also review the decisions of the other judges. He may concur outright, concur in part, dissent in part or dissent to the whole of a decision. Usually each judge has one of the commissioners of the Court and a law clerk to assist him. Differences among the judges may be the subject of additional conferences to settle points of dispute.[37]

The Court generally issues a written opinion in every case heard, setting forth the reasons for its decision; this is in sharp contrast to other courts of appeal.[38] The concurrence of two judges is required for the rendition of a final decision. The opinion bears the name of the author judge and an indication as to the concurrence or

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[37] Ibid.

[38] U. S., Congress, Senate, Subcommittee of the Committee on the Judiciary, Hearings, Constitutional Rights of Military Personnel, 87th Cong., 2nd Sess., 1962, p. 193.

dissent of the other justices. It is not uncommon for judges to write separate opinions which concur in the same conclusion but for different reasons than those stated in the main opinion. Likewise, a dissenting opinion which states the legal reasons for the nonconcurrence of one of the judges is often appended.[39] Another type of opinion is that known as per curiam. In this type of opinion no author judge is indicated. A per curiam decision is used in a case that falls squarely within the reasoning of a previous decision of the Court.[40]

As of June 30, 1966 the Court had rendered 2,294 opinions; of these 2,275 were published. In forty-nine percent of the published opinions, decisions of boards of review were modified or reversed.[41] The published opinions of the Court are available in many large public libraries and in most bar association and law school libraries. The official reports of the Court are known as the Court of Military Appeals Reports (USCMA). The opinions of the Court may also be found in the Court-Martial Reports (CMR). One or more sets of the CMR's are maintained in each staff judge advocate office. In addition the most recent opinions of the Court are released weekly in unbound mineograph form. Printed pamphlets of opinions appear every two weeks.[42]

Errors are corrected by the Court in several ways. If there is insufficient evidence in the record to support the findings of guilty, the Court will dismiss the charges. In a case involving prejudicial

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[39]Military Justice, V, 25.

[40]Military Justice, V, 26.

[41]Table 5, 6.

[42]Statement of Staff Judge Advocate, Grand Forks Air Force Base, N. D.

error, the Court will set aside findings of guilty and usually will order a rehearing of the case. The Court occasionally dismisses the charges, however, if it appears that the interests of justice will best be served by such action. When the error affects some, but not all, findings of guilty, only those affected are set aside. The unaffected findings are affirmed.

A rehearing may be ordered of offenses as to which the findings have been set aside. In a multiple charge case, however, the Court may return the record of trial to the Judge Advocate General for reference to a board of review with directions that the board order a rehearing or that it order dismissal of the findings of guilty that have been set aside and that it reassess the sentence on the basis of the affirmed findings. The Court may affirm the sentence on the basis of the affirmed findings of guilty if the offense set aside is relatively minor in relation to the remaining charges.

Where the findings are unassailable but error affects the sentence, other corrective action is appropriate. If the entire sentence as adjuged by the court-martial is affected, a rehearing on the sentence only may be ordered; or the case may be referred to the Judge Advocate General for submission to a board of review for reconsideration of the sentence. When some but not all of the findings of guilty are set aside and dismissed, the case may be returned to The Judge Advocate General for redetermination of the sentence on the affirmed findings; however, if the affirmed findings are minor in relation to those which are dismissed, the Court will order a rehearing on the sentence. Rehearings are always before a court-martial whose

members have not acted previously in the case.[43]

Errors committed during the post-trial proceedings, as for example, the inadequacy of a staff judge advocate review, will result in a case being returned for corrective action to the review level at which the error occurred. If the particular reviewing authority is unable to correct the error with impartiality and freedom from the influence of the previous erroneous action, the case will be referred to another competent reviewing authority. Thus, if the error occurred at a general court-martial reviewing level, the case might be sent to a neighboring general court-martial reviewing authority for the preparation of a new review, if appropriate.

It has been said that creation of the Court was the most revolutionary change wrought by the Uniform Code of Military Justice.[44] "The decision of the Court of Military Appeals is final, and there is no further review by a United States Circuit Court of Appeals.[45] Numerous decisions of the Court have laid down far-reaching principles and have overturned many practices and procedures long used in the military system of law. The Court has invalidated, expressly or impliedly, many portions of the Manual for Courts-Martial and has held that its use by members of the court-martial is an error which denies the accused a fair trial.[46] Specific opinions concerned with Constitutional rights of the accused will be reviewed in chapters IV and V.

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[43] Manual for Courts-Martial, United States, 1951, p. 160.

[44] U. S., Congress, House, Report 491, UCMJ, H. R. 4080, 81st Cong., 1st Sess., 1949.

[45] Shaw v. United States, 209 F 2nd 811 (D. C. Cir. 1954).

[46] United States v. Boswell, 8 USCMA 145, 23 CMR 369 (1957). United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957).

TABLE 2

UNITED STATES COURT OF MILITARY APPEALS

CASES DOCKETED

	Total as of June 30,'60	FY 1961	FY 1962	FY 1963	FY 1964	FY 1965	FY 1966	15 years Total as of June 30,'66
PETITIONS								
Army	8,099	371	431	353	371	471	402	10,498
Navy	2,745	330	323	268	302	245	229	4,442
Air Force	3,196	252	193	204	176	204	150	4,375
Coast Guard	39	1	1	2	2	1	3	49
Total	14,079	954	948	827	851	921	784	19,364
CERTIFICATES								
Army	111	11	7	6	3	4	5	147
Navy	174	7	6	5	6	5	5	208
Air Force	43	6	4	9	8	5	2	77
Coast Guard	6	0	0	0	0	0	0	6
Total	334	24	17	20	17	14	12	438
MANDATORY								
Army	31	0	0	0	0	0	0	31
Navy	3	0	0	0	0	0	0	3
Air Force	2	1	0	0	0	0	0	3
Coast Guard	0	0	0	0	0	0	0	0
Total	36	1	0	0	0	0	0	37[1]
Total Cases Docketed	14,449	979	965	847	868	935	796	19,839[2]

[1] 2 Flag Officer cases; 1 Army and 1 Navy.

[2] 19,521 cases actually assigned docketed numbers. Overage due to multiple actions of the same cases.

TABLE 3

UNITED STATES COURT OF MILITARY APPEALS - CASES TRIED BY SERVICES, REVIEWED BY BOARDS OF REVIEW, AND DOCKETED

	FY 1962	FY 1963	FY 1964	FY 1965	FY 1966
COURT MARTIAL CASES					
Army	72,025	60,607	43,118	43,456	38,613
Navy	45,529	39,033	25,041	24,565	26,936
Air Force	15,429	12,850	7,551	4,821	3,315
Coast Guard	835	593	347	327	310
Total	133,818	113,083	76,057	73,169	69,174
CASES REVIEWED BY BOARDS OF REVIEW					
Army	1,418	1,465	1,491	1,261	1,092
Navy	3,212	3,208	2,727	2,376	2,411
Air Force	934	762	761	604	437
Coast Guard	27	27	13	9	14
Total	5,591	5,462	4,992	4,250	3,954
CASES DOCKETED WITH U.S. COURT OF MILITARY APPEALS					
Army	438	359	374	475	407
Navy	329	273	308	250	234
Air Force	197	213	184	209	152
Coast Guard	1	2	2	1	3
Total	965	847	868	935	796

TABLE 4

UNITED STATES COURT OF MILITARY APPEALS COURT ACTION

	Total as of June 30,'60	FY 61	FY 62	FY 63	FY 64	FY 65	FY 66	Total as of June 30,'66
PETITIONS								
Granted	1,442	114	101	88	99	86	112	2,042
Denied	12,212	842	799	765	758	823	672	16,871
Denied by Memorandum Opinion	2	0	0	0	0	0	0	2
Dismissed	9	1	2	0	2	1	0	15
Withdrawn	299	8	14	6	5	6	6	344
Disposed of by order setting aside findings and sentence	3	0	0	0	0	0	2	5
Disposed of on Motion to Dismiss;								
With Opinion	7	1	0	0	0	0	0	8
Without Opinion	36	2	1	1	0	0	0	40
Remanded to Board of Review	115	23	5	6	4	10	5	168
Court action due (30 days)[1]	77	57	88	57	38	47	42	42
Awaiting Replies	19	25	25	25	25	20	18	18
CERTIFICATES								
Opinions rendered	311	37	16	18	19	12	14	427
Opinions pending[1]	10	2	3	2	1	2	2	2
Withdrawn	6	0	1	0	0	0	0	7
Remanded	1	0	1	0	0	0	0	2
Set for hearing[1]	0	0	0	0	0	0	0	0
Ready for hearing[1]	1	1	0	0	0	0	0	0
Awaiting briefs[1]	6	1	0	0	1	2	0	0
Disposed of by Order	0	0	0	0	0	0	0	1
MANDATORY								
Opinions rendered	35	1	1	0	0	0	0	37
Opinions pending[1]	1	0	0	0	0	0	0	0
Remanded	1	0	0	0	0	0	0	1
Awaiting briefs[1]	0	1	0	0	0	0	0	0

[1]As of June 30, 1960, 1961, 1962, 1963, 1964, 1965, 1966.

TABLE 5

UNITED STATES COURT OF MILITARY APPEALS OPINIONS RENDERED

	Total as of June 30,'60	FY 61	FY 62	FY 63	FY 64	FY 65	FY 66	Total as of June 30,'66
Petitions	1,228	91	95	89	84	83	98	1,768
Motion to dismiss	10	1	0	0	0	0	0	11
Motion to stay proceedings	1	0	0	0	0	0	0	1
Per curriam grants	22	4	1	2	1	6	4	40
Certificates	272	34	15	17	15	11	11	375
Certificates and petitions	37	3	1	1	4	1	2	49
Mandatory	35	1	1	0	0	0	0	37
Remanded	2	0	0	0	0	0	0	2
Petitions for a new trial	1	0	1	0	0	0	0	2
Petitions for reconsideration of:								
Denial order	0	0	0	0	0	3	2	5
Opinion	0	0	0	0	0	0	1	1
Petition for new trial	1	0	0	0	0	0	0	1
Motion to reopen	1	0	0	0	0	0	0	1
Petitions in the nature of writ of error cerram nobis	0	0	0	0	0	0	1	1
Total[1]	2,610	134	114	109	104	104	119	2,294

[1] 2,294 cases were disposed of by 2,275 published opinions. 120 opinions were rendered in cases involving 67 Army officers, 29 Air Force officers, 16 Navy officers, 5 Marine Corps officers, 2 Coast Guard officers, and 1 West Point cadet. In addition, 19 opinions were rendered in cases involving 20 civilians. The remainder concerned enlisted personnel.

TABLE 6

UNITED STATES COURT OF MILITARY APPEALS COMPLETED CASES

	Total as of June 30,'60	FY 61	FY 62	FY 63	FY 64	FY 65	FY 66	Total as of June 30,'66
Petitions denied	12,212	842	799	765	758	823	672	16,871
Petitions dismissed	9	1	2	0	2	1	0	15
Petitions withdrawn	299	8	14	6	5	6	6	344
Certificates withdrawn	6	0	1	0	0	0	0	7
Certificates disposed of by order	0	0	0	1	0	0	0	1
Opinions rendered	1,603	133	114	109	104	104	119	2,286
Disposed of in motion to dismiss:								
With opinion	7	1	0	0	0	0	0	8
Without opinion	36	2	1	1	0	0	0	40
Disposed of by order setting aside findings and sentence	3	0	0	0	0	0	2	5
Writ of error coram nobis by order	0	0	0	0	1	1	0	2
Motion for bail denied	0	0	0	0	0	0	1	1
Remanded for board of review	115	23	6	6	4	10	5	169
Total	14,290	1,010	937	888	874	945	805	19,749

Pending completion as of June 30	1960	1961	1962	1963	1964	1965	1966
Opinions pending	38	16	19	15	20	10	17
Set for hearing	1	0	0	0	0	0	0
Ready for hearing	0	1	0	0	1	1	0
Petitions granted-awaiting briefs	9	17	14	9	10	9	7
Petitions-court action due 30 days	77	57	88	57	38	47	42
Petitions-awaiting replies	19	25	25	21	25	20	18
Certificates-awaiting briefs	6	1	0	2	1	2	0
Mandatory-awaiting briefs	0	1	0	0	0	0	0
Total	150	118	146	104	95	89	84

CHAPTER IV

CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL

Scope of Military Justice

Before examining the constitutional rights of military personnel, we should first consider why this is important. Kallen and Pepper, in a very comprehensive study of the scope of military justice,[1] pointed out that this is really the largest judicial system in our nation. In comparing the military with other judicial systems the study pointed out that in 1945, there were approximately 730,000 trials by courts-martial; during the same period there were about 37,500 criminals tried in all the Federal courts--a ratio of twenty to one. In our most populous state, New York, there were 207,000 cases for the same period--more than a three to one ratio. All figures excluded minor offenses.

> ....We conclude that the Armed Forces at peak mobilization in World War II not only handled one third of the nation's crime potential, but also that their courts handled one third of all criminal cases tried in the nation, with the remaining two thirds being divided between 49 civilian systems.[2]

The same study, estimating the peacetime situation of 280,000 cases per year in the military, compared to New York's 267,000 went on to say.

> Thus, even without a large-scale war, it would appear that the military system of justice handles a greater

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[1]Delmar Karlen and Louis H. Pepper "The Scope of Military Justice." Journal of Criminal Law, Criminology and Political Science. Sept.-Oct. 1952 Vol. 43, No. 3.

[2]Ibid.

> volume of criminal business than that of the nation's largest civilian system.
>
> ....The conclusion seems justified that military justice is the largest single system of criminal justice in the nation, not only in time of war, but also in time of peace; now, and as far ahead as we can see.[3]

If we realize that the armed service is predominantly composed of the sex and age group in which the incidence of crime is the highest, and that the serviceman is liable for military offenses as well as civilian offenses, we can appreciate the scope of military justice. Actually military offenses, which are entirely beyond the jurisdiction of civilian authority, account for approximately two thirds of all persons imprisoned by courts-martial sentences.[4]

Further, if we consider that today most of our servicemen are draftees, and those not actually drafted were impelled to volunteer because of direct and indirect influence of the draft, we can appreciate a new peacetime situation. Now we are actually concerned about civilians, temporarily in uniform, not the hard-core small regular force of the past.

Today, in dramatic contrast to pre-World War II conditions, our armed services number approximately three million; every resident male is a potential member of the peacetime military; active and reserve obligation encompasses over ten percent of a normal lifespan. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry the wisdom of being concerned about the rights of the military citizen should be apparent.[5]

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[3] Ibid.

[4] Ibid., citing MacCormick and Evjen, "Statistical Study of 24,000 Military Prisoners," Federal Probation, No. 2, pp. 6-8.

[5] Earl Warren, "The Bill of Rights and the Military." The James Madison Lecture for 1962, delivered at the School of Law, New York University, Feb. 1, 1962. N.Y.U. Quarterly, 1962.

Note the statistical tables at the end of this chapter which confirm the magnitude and scope of the military justice system. These data indicate that the study referred to above, which was completed in 1952, is not completely valid today. The reduced number of cases is a direct result of a recent change permitting greater use of non-judicial punishment, and also reflects an improvement in discipline under UCMJ.

Fundamental Rights

The United States Supreme Court and the Court of Military Appeals both believe that military personnel are protected by "fundamental constitutional rights."[6] Recently Chief Justice Earl Warren stated in a lecture at the School of Law, New York University:

> ....The Supreme Court indicated in Burns v. Wilson that court-martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights. The various opinions of the members of the Court in Burns are not, perhaps, as clear on this point as they might be. Nevertheless, I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.[7]

The United States Court of Military Appeals unequivocally stated in United States v. Jacoby, ".... the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[8] Chief Judge Robert E. Quinn, USCMA, has stated:

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[6]Burns v. Wilson, 346 U. S. 137, 346 U. S. 844 (1953). United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960).

[7]Warren, loc. cit.

[8]United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960).

> I firmly believe that accused persons in the military services are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication by the provisions of the Constitution itself.[9]
>
> I believe we hold among the most important judicial appointments in the country with the exception of the Supreme Court. Our jurisdiction is world-wide and with 3,000,000 men in the armed forces, we go into almost every home. The function of this court is to safeguard the rights of individuals which too often are ignored or violated by military organizations. As the public becomes more familiar with our work, I believe that draftees and their families will be more reconciled to military service made necessary by world conditions."[10]

At the time of the enactment into law of the Uniform Code of Military Justice, President Harry S. Truman remarked, "Under the provisions of this new and modern code, the democratic ideal of equality before the law is further advanced."[11]

Testifying at the Senate Hearings on Constitutional Rights, General Alan B. Todd, U. S. Army Assistant Judge Advocate General, stated:

> Congress has sought to insure that the provisions and protections granted by the Constitution extend to those individuals serving our Nation as members of the armed services. The Department of the Army and the Judge Advocate General believe that the intent of Congress that the protections of the Constitution of the United States extend to the members of the Military Establishment has become a reality. We welcome the opportunity to discuss the constitutional safeguards extending to each of us in the military services.[12]

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[9] United States v. Sutton, 3 USCMA 220, 11 CMR 220 (1953). See letter Quinn to Ervin

[10] Stanley Frank, "The GI's Day in Court." Nations Business. Jan. 1953, p. 36.

[11] New York Times, May 7, 1950, pp. 82, 83.

[12] U. S., Congress, Senate, Subcommittee of the Committee on the Judiciary, Hearings, Constitutional Rights of Military Personnel, 87th Cong., 2nd Sess., 1962, p. 99.

At the same hearings, General A. M. Kuhfeld, U. S. Air Force Judge Advocate General, said:

> ....I think there should be definite provisions for reviews that insure that the individual and all of his rights are protected. I can say this: I do not think that there is any question about his rights being protected under the present code. I was engaged 4 years as State's attorney, for years as Assistant Attorney General, and would say without any fear of successful contradiction that I know of no State or no system of the administration of justice in which the accused or the defendant has more protection than he has under the Uniform Code of Military Justice.[13]

Testifying at the same hearings, the Honorable Paul B. Fay, Jr., Under Secretary of the Navy stated:

> Relative to the matter of protecting and safeguarding constitutional rights in legal and administrative procedures, I feel that the rights of Navy men and Marines are adequately safeguarded under the provisions of the Uniform Code of Military Justice....The uniform code insures the protection of individual rights from the time of having committed an offense until final review of his case by the U. S. Court of Military Appeals is completed.[14]

The General Counsel of the Department of the Treasury, Fred B. Smith, demonstrated his concern for constitutional rights by this statement in the 1966 annual report pursuant to UCMJ:

> On June 13, 1966, the Supreme Court handed down its decision in Miranda v. Arizona, 348 U. S. 436, 86 S. Ct. 1662, enunciating concrete guidelines for the interrogation of persons suspected of crime. On June 15, district legal officers of the Coast Guard were advised that in view of the Miranda decision, whenever an Article 31 warning was given, the suspect so warned was also to be informed that he had a right to consult a lawyer before being questioned, and to be told specifically: "You have the right to have the lawyer or the counsel designated for you present with you during the inter-

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[13] Ibid., p. 155.

[14] Ibid., p. 51.

> rogation." The Coast Guard was thus the first armed force to embrace the Miranda rules.[15]

The views of the members of our legislative branch are better known. Some have been cited in chapters 11 and 111; note Appendix. In his introduction to the 1962 Senate Hearings on Constitutional Rights the Chairman, Senator Sam J. Ervin, Jr., reviewed the objectives of Congress as follows:

> The hearings that preceded enactment of the Uniform Code of Military Justice indicate that Congress had in mind a number of fundamental rights which it wished to protect for the serviceman....In an effort to provide for minimal standards of "due process" in major cases, Congress created the post of law officer....The establishment of direct civilian review of court-martial convictions, an inovation in American military justice, furnished the serviceman a remedy for invasion of many important constitutional rights.....etc.[16]

The recognition of individual rights of military personnel is a relatively recent concept. The relationship of the Constitution and more specifically the Bill of Rights has rapidly assumed increasing importance because of changing domestic and world conditions.

Traditionally, military organizations have been composed of individuals who gave up their citizen rights. They were in a kind of "Servitude." Blackstone referred to soldiers as occupying a "State of Servitude in the midst of a nation of Freemen", and added that the soldier's position was "The only State of Servitude" in England. In the early years of our own Republic our armed forces consisted of small bands of volunteers. The individual serviceman was not highly regarded and there was little worry about loss of rights on his part.

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[15] Annual Report, USCMA, 1966, p. 65.

[16] Hearings, CRMP, Note 12 SUPRA, p. 4.

Strict discipline was the rule and was considered necessary for military success. There is strong evidence that the framers of the Bill of Rights did not consider that its provisions applied to any but civil trials.[17]

It is interesting to note that even the United States Court of Military Appeals, whose members frequently espouse constitutional rights of servicemen, in an early case concluded that such rights do not stem from constitutional guarantees, but rather are based solely upon Federal Legislation.[18] In United States v. Clay Judge Latimer stated:

> We look to the acts of Congress to determine whether it has declared that there are fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said he has been fairly convicted.
>
> There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses.
>
> Some of them are more important than others, but all of sufficient importance to be a significant part of military law. We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of a more descriptive phrase, we label the pattern as "military due process" and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted. The UCMJ contemplates that he be given a fair trial and it commands us to see that the proceedings in the courts below reach that standard.
>
> Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudences for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom these rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we cannot give the same legal effect to the

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[17]General Hull was tried by court-martial and sentenced to death. At the trial he asked to have his lawyer speak for him and was refused. Since this was a case involving a General officer and death sentence it came before the President, James Madison, the draftsman of The Bill of Rights. He approved the proceedings. (from Frederick Bernays Wiener, "Courts-Martial and The Bill of Rights," 72 Harv Law Rev. 266 (1958), pp. 294-304).

[18]United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

> rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.
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> As we have stated in previous opinions, we believe Congress intended, insofar as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military forces from certain vices which infested the old system. Believing this, we are required to announce principles consistent therewith.
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> A cursory inspection of the UCMJ, discloses that Congress granted to an accused the following rights which parallel those afforded to defendents in civilian courts: To be informed of the charges against him: to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offenses, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur with findings to this effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.
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> ....We impose upon military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process.[19]

The Court of Military Appeals later insisted that except for the right to presentment by grand jury and to trial by petit jury, an individual in the military service has every right and privilege guaranteed to any citizen by the Constitution.[20] Also in United States v. Jacoby, The Court of Military Appeals ruled, "The protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[21] Richard L. Tedrow, Chief Commissioner, USCMA, has stated:

> There is no question but that all three members of the present Bench (Quinn, Ferguson, Kilday) hold that those

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[19] Ibid.

[20] United States v. Burney, 6 USCMA 776, 21 CMR 9 (1956)

[21] United States v. Jacoby, 11 USCMA 429, 29 CMR 244 (1960).

> in the military are entitled to all constitutional rights unless they are excluded directly or by implication. In the early days Brosnan had various doubts about this in finding necessary exceptions on occasion; Latimer took the position that a civilian constitutional right must first be granted by the Congress to those in the military.[22]

A sharp division has always existed between the military court-martial system and the United States judicial systems. The United States Supreme Court has maintained a hands-off attitude toward review of military justice.[23] The Court's interest has been concerned with jurisdiction only. The Supreme Court ruled in Dynes v. Hoover, that the court-martial system is not a part of the judicial system of the United States. Considering provisions of the Constitution the Court stated:

> These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that power to do so is given without any connection between it and the Third Article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other.[24]

Since courts-martial are not included among the "inferior courts" of Article 3 and are not a part of the Federal Judicial system, there is no direct appeal channel to the Federal Appellate courts. During the civil war the system of military trials was challenged in the Supreme Court. The Court dismissed the case, stating that it was without jurisdiction to review the proceedings of a military tribunal.[25]

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[22]Richard L. Tedrow, Digest: Annotated and Digested Opinions, U. S. Court of Military Appeals (Harrisburg: The Stackpole Company, 1966), p. 658.

[23]Warren, loc. cit.

[24]Dynes v. Hoover, 20 How. (61 U. S.) 65 (1857).

[25]Ex Parte Vallandigham, 1 Wall. 243 (1864).

For court-martial matters to come before the Federal courts, persons held or tried by the military must petition the Federal courts for writ of habeus corpus. By so petitioning, a person detained by or because of military authority raises the issue of whether the military has the power to detain and try him. This is the basic issue of jurisdiction. The petition may be made to the appropriate Federal District Court and may reach the Supreme Court by way of appeal. In an early example, which has been considered as one of the great landmark decisions in the cause of civil supremacy, Ex Parte Milligan, the court ruled that the military had no jurisdiction over a civilian, even in time of war, if civil courts were operating. The Court was particularly concerned about the Constitutional rights of the civilian.[26] In Grafton v. United States the Court ruled:

> Courts-martial are lawful tribunals, with authority to determine finally any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.[27]

Later Supreme Court jurisdictional cases, even after the Uniform Code of Military Justice, have declared that military courts have no jurisdiction over civilians, citing the lack of constitutional guarantees.[28] These rulings have declared unconstitutional certain provisions of the UCMJ granting jurisdiction over civilians. (Article 3(a) and Article 2(11).

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[26]Ex Parte Milligan, 4 Wall. 2; 18 L. ed. 281 (1866).

[27]Grafton v. United States, 206 U. S. 333 (1907).

[28]United States ex rel Toth v. Quarles, 350 U. S. 11; 76 Sup. Ct. 1 (1955).

But now with the decision in Burns v. Wilson, the Supreme Court has shown that; "Court-martial proceedings could be challenged through habeus corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights."[29]

In another case, although not directly involving a court-martial proceeding, the Supreme Court showed a special interest in the civilian serviceman's basic rights. In this case the court considered a provision of our law that acted retroactively to denationalize a citizen convicted of wartime desertion by a court-martial. Under this provision, over 7000 men who had served in the Army alone, in World War II, were rendered stateless. It was the decision of the Court that by this act, Congress had exceeded its constitutional powers by depriving citizens of their birthright. Four members of the Court, including the chief justice, expressed the view that this law, effectively denying the person's rights to have rights, was a cruel and unusual punishment. The need for military discipline was considered an inadequate foundation for expatriation.[30]

The executive branch of our government has also been reluctant to recognize the constitutional basis for the serviceman's rights. As late as 1911, it was generally denied that the personal guarantees found in the constitution applied to men in uniform.[31] We even find under UCMJ that some court-martial officers believe that persons in the military do not have constitutional rights. The Court of Military Appeals reversed one conviction where the court-martial president stated

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[29]Warren, loc. cit.

[30]Trop v. Dulles, 356 U. S. 86.

[31]James Snedeker, Military Justice Under The Uniform Code (Boston: Little Brown and Co. 1953), p. 445 N. 1 citing, JAG, Navy, June 29, 1911.

his belief that servicemen have no constitutional rights except as given in the Code.[32] Also in a most recent answer to a contention by the Navy's Judge Advocate General that, "military law is in nowise affected by constitutional limitations", the Court said, "the time is long since past when this Court will lend an attentive ear to the argument that members of the armed forces are by reason of their status, ipso facto deprived of all protections of the Bill of Rights."[33]

Even the United States Air Force, whose military justice experience has been almost entirely under the UCMJ[34] has, at least in some cases, disregarded some of the basic rights. An editorial in the Washington Post was especially critical.

> The case of Captain Joseph P. Kauffman, now before the United States Court of Military Appeals, has exposed some thoroughly abhorrent conduct on the part of the United States Air Force. Captain Kauffman was convicted, of conspiracy to commit espionage--and was certainly guilty of conduct that was extremely foolish if not actually disloyal. But the Air Force, by its own admission, was guilty of conduct that violated the law--and violated fundamental standard of fairness and decency as well.
>
> The Air Force admitted that, in its investigation of the Kauffman case, its agents illegally broke into the officer's off-base home four times and searched it without a warrant. These agents also tapped his telephone and listened in on conversations between him and his attorney. This reckless disregard of the law and of a defendant's rights recalls the recent case of Airman Gerald M. Anderson from whom a confession was extorted after 40 hours of grilling by Air Force investigators less than a year ago in Idaho. What manner of Gestapo is the Air Force operating?

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[32] United States v. Deain, 5 USCMA 44, 17 CMR 44 (1954).

[33] Time, May 5, 1967 Vol. 89 No. 18 p. 50.

[34] The Air Force operated initially under the Army Articles of War until the UCMJ became effective in May 1951 (Act of June 25, 1948; c. 648, 62 Stat. 1014).

> It is beside the point that the conduct of the Air Force was no doubt prompted by zeal and by concern for the national security. The Air Force was established as a defender of American values and what is proudly called an American way of life. It cannot protect those values and that way of life by disregarding them.[35]

The Anderson case referred to caused considerable notoriety for the Air Force and its Office of Special Investigations. In this case, Anderson confessed to a double murder after intensive interrogating. Seven months later he was exonorated while in theElsinore County, Idaho, jail awaiting trial. Another man confessed and convinced authorities of Anderson's innocence.[36]

Of Course one would expect the military to be more concerned with overall discipline than with the rights of the accused. The armed forces have always considered military justice, or more specifically the court-martial, as an instrument to enforce discipline.

> Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."[37]

This followed the British concept, "It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the Army."[38]

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[35]Washington Post, Oct. 23, 1963 (U. S. v. Kauffman, 14 USCMA 283, 34 CMR 63).

[36]James R. Phelan, "Innocent's Grim Ordeal," Saturday Evening Post, Feb. 2, 1963.

[37]William Winthrop, Military Law (Washington: W. H. Morrison, 2 vols, 1886), Vol. I, p. 52.

[38]Ibid., p. 53 (citing Clodes, "Military Forces of the Crown," Vol. 6).

Professor Morgan, in discussing the background of the Uniform Code, emphasized the problem of satisfying Secretary Forrestal's directive to frame a code that would provide full protection of the rights of persons subject to the code without undue interference with appropriate military functions. "This meant complete repudiation of a system of military justice conceived only as an instrumentality of command."[39]

Whether we consider that the serviceman's rights are constitutional or statutory, or were given by the founding fathers or subsequent lawmakers, or were recognized by old or new judicial decisions, the fact remains he now has protections equal to and in some cases greater than his civilian counterpart.[40] Since our military justice system is based on constitutional authority let us examine those rights or guarantees based on the Constitution. The Uniform Code mentions some of them but is silent on others, and nowhere enumerates the guarantees applicable.

Comparisons of Justice

All of the guarantees enumerated in the Constitution do not apply in courts-martial. Some are specifically excepted, and some are by their history inapplicable in whole or part. The prohibition of

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[39]Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," Vanderbilt Law Review, Vol. 6-169, Feb. 1953.

[40]Carrol C. Moreland, Equal Justice Under Law: The American Legal System (New York: Oceana Publications Inc., 1957) p. 55. William C. Hamilton, Jr., "Military Law: Drumhead Justice is Dead," American Bar Association Journal Vol. 43 Sept. 1957, p. 797. See statement by A. Kenneth Pye, Assoc. Dean and Prof. of Law, Georgetown University Law Center. Senate Hearings, Constitutional Rights of Military Personnel, 1962, p. 567; and Testimony p. 787. Also see Michigan Law Review, Vol. 63-1, Nov. 64. "...Courts-martial, unlike their civilian counterparts, are paternalistic and designed to deal with the internal affairs of the military when summary command discipline is appropriate. The maximum limits on punishment, the stringent rules against self-incrimination, and the elaborate system of automatic and discretionary review found in military courts offer greater protection to a defendant before a court-martial than he would receive in civilian courts."

prosecution for a capital or otherwise infamous crime except upon presentment or indictment of a grand jury is specifically excepted from operation in cases arising in the land or naval forces.[41] The right to a jury trial is excepted by implication; that right is interpreted as applicable to those whom the right of grand jury action is guaranteed by the Fifth Amendment.[42] The right to a trial in the state where the crime was committed, and the protection against excessive bail have never been held applicable to courts-martial procedure; they were not so applicable at the time of the adoption of our Constitution, and it is upon the background of the conditions existing at that time that the language of the Constitution is interpreted.[43] The prohibition of warrants issued upon other than probably cause, supported by oath, and being specific as to place, persons, and things[44] does not apply to courts-martial for the same historical reason; but the failure to make any provision in the armed forces for the issuance of search warrants does not operate to give to military authorities unlimited power to make searches and seizures.[45] The guarantee against unreasonable searches and seizures applies to persons in the armed forces, but greater latitude is allowed, due to the exigencies of military service, in the determination of what may be unreasonable.[46]

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[41] U. S., Constitution Amend. V.

[42] Ex Parte Milligan, 4 Wall. 2, 18 L. ed. 281 (1866).

[43] Ex Parte Quirin, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

[44] U. S., Constitution Amend. IV.

[45] Best v. United States, 184 F. 2nd 131, (C. C. A. 1st. 1950).

[46] Gillars v. United States, 182 F. 2nd 962, (APP. D. C. (1950).

Although many scholars have shied away from comparing military and civilian justice because of basic differences, a number of seemingly valid comparisons can be made. Some of the fundamental guarantees which apply to an accused in military justice are the following:[47]

1. Right to be informed of the nature and cause of the accusation (U. S. Const. Amend. VI).

2. Right to have the assistance of counsel for his defense (U. S. Const. Amend. VI).

3. Right to a speedy trial (U. S. Const. Amend. VI).

4. Right to a public trial (U. S. Const. Amend. VI).

5. Right to be confronted with the witnesses against him (U. S. Const. Amend. VI).

6. Right to have compulsory process for obtaining witnesses in his favor (U. S. Const. Amend. VI).

7. Protection against compulsory self-incrimination (U. S. Const. Amend. V).

8. Protection against unreasonable searches and seizures (U. S. Const. Amend. IV).

9. Due process of law (U. S. Const. Amend. V).

10. Prohibition of cruel and unusual punishments and excessive fines (U. S. Const. Amend. VIII).

11. Protection against double jeopardy (U. S. Const. Amend. V).

12. Other rights retained by the people and not delegated to the Federal Government (U. S. Const. Amend. IX).

The right of the accused to be informed of the nature and cause of the accusation against him entitles him to insist that the charges

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[47] Snedeker, op. cit. p. 447.

and specifications apprize him, in advance of trial, of the offense charged, with such reasonable certainty that he can make his defense and subsequently protect himself against another prosecution for the same offense. Under the UCMJ,[48] an accused must be immediately informed of the specific wrong of which he is accused, if placed under arrest; he must be informed of the charges against him as soon as practicable after they have been formally drawn; he must be advised of such charges when a pretrial investigation is ordered; and he must be served with a copy of the charges prior to trial. The UCMJ is still subject to some criticism because of the vagueness of the General Article 134. This Article, although an improvement over the former AW 96 and AGN 22, "Conduct to the prejudice of good order and discipline", is criticized because a potential offender cannot be sure of the nature of the offense. Of course when actually being informed of the nature of the charge specific language is used. In general the basic right is upheld.

The right to have assistance of counsel for the accused's defense is recognized as essential to any fair trial of a case prosecuted by the Federal Government.[49] Assistance of counsel means not only the right to have counsel, but to have qualified counsel, and the right to an opportunity for such counsel to examine the facts and the law and to have reasonable time to prepare a defense. This right applies to court-martial,[50] and was denied in part under the old system. Under

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[48]UCMJ 10, 30 (b), 31(b), 35. UCMJ 30 presupposes the existence and application of the Constitutional Right.

[49]The Supreme Court Miranda decision has made the right to counsel applicable to State Justice, even in pre-trial procedure. This decision has also resulted in some adjustments in military procedure.

[50]Johnson v. Zerbst, 304 U. S. 458, 58 Sup. Ct. 1019 (1938).

UCMJ, the accused has the right to counsel at the pretrial investigation, during the trial, and before appellate review agencies.[51] Counsel will be provided for him. The USCOMA has ruled that the right to obtain his own counsel even applies in the police investigation of a suspect as part of military due process.[52] The UCMJ provides that defense counsel for a general court-martial must be a fully qualified lawyer certified by the Judge Advocate General as competent to perform as defense counsel.[53] In a special court-martial he need not have legal qualifications unless the tiral counsel (prosecutor) is so qualified.[54] The accused has the right to choose his military counsel; he will be provided if reasonably available. In any case the accused can obtain the services of civilian counsel at his own expense.[55] In general the basic right is fully protected.

The right to a speedy trial must be considered as relative and must be dependent upon the circumstances of a particular case. Reasonable delay is acceptable.[56] Unjustified delays, however, if they deprive the accused of support of witnesses or prejudice his defense are violations of the right. Under UCMJ, the right to a speedy trial is protected by

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[51] UCMJ 32(b), 38(b), 70(c), (d).

[52] United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957). This seems to be a forerunner of the Miranda rule.

[53] UCMJ 27(b).

[54] UCMJ 27(c). In practice, the Air Force now provides counsel in special courts-martial if the offense is serious enough for a possible bad conduct discharge as punishment. The Army always refers such cases to general court-martial where counsel is provided.

[55] UCMJ 38(b). "Reasonably available" depends on military priority.

[56] Beavers v. Haybert, 198 U. S. 77, 25 Sup. Ct. 573 (1905).

the provision that immediate steps be taken to try the accused or to dismiss the charges.[57] There is also a requirement that general court-martial charges must be forwarded to the officer exercising general court-martial jurisdiction within eight days after arrest.[58] Article 33 contains the provision "if practicable." This condition has been the subject of some criticism by the U. S. Court of Military Appeals, which in one particular case stated:

> While, under the particular circumstances of this case, we find neither a denial of due process nor prejudice to the substantial rights of the accused, we emphasize the duty and responsibility of every officer to comply with the mandates of the Uniform Code. In the past, we fear, Article 33 has been observed more often in the breach than in following its clear terms. In order to avoid future controversies in this area, we suggest that the attention of all concerned with the processing of court-martial matters be forcibly drawn to its unambiguous command.[59]

While there is punitive action provided against offenders[60] for violating Article 33, there is no Code remedy provided for the accused. In general the right is upheld and most military cases are completed more quickly than civilian cases.[61]

The right to a public trial is a right to have the court sit "with open doors" during the presentation of evidence. It originated because of aversion to Star Chamber practice, and was imprinted on the minds of our country's founders by fears arising from memory of the

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[57]UCMJ 10. The constitutional right was discussed in the hearings on the Code. House Hearings UCMJ, 829, 906, 911, 983, 1012.

[58]UCMJ 33.

[59]United States v. McKenzie, 14 USCMA 261, 34 CMR 141 (1964).

[60]UCMJ 98.

[61]Morris O. Edwards and Charles L. Decker, The Serviceman and The Law (Harrisburg: The Military Service Publishing Co., 1961) p. 93.

Spanish Inquisition.[62] The scope of the right has been subject to disagreement, but according to the Supreme Court, the purpose is to allow the public to see that the accused received fair treatment and to act as an effective restraint on possible abuse of judicial powers.[63] The accepted practice is to exclude young persons when public decency may be offended. Under the Uniform Code the same general rules apply. The right to a public trial is not specifically mentioned in UCMJ, but in the House hearings on the Code, it was discussed and agreed that the right applied.[64] The U. S. Court of Military Appeals has indicated that except in security matters, the right to a public trial is the same in the military as in civilian courts.[65] There is a provision in the Code to extend the Statute of Limitations if trials must be deferred during wartime.[66]

The right of confrontation is a common law right which has always had some exceptions. Typical exceptions are dying declarations and former sworn testimony of a witness now deceased.[67] The Sixth Amendment preserved and continued the common law right. This right assures an accused that only those witnesses who personally appear at his trial and are subject to his cross examination can testify against him. Under UCMJ this right is only partially upheld. The Code provides that the prosecution may, upon notice to the accused, take depositions of

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[62] In re Oliver, 333 U. S. 257, 68 Sup. Ct. 499 (1948)

[63] Ibid.

[64] House Hearings UCMJ, 743, 983, 1044.

[65] United States v. Brown, 7 USCMA 251, 22 CMR 41 (1957).

[66] UCMJ 43(e). See also MCM 53(e).

[67] Kirby v. United States, 174 U. S. 47, 19 Sup. Ct. 878 (1899).

witnesses who are unable or refuse to testify in person. Such depositions may be read in evidence.[68] The U. S. Court of Military Appeals, however, has ruled that valid depositions require the presence of accused or defense counsel at the taking, and that written interrogatories are insufficient protection for the rights of the accused. Of course the accused can waive this right.[69] This ruling is considered an exceptionally strong pronouncement for the accused's constitutional rights. Statutory authority for depositions based on military necessity date back to AW 25 and AGN 68. The unconstitutional aspects have been argued many times in the past.[70] With the USCMA ruling, the right is substantially upheld in military justice.

The right to compulsory process for obtaining witnesses in the accused's favor is not an absolute right; it should not be denied, however, unless the demand for witnesses is unreasonable. It was not a common law right and the constitutional guarantee does not compel the prosecution to secure the attendance of defense witnesses.[71] Examples of unreasonableness might be the immaterial nature of the expected testimony, or the accumulation of extra corroborative witnesses. In Federal criminal cases it is the duty of the Judge to issue subpoenas and to send for defense witnesses within jurisdiction of the court. This may be at government expense if the accused is unable to bear the cost.[72]

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[68] UCMJ 49.

[69] United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960).

[70] Antieau, "Courts-martial and the Constitution," 33 Marq. L. Rev. 25 (1949).

[71] Keller v. State, 123 Ind. 110, 23 N. E. 1138, 18 AM. St.

[72] United States v. Kenneally, 26 Fed. Cas. 760, No. 15, 522, (N. D. 166, 1870).

Under UCMJ the right to have compulsory process to obtain defense witnesses is authorized. "The trial counsel, 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."[73] There has been some anxiety concerning the "equal opportunity" condition. "The issuances of subpoenas for distant witnesses has sometimes been dependent upon the state of the budget, not upon the materiality of the testimony."[74] The United States Court of Military Appeals has had relatively few issues of compulsory process, but has been careful to protect the right of the accused.[75]

The right against compulsory self-incrimination is one of the most publicized in our society. The basic rule is aimed at physical or moral compulsion to extort communications which would expose to criminal prosecution the person from whom they are extorted.[76] It is not limited to oral testimony, but protects against the use of legal process to compel production in evidence of written communications, such as books and papers, of an incriminating character.[77] It applies to a witness as well as to the accused. The accused cannot be compelled to testify at his own trial; if he becomes a witness it must be at his own request.[78]

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[73]UCMJ 46.

[74]Snedeker, op. cit. p. 453.

[75]United States v. Thorton, 8 USCMA 446, 24 CMR 256 (1958). United States v. Hawkins, 6 USCMA 135, 19 CMR 261 (1955). United States v. Daniels, 11 USCMA 52, 28 CMR 276 (1960).

[76]Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2 (1910).

[77]Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524 (1886).

[78]U. S., Constitution Amend. V. "....nor shall be compelled in any criminal case to be a witness against himself...."

The right extends to joint trials in that one accused may not be compelled to testify against the other. Of course voluntary confessions, statements, etc. are not self-incrimination if introduced into evidence. The requirements for accused persons to undergo intoxication tests, display parts of the body, assume a specific stance, etc. are not considered compulsory self-incrimination in Federal Courts. Under UCMJ this right is more than adequately protected.[79] This constitutional right was covered in the old AW 24 and AGN 42, but the Code goes even further. The UCMJ prohibits anyone subject to the Code from interrogating or taking any statements from an accused, before informing him of the nature of the accusation, and advising him of his right to refuse to make any statement. Compulsion of any sort is prohibited and may itself be punishable by the Code. Although the right is legally established, the superior-subordinate relationship in a military society has some tendency to be a form of compulsion.[80] Winthrop, one of the most revered authorities on military law, long ago recommended that, in view of the authority and influence of superior rank, confessions made by military subordinates held in confinement should be held incompetent.[81] The United States Court of Military Appeals negated certain provisions of the Manual for Courts-Martial, United States, 1951, by rulings on the privilege against self-incrimination. The USCMA decisions said that the privilege is violated: by requiring an accused to make a sample

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[79] UCMJ 31. House Hearings UCMJ, 988.

[80] See Professor Arthur Keefe's description of the Navy's "Sugar Cane Rape Cases" in Hawaii in 35 Cornell L. Q. 164 (1949). See also notes 35 and 36 Supra.

[81] Winthrop, op. cit., p. 329.

of his handwriting;[82] by requiring an accused to utter words for the purpose of voice identification;[83] and by compelling a person to furnish a urine specimen for the purpose of using an analysis of it, as evidence against him.[84] These decisions have made it clear that Article 31, UCMJ, is much broader than the Fifth Amendment and affords greater protection to the military accused.

The protection against unreasonable searches and seizures[85] is dependent upon the reasonableness of a search or seizure made without a search warrant, considering all the circumstances. The boundaries of the right of privacy are not necessarily those of reasonableness, and the opportunity to secure a search warrant in advance is but one factor, not a conclusive test. A search may be reasonable if made as an incident to a lawful arrest.[86] Also the Supreme Court has held that, a search without a warrant may be conducted on "probable cause" if an offense is in progress. The Rabinowitz v. United States and other recent decisions demonstrate that easy generalizations in this field are extremely dangerous; it is difficult to formulate a precise rule which can be applied to every case. The law of search and seizure

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[82]United States v. Rosato, 3 USCMA 143, 11 CMR 143 (1953). United States v. Eggers, 3 USCMA 191, 11 CMR 191 (1953).

[83]United States v. Greer, 3 USCMA 576, 13 CMR 132 (1953).

[84]United States v. Jordan. 7 USCMA 542, 22 CMR 242 (1957).

[85]In general, the Fourth Amendment forbids police officers to search persons, houses, papers and effects without a warrant issued by a proper judicial officer.

[86]A search may be made without a warrant as an incident to a lawful arrest. United States v. Rabinowitz, 359 U. S. 56, 70 Sup. Ct. 430 (1950).

is uncertain and extremely complex.[87] For example, even though probable cause for arrest of a person may justify the arrest, a subsequent search may be made unreasonable because of the method used.[88] Related to the basic right of the Fourth Amendment is the right of privacy in the use of communications media. This is supported by section 605, Federal Communications Act of 1934,[89] which provided that, "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The basic use of wiretaps and other communications interception techniques is a controversial legal issue.[90] In the military, under UCMJ, the protection against unreasonable searches and seizures applies fully to the private homes and property of persons subject to military law when they are located outside the limits of areas under military control.[91] The protection applies also to quarters and property inside areas under military control, but the reasonableness test might well be different; consider, for example, the responsibility of the commanding officer for safety, order, and discipline in such areas.[92] "The mere fact that the issuance of search warrants by the armed forces is not provided for,

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[87]Rocco J. Tresolini, American Constitutional Law, (New York: The MacMillan Company, 1959), p. 546.

[88]Forcible use of a stomach pump without consent was held unreasonable. United States v. Willis, 85 F. Supp. 745 (S. D. Calif., 1949).

[89]48 Stat. 1103; 47 U. S. C. 605.

[90]W. S. Fairfield and Charles Clift, "The Wiretappers," The Reporter, Dec. 23, 1952, p. 9; Jan. 6, 1953, pp. 9-20.

[91]House Hearings UCMJ, 1062.

[92]Best v. United States, 184 F. 2nd. 131 (CCA 1st. 1950).

however, does not confer upon such forces the power to make unreasonable searches and seizures."[93] Evidence is inadmissible against an accused if it was obtained as a result of an unlawful search or in violation of the Federal Communications Act of 1934. Additionally, all evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible.[94] In general, the Federal rules are applicable and the right is well protected. "The general principles governing search and seizures are simple, but not always easy to apply. Essentially each case must depend upon its own facts."[95] USCMA decisions will be discussed in the following chapter.

The right to Due Process of Law has been another highly publicized and controversial doctrine in constitutional law. The major controversy has been concerned with its application to States, as a clause in the Fourteenth Amendment.[96] The basic right, "....nor be deprived of life, liberty, or property, without due process of law....,"[97] is the concern of Federal and therefore Military Justice. Due process is generally a procedural right and is the recognition and respect of substantial rights other than the specific fundamental rights listed in the Constitution and Amendments. These rights have generally been deemed essential to a fair trial in American Justice. When any of these rights are denied

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[93] Ibid.

[94] MCM 152. Also see Major Fenton J. Mee, USMC, "Search and Seizure," Navy JAG Journal, Mar., 1948, p. 2.

[95] United States v. Wilcher, 4 USCMA 215, 15 CMR 215.

[96] Walton H. Hamilton, "The Path of Due Process of Law," The Constitution Reconsidered (Conyers Read, ed.) (New York: Columbia University Press, 1938), p. 167.

[97] U. S., Constitution Amendment, V.

and the denial is a substantial prejudice against an accused, there has been a denial of due process.[98] In military justice, the right to due process is not well covered under UCMJ. There has developed, however, a "military due process" pattern for fair treatment. This pattern is based on the laws enacted by Congress and generally parallel civilian justice. The United States Court of Military Appeals has assumed the role of enforcing this concept. "We impose upon military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process."[99] The Supreme Court moreover in Burns v. Wilson stated:

> ....For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers-as well as civilians-from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than by finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.[100]

There are of course, many military due process rights and protections for the accused, in the Code and the Manual for Courts-Martial, but they are not defined as such. As cited by USCMA these are:[101]

1. To be informed of the charges against him. (UCMJ 10, 30).
2. To cross-examine witnesses for the Government. (MCM 149).
3. To challenge members of the court for cause or peremptorily. (UCMJ 41).
4. To have a specified number of members compose General and Special court-martial (UCMJ 29).

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[98] Snedeker, op. cit., p. 456 citing House Hearings UCMJ 1013.

[99] United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

[100] Burns v. Wilson, 346 U. S. 137, 73 Sup. Ct. 1045 (1953).

[101] United States v. Clay, Supra, pertains to 1-10 only.

5. To be represented by counsel (UCMJ 27).

6. Not to be compelled to incriminate himself (UCMJ 31).

7. To have involuntary confessions excluded from consideration (UCMJ 31).

8. To have the court instructed on the elements of the offenses, the presumption of innocence, and the burden of proof (UCMJ 51).

9. To be found guilty of an offense only when a designated number of members concur with findings to this effect (UCMJ 52).

10. To be sentenced only when a certain number of members vote in the affirmative (UCMJ 52).

11. The pre-trial investigation (UCMJ 32).[102]

In summary, the concept of military due process serves as a substitute to the civilian constitutional right to due process of law.

The protection against cruel and unusual punishments and excessive fines was directed principally at the brutality of early English law. Some of the cruel and degrading punishments presumedly considered were: beheading and quartering, dragging through the streets, disembowelling alive, burning at the stake, mutilation by cutting off hands and ears, and the use of many barbarous forms of torture.[103] Punishments are cruel when they involve torture or a lingering death, or are inhuman or barbarous.[104] Flogging, keel-hauling, and confinement in irons were not unusual in the armed services at the time of adoption

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[102] United States v. Allen, 5 USCMA 626, 18 CMR 250, (1955).

[103] David Fellman, "Cruel and Unusual Punishments," Journal of Politics, Feb. 1957, p. 35.

[104] Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544 (1910).

of the Bill of Rights; they were, however, prohibited by law by 1861.[105] Confinement on a bread and water diet was upheld as not cruel and unusual punishment when inflicted by a civilian court in 1907.[106] This is still an authorized punishment in the United States Navy. In the military today, UCMJ prohibits punishment by flogging, branding, marking or tattooing on the body, or any other cruel or unusual punishment. The Code also prohibits the use of irons, except for the purpose of safe custody.[107] The Code still authorizes confinement on bread and water, but limits its imposition to not more than three consecutive days as a non-judicial punishment against enlisted offenders attached to or embarked in a vessel.[108] Since it is not a prohibited punishment, a navy court-martial could adjudge up to thirty days confinement on bread and water; the three consecutive day restriction for bread and water still applies. Loss of pay within the limits prescribed by the President or provided for as a fine by statute is not excessive. The right is adequately protected.

The protection against double jeopardy as stated in the Fifth Amendment, "....for the same offense to be twice put in jeopardy of life and limb," has been liberally construed to preclude a second prosecution for the same offense regardless of punishment.[109]

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[105] 9 Stat. 515 (1850). 12 Stat. 317 (1861).

[106] Spencer v. State, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989 (1907).

[107] UCMJ 55.

[108] UCMJ 15(b) (2) (A). Revision effective Feb. 1, 1963, but see Chap. V, Note 94.

[109] Ex Parte Lange, 18 Wall. 163 (U. S. 1874).

Although a controversial subject for many years, jeopardy is considered to begin at the time of arraignment.[110] Since state and federal courts derive their authority from a different sovereign source, an accused can be prosecuted by both without being in double jeopardy. Many states have, however, extended protection against trial in state courts after trial for the same offense under federal authority. Although the question has not been definitely decided, the Supreme Court indicated that the double jeopardy provisions of the Fifth Amendment apply to courts-martial.[111] In the military, under UCMJ, Article 44 provides that no person shall, without his consent, be tried a second time for the same offense. The major distinction, which carries over from the old Article of War 40, provides that a trial is not terminated, if found guilty, until review of the case has been fully completed.[112] Since a court-martial is a federal court an accused may not be tried for the same offense in another federal court. He may, however, be tried by both a state court and a court-martial. In practice, the armed services do not prosecute by a court-martial if there has been a conviction in a civil court. There are circumstances of course which may prompt the military to prosecute.[113] The right against double jeopardy is inferior to the civilian constitutional right.

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[110] Ibid., Kepner v. United States, 195 U. S. 100, 24 Sup. Ct. 797 (1904).

[111] Wade v. Hunter, 336 U. S. 684, 69 Sup. Ct. 834 (1949).

[112] UCMJ 44(b). Rehearings are provided to prevent "an obviously guilty man" from escaping punishment "on a technicality." Hearings UCMJ 1180. An exception is lack of sufficient evidence, UCMJ 63.

[113] See statement by Brigadier General Alan B. Todd, Appendix C.

The other rights "retained by the people" statement of the Ninth Amendment is designed to dispel any theory that the enumerated rights in the Constitution form a complete list. It preserves to the people those safeguards which are inherent in Anglo-Saxon justice. The concept that a person is presumed innocent until proved guilty is such a right. This right is expressly covered by UCMJ which provides that the presumption of innocence be brought to the attention of a court-martial before a vote is taken as to guilt or innocence.[114] The Code also provides for the burden of proof.[115]

Those rights enumerated and discussed above are also not a complete and closed list. Note Table 9 at the end of this chapter which makes a comparison of civilian and military rights.[116] Beyond these rights of the accused, are other constitutional and natural rights which are not directly related to criminal justice. For example the right to marry enters into a military justice case, when a conviction of failure to obey a lawful order was set aside; the order requiring a six months' waiting period was not lawful, as it was an unreasonable restraint of personal freedom.[117] The guardian role of the United States Court of Military Appeals in specific cases will be discussed in the next chapter.

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[114] UCMJ 51(c) (1) and (2).

[115] UCMJ 51(c) (4).

[116] Edwards and Decker, op. cit. Table 9.

[117] Earl Snyder, Every Serviceman's Lawyer (Harrisburg: The Stackpole Company, 1960), p. 28. Similarly, unlawful restraints of freedom of speech have been corrected by UCMA.

TABLE 7

NUMBERS OF COURTS-MARTIAL BY TYPE FOR FISCAL YEARS SHOWN - U. S. ARMY

FY	Average Strength	General		Special		Summary		All Courts-Martial		
		Convicted	Total	Convicted	Total	Convicted	Total	Convicted	Acquitted	Total
1917	.....	7,155	7,737	3,604	3,942	75,509	79,097	86,268	4,508	90,776
1918	.....	10,348	12,357	13,294	14,734	202,173	211,913	225,815	13,183	239,004
1919	.....	14,184	16,547	21,307	24,452	197,585	209,445	233,076	17,368	250,444
1920	.....	5,944	6,769	5,116	5,838	54,198	59,961	65,308	7,260	72,568
1921	.....	6,660	7,905	6,717	7,410	39,004	40,778	52,381	3,712	56,093
1922	.....	5,577	6,468	7,863	8,545	20,639	21,362	34,079	2,296	36,375
1923	.....	3,839	4,310	6,550	7,139	16,194	16,812	26,583	1,678	28,261
1924	.....	4,379	4,671	6,022	6,536	13,091	13,556	23,492	1,271	24,763
1925	.....	5,170	5,475	6,948	7,517	13,656	14,129	25,774	1,347	27,121
1926	.....	5,196	5,493	5,751	6,428	13,129	13,566	24,076	1,411	25,487
1927	.....	4,983	5,239	4,804	5,491	10,540	11,798	20,327	2,201	22,528
1928	.....	5,465	5,743	5,760	6,176	12,470	12,906	23,695	1,130	24,825
1929	.....	4,638	4,861	5,410	5,744	12,417	12,750	22,465	890	23,355
1930	.....	4,701	4,909	5,301	5,650	12,554	12,906	22,556	909	28,465
1931	.....	3,656	4,052	5,461	5,805	12,763	13,072	21,880	1,049	22,929
1932	.....	2,783	2,954	4,719	4,983	12,115	12,331	19,617	651	20,268
1933	.....	1,580	1,681	.....	4,138	.....	10,350	.....	.....	16,169
1934	.....	1,481	1,590	.....	.....	.....	.....	.....	.....	.....
1935	.....	1,316	1,407	.....	.....	.....	.....	.....	.....	.....
1936	.....	1,643	1,742	.....	.....	.....	.....	.....	.....	.....
1937	.....	2,062	2,223	.....	.....	.....	.....	.....	.....	.....
1938	.....	2,579	2,699	.....	.....	.....	.....	.....	.....	.....
1939	.....	1,959	2,046	.....	4,016	.....	9,596	.....	.....	15,658
1940	.....	1,776	1,851	4,208	4,431	10,000	10,141	15,984	439	16,428
1941	755,000	3,187	3,388	9,473	9,926	23,481	23,821	36,141	994	37,135
1942	1,992,000	3,225	3,725	36,650	38,418	63,923	65,919	103,798	4,264	108,062
1943	5,224,000	13,836	14,782	113,386	117,697	187,875	190,670	315,097	8,052	323,149

TABLE 7--Continued

FY	Average Strength	General		Special		Summary		All Courts-Martial		
		Convicted	Total	Convicted	Total	Convicted	Total	Convicted	Acquitted	Total
1944	7,507,000	21,547	22,815	.....	204,123	.....	292,172	.....	.....	519,110
1945	8,131,000	24,102	25,671	168,675	175,591	272,163	279,146	464,940	15,468	480,408
1946	4,816,000	32,657	35,977	48,027	50,402	98,707	101,625	179,391	8,613	188,004
1947	1,417,000	9,382	9,977	.....	44,130	.....	97,104	.....	.....	151,211
1948	585,000	8,928	9,561	.....	36,971	.....	81,794	.....	.....	128,326
1949	657,000	5,130	5,532	.....	25,119	.....	52,597	.....	.....	83,246
1950	632,000	4,736	5,090	.....	30,359	.....	68,128	.....	.....	103,577
1951	1,090,000	4,819	5,206	25,484	27,404	.....	79,226	.....	.....	111,836
1952	1,597,000	7,376	8,037	50,335	53,483	88,564	90,950	146,275	6,195	152,470
1953	1,536,000	10,444	11,168	62,079	65,547	97,266	100,888	169,789	7,807	177,596
1954	1,477,000	9,642	10,149	50,995	54,144	76,922	79,498	137,559	6,232	143,791
1955	1,311,000	9,359	9,884	43,030	45,852	60,615	62,613	113,004	5,345	118,349
1956	1,083,000	7,404	7,750	34,203	36,451	48,857	50,702	90,464	4,439	94,903
1957	1,004,000	5,308	5,586	32,594	34,761	49,907	51,978	87,809	4,516	92,325
1958	939,000	3,560	3,767	26,424	28,125	43,368	45,156	73,352	3,695	77,048
1959	889,000	2,251	2,376	19,075	20,287	34,875	35,224	56,201	2,686	58,887
1960	921,760	1,959	2,060	19,279	20,424	33,414	34,682	54,652	2,514	57,166
1961	923,828	1,768	1,899	22,108	23,471	36,499	38,049	60,575	3,044	63,419
1962	1,053,706	1,762	1,876	25,254	26,607	41,694	43,542	68,710	3,315	72,025
1963	1,015,142	1,762	1,843	25,147	26,448	30,939	32,316	57,848	2,759	60,607
1964	1,015,287	1,763	1,865	23,102	24,327	16,055	16,926	40,920	2,198	43,118
1965	1,016,832	1,463	1,553	23,757	24,813	16,106	17,090	41,326	2,130	43,456
1966	1,096,803	1,386	1,476	22,169	23,121	13,169	14,016	36,724	1,889	38,613

TABLE 8

TOTAL COURTS-MARTIAL BY SERVICE FOR FISCAL YEARS 1962-1966

Court-Martial	Military Service	1962	1963	1964	1965	1966
General	Army	1,876	1,843	1,865	1,553	1,476
	Navy	495	420	440	339	355
	A. Force	483	492	421	406	258
	C. Guard	4	6	3	1	3
	All	2,858	2,761	2,730	2,309	2,092
Special	Army	26,607	26,448	24,327	24,813	23,121
	Navy	15,782	15,724	13,816	13,174	14,647
	A. Force	3,257	2,809	2,707	2,287	1,825
	C. Guard	148	139	89	95	95
	All	45,794	45,120	40,939	40,369	39,688
Summary	Army	43,542	32,316	16,926	17,090	14,016
	Navy	29,252	22,756	10,785	11,052	11,934
	A. Force	11,689	9,549	4,423	2,128	1,232
	C. Guard	683	448	255	231	212
	All	85,166	65,069	32,389	30,501	27,394
Total	Army	72,025	60,607	43,118	43,456	38,613
	Navy	45,529	39,033	25,041	24,565	26,936
	A. Force	15,429	12,850	7,551	4,821	3,315
	C. Guard	835	593	347	327	310
	All	133,818	113,083	76,057	73,169	69,174

TABLE 9

TABLE SHOWING COMPARISON OF MILITARY AND CIVILIAN SAFEGUARDS OF ACCUSED PERSONS

Rights of Civilians	Rights of Servicemen
(1) Court must have jurisdiction a. over person b. to try offense c. to award punishment	(1) Same a. same b. same c. same
(2) Presumption of innocence (reasonable doubt resolved in favor of accused) (common law)	(2) Same (Article 51c)
(3) Habeas Corpus (liberty of person) (Article 1, Section 9)	(3) Essentially same (MCM 8,214)
(4) No. ex post facto law (Article 1, Sec. 9)	(4) Essentially same (MCM 8)
(5) Grand jury indictment (V Amend)	(5) Impartial investigation (includes right to counsel) (Article 322 and b)
(6) Against double jeopardy (V Amend)	(6) Essentially same (Article 44)
(7) Against self-incrimination (V Amend)	(7) Essentially same (Article 31)
(8) "Due process" - includes other enumerated rights (V Amend)	(8) "Due process" includes trial in accordance with law, regulation, customs of the service not inconsistent therewith (Article 42)

TABLE 9--Continued

Rights of Civilians	Rights of Servicemen
(9) Opportunity to be heard (V & XIV Amend) a. Testify (Title 18, U. S. C. Sec. 3481) b. Remain silent	(9) Essentially same a. To testify as witness (includes right to testify for limited purpose) b. Option to remain silent (MCM Article 31)
(10) Be present during trial (V & XIV Amend)	(10) Essentially same (MCM 11c, 53a)
(11) Speedy and public trial (VI Amend)	(11) Essentially same (Article 30b, Article 98; MCM 30h) (court may be closed to public in special cases MCM 53e)
(12) Jury, impartially selected (includes right to challenge) (VI Amend; common law)	(12) Court members, impartially selected; 1/3 enlisted if accused requests (Article 25); challenges for cause and one peremptory challenge (Article 41)
(13) Be informed of charge (notice) (VI Amend)	(13) Essentially same (Article 35)
(14) Confront hostile witnesses (Cross examine) (VI Amend)	(14) Same (MCM 117, 149b; Article 49)
(15) Compulsory process to obtain favorable witnesses (VI Amend)	(15) Same (Article 46; MCM 115a)
(16) Assistance of counsel (VI Amend)	(16) Essentially same (Article 27; MCM 6, 44, 46)

TABLE 9--Continued

Rights of Civilians	Rights of Servicemen
(17) No excessive bail (VIII Amend)	(17) Not applicable (but there is corresponding prohibition against confinement for minor offenses) (Article 56; MCM 18b, 127c)
(18) No excessive fines (VIII Amend)	(18) Essentially same (MCM 126h (3)
(19) No cruel or unusual punishment (VIII Amend)	(19) Same (Article 55; MCM 125)
(20) Right to appeal in certain cases (Statutory)	(20) Three automatic reviews in serious cases plus right to petition for appeal thereafter - right to free counsel at each step (Articles 65-73; MCM 98-105)

CHAPTER V

DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS

Typical Procedure

In this chapter I will refer to specific decisions of the United States Court of Military Appeals, how those decisions protect the rights of those subject to the Uniform Code of Military Justice, and the impact of those decisions on the military justice system. There were many significant improvements in the Uniform Code of Military Justice over the old systems, but the most significant was the creation of the Court itself. In an annual report to the Congress, the Court stated:

> In June 1951, when the Court, the first civilian judicial body in this Nation's history to sit in final review upon military courts-martial, was constituted, it was immediately faced with an enormous task. Those accustomed to the provisions of the Articles of War and the Articles for the Government of the Navy found its terms revolutionary. Lawyers for the accused and the Government-a law officer who did not deliberate with the court-instructions on the law in open court-verbatim records of trial in all serious cases-a meaningful system of appellate review had, for the first time, been provided for all branches of our Armed Forces by a Congress and Executive determined to uproot the last vestige of evil which flowed from practices under antecedent legislation. But, in the manner of most Codes, these provisions of law supplied only the skeleton of military due process. Their interpretation, pursuant to the intent of Congress was left to this Court, composed of civilian judges in accordance with the well-tried American tradition of ultimate civilian control over the military, and thoughtfully balanced by devolution upon the Executive of the right to prescribe rules of evidence and procedure as well as limitations upon maximum punishment.
>
> At the outset, the Court was met with hostility on the part of many Armed Forces officers, accentuated by the

> fact it began its role as a supreme judicial body in the midst of war. Nevertheless, from the beginning, it insisted that rights granted by the Constitution and the Congress not be sacrificed in the face of preconceived and untested notions of guilt and fashioned on the framework of the Code, a sound system of military justice, designed fairly to arrive at a proper verdict and sentence, and proven to be workable both in time of war and peace.[1]

Before examining specific actions of the USCMA it would be wise to review the working of military justice before a case reaches that level. To make this review more meaningful we will make comparisons with the civil judicial system, and point out some similarities and distinctions, particularly those related to the rights of an accused.

Anyone subject to the code may initiate sworn charges against an individual subject to military jurisdiction. It is customary, however, that a person subject to the code report the facts to the accused's commander who may then prefer charges.[2] The commander must make a preliminary inquiry in order to make intelligent disposition of the case. If he decides that charges should be preferred, he then takes appropriate action. This step corresponds to action of the district or county attorney in issuing a warrant for arrest.[3]

If the accused's commander determines that the alleged offense is of a serious nature,[4] he forwards the charges with his report of

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[1]Annual Report of the United States Court of Military Appeals, 1965, p. 11. The war referred to in the quote was the Korean conflict.

[2]Manual for Courts-Martial, United States, 1951, par. 29b. Henceforth cited as MCM, 1951.

[3]Federal Rules of Criminal Procedure, Rule 4. Henceforth cited as FRCP. Note that preliminary inquiry is not required as in military law. A sworn complaint is sufficient for issuance of warrant of arrest.

[4]MCM, 1951, 32. Less serious offenses may be disposed of by non-judicial punishment under Article 15, UCMJ. See chapter VI for a discussion of this Article.

investigation to the next higher commander who reviews the case and decides what action to take. This intermediate commander relies upon the advice of his Staff Judge Advocate, an experienced lawyer, and his own experience and judgement. He may decide to refer the case to a summary or special court-martial at this level of command, or to refer it with his recommendations to a higher commander exercising general court-martial jurisdiction. His decision will depend, to a great extent, upon the seriousness of the charges.[5]

Let us assume that the intermediate commander recommends trial by general court-martial. The charges and allied documents (including sworn statements of witnesses, summary of evidence, documentary exhibits, and recommendations), go to the Staff Judge Advocate of the commander exercising general court-martial jurisdiction.[6] This senior legal officer thoroughly reviews the case and advises his commander of the action to take. The commander at this level is usually a general or flag officer.

If the allegations are of such serious nature that the senior commander feels that reference to trial by general court-martial should be considered, an officer is appointed to formally investigate the charges.[7] As a result of this investigation the commander may decide to convene a general court-martial. Charges cannot be referred for trial however, unless the Staff Judge Advocate can certify that the

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[5]MCM, 1951, 33. See table chapter II for comparison of scope of courts-martial.

[6]MCM, 1951, 32, 33.

[7]Uniform Code of Military Justice, Article 32. Henceforth cited as UCMJ. This Article 32 investigation may already have been ordered and conducted under lower authority.

specification states an offense and the evidence is legally sufficient to make out a prima facie case as to each element.[8] The comparable civilian procedure is issuance of a warrant of arrest, commissioner's hearing and grand jury action.[9] The pretrial investigation is comparable to the preliminary hearing and the grand jury action.[10]

It is interesting to note that in the military procedure at the pretrial investigation, an accused is entitled to military counsel at no expense to himself, to present his own witnesses and to cross-examine government witnesses.[11] This pretrial investigation is a new procedure for the Navy. Compare the right of the civilian defendent under Rule 6, Federal Rules of Criminal Procedure, which authorizes only the presence of attorneys for the Government, witness under examination, interpreter if needed, and stenographer, in grand jury sessions.

The investigating officer makes his report in which he can recommend dismissal, trial by a lower court, or referral to trial by general court-martial. Let us assume that the investigating officer recommends trial by general court-martial. The case is then referred to a court composed almost entirely of senior officers (or one-third enlisted men if the accused so requests) serving in a capacity comparable to a jury. The court is supervised by a law officer, an experienced lawyer who is certified as competent to perform such duties

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[8]MCM, 1951, 35.

[9]FRCP, Rules 5, 6.

[10]United States v. Lee, 1 USCMA 212, 2 CMR 118 (1952)

[11]The Article 32 investigating officer is usually a field grade (major or above) officer. When workload permits a legal officer is sometimes directed to this duty. This author has conducted such an investigation.

by the Judge Advocate General of the service; this position is comparable to that of a federal district judge. He is the directing authority of the trial.[12] A further matter of interest is the fact that counsel, in all cases an attorney who is certified as competent to perform the duties of defense counsel by the Judge Advocate General of the service, is furnished the accused free of charge.

Trial procedure in a military court-martial[13] is similar to that in a Federal District Court. Furthermore, the United States Court of Military Appeals has stated that if fair trial requires it, the Court will adopt procedure contrary to civil practice or former military rule.[14] The United States Supreme Court ruled, "any ambiguity in a provision of the Uniform Code of Military Justice must be resolved in favor of the accused."[15] All the safeguards of federal trial procedure apply. The punishment which a court-martial may direct for an offense shall not exceed such limits as the President may prescribe for that offense.[16] The manual for courts-martial including the table of maximum punishment is prescribed by executive order.[17]

To continue the comparison, let us assume that the accused is convicted and sentenced to a punitive discharge and confinement in

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[12] United States v. Blankenship, 7 USCMA 328, 22 CMR 118 (1956). United States v. Berry, 1 USCMA 235, 2 CMR 141 (1952).

[13] UMCJ, 36(a); MCM, 1951. Appendix 8 contains trial procedure guide.

[14] United States v. Hemp, 1 USCMA 280, 3 CMR 14 (1952).

[15] Jackson v. Taylor, 353 U. S. 569, 77 Sup. Ct. 1027 (1957).

[16] UCMJ, 56.

[17] Initially executive order 10214. President Harry S. Truman, Feb. 8, 1951. There have been numerous revisions of the manual by executive order. UCMJ is public law and can only be revised by full legislative action.

excess of one year. He is furnished a verbatim record free of charge and appellate steps then begin. A lawyer in the office of the Staff Judge Advocate thoroughly reviews the case for error, sufficiency of evidence, and with a view toward clemency action. The record of trial, the written review, and the recommendations of the reviewing officer then go to the commander who convened the court. He can approve, disapprove or modify the sentence, in addition to exercising the power to grant clemency. This constitutes the first appellate step.[18]

If the sentence as approved includes a punitive discharge or confinement for one year or more, the record goes forward to a board of review.[19] This board of review is composed of three experienced senior military attorneys, at the highest Department level. The Board thoroughly reviews the case without petition from the accused, it has the power to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, a power unique in appellate procedure. During this second appellate step, the accused is entitled to the services of experienced appellate attorneys who are authorized to present briefs and oral arguments, precisely as in the Federal Court of Appeals.

If this conviction is sustained by the board of review, notice of such action is served upon the accused. Within thirty days he may indicate his intention to petition the United States Court of Military Appeals for a review of his case.[20] This notice can take the form of a letter dropped in a mailbox, a letter placed in official military

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[18]MCM, 1951, 84-93.

[19]MCM, 1951, 100.

[20]UCMJ, 67(c).

channels, a statement to his counsel, or completion of a form given him at the time of service of the action of the board of review. At the time he takes action to transmit his desire to appeal, his right to petition the court accrues, and he is again entitled to appellate counsel at government expense. This is his third appellate step. Contrast his appellate rights with the appellate rights of a civilian defendent. Contrast also the mentioned thirty-day period with the period allowed a civilian defendent under Rule 37(a) (2), Federal Rules of Criminal Procedure, which requires that an appeal be perfected within ten days from the final order. Consider also the appellate steps in civilian courts where a defendent is allowed normally one appellate review upon the law of the case, and at considerable expense to himself for attorney fees, transcripts, filing fees and the like.[21]

When these appellate steps have been finished, the military procedure is not yet complete. After final action by the board of review or the United States Court of Military Appeals as the case may be, the record is examined in the Office of the Judge Advocate General for possible clemency action. The accused must also be considered for clemency within six months after confinement and each year thereafter during his confinement. Contrast these several opportunities for clemency afforded a military accused with the one opportunity afforded a civilian defendent by reference of his case to a busy probation officer in a Federal District Court.

A further point that may be of considerable interest is the fact that this military appellate procedure is not limited to those

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[21]William C. Hamilton, "Military Law: Drumhead Justice is Dead," American Bar Association Journal, Vol. XLIII, pp. 797-800.

accused individuals who plead not guilty at trial level and require the government to prove its case. The same rights and appellate steps are afforded an accused who pleads guilty and offers no evidence in his behalf.[22]

The procedure in the United States Court of Military Appeals was described in Chapter III. In discussing the goals of UCMJ and USCMA, the Court has said that it has been its desire to establish for the military a body of law under which all who serve in the military can rely on receiving a fair and impartial trial if they are charged with a crime subject to military jurisdiction. This does not mean that the Court considers itself the be-all and end-all of the military justice system. Rather, it is the belief of the Court and its members, that a good military justice system begins as soon as it is known that a crime has been committed. Thus, the system must be impregnated with honesty, fairness, and impartiality throughout the whole procedure; commencing with the investigation, the charges, the appointing of the members of the court-martial as well as the counsel who will appear before such members; the proceedings before the court-martial, the staff judge advocate's or legal officer's review, the convening authority's action; the proceedings before the Boards of Review, and ultimately by the review of the United States Court of Military Appeals. Each step is an important cog in the military justice machine. It is the aim of the Court to achieve at every level that excellence in

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[22]MCM, 1951, 84a. "General. After every trial by court-martial, etc." The code provides for an automatic review in all cases-first by the convening authority and then by the Judge Advocate General. The three appellate steps in the assumed case were a result of the serious sentence. (dishonorable discharge and confinement for one year).

operation, which is not only desirable but also necessary to the administration of military justice.[23]

USCMA In Action: Jurisdiction

In this attempt to show how the Court accomplishes the mission of guardian of military justice let us examine some cases and decisions. Before any trial can begin the Court must have legal jurisdiction. The Uniform Code is very specific. The Court of Military Appeals monitors jurisdiction in the exercise of its normal appellate function. In doing so four questions are considered: (1) was the court-martial duly constituted? (2) did it have jurisdiction of the person tried? (3) did it have jurisdiction of the offense charged? (4) was the sentence imposed within the prescribed maximum limit?

In discussing the first question, "was the court-martial duly constituted?" one should realize that courts-martial unlike ordinary civil courts, do not possess any high degree of permanance. They come into existence by direct written orders of the convening authority,[24] usually a senior commander; in the case of a general court-martial he is normally a general or flag officer. Large commands often have several general and special courts appointed at one time. Due to the nature of the military occupation, court members are often unavailable; this requires frequent amendments and the creation of new courts. The Uniform Code requires members of general and special courts-martial, all

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[23]The United States Court of Military Appeals, pamphlet 0-774-858 (Washington: U. S. Government Printing Office, 1965), p. 5.

[24]UCMJ, 22, 23, 24. These Articles respectively specify who may convene a General, Special and Summary court-martial. Also see Table 1.

counsel, the law officer and the reporter to take an oath in each case "in the presence of the accused to perform their duties faithfully."[25] USCMA has said:

> General courts-martial, being tribunals of special and limited jurisdiction, must be convened strictly in accordance with statutory requirements. . . . members of a court-martial must have been lawfully appointed thereto in order that they may enjoy status as members.[26]

The eligibility of all members is carefully evaluated. In one case a security watch officer on the night of the offense in question made an investigation and later sat as a member of the special court that tried the accused. The USCMA found "a probability of specific prejudice" against the accused, and ruled that the prejudice was not waived by failure to challenge even though the accused had pleaded guilty.[27] There must also be careful scrutiny of the eligibility of the law officer, trial and defense counsel, and the status of the convening authority.[28] The following is an interesting case concerning convening authority.

An airman at Bolling Air Force Base, Washington, D. C., burglarized the house of General Edwards, and four days later made a similar attempt at the house of General Lee, the Base Commander.

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[25]UCMJ, 42(a).

[26]United States v. Padilla and Jacobs, 1 USCMA 601, 5 CMR 31 (1952).

[27]United States v. Bound, 1 USCMA 224, 2 CMR 130 (1952).

[28]MCM, 1951, par. 5, 6, 7. Eligibility even concerns the Reporter. An accuser, whether actual or nominal, is disqualified from acting as Reporter or interpreter in court-martial proceedings in which he is the accuser nor can the accuser take depositions. United States v. Moeller, 8 USCMA 275, 24 CMR 85 (1957). United States v. Martinez, 11 USCMA 224, 29 CMR 40 (1960). United States v. Payne, 12 USCMA 455, 31 CMR 41 (1961).

General Lee was interviewed as part of an investigation. The charge involving General Lee's house was dropped. The accused was tried, for the offense at General Edwards' house, by a court convened, after the event, by General Lee as Base Commander. The accused was convicted and sentenced to a dishonorable discharge and five years confinement. In his review as convening authority, General Lee reduced the confinement to two years. The Court of Military Appeals held that General Lee was disqualified to act as convening and reviewing authority. The Court ruled:

> .....reasonable persons would impute to General Lee at the time he appointed the court a personal feeling or interest in the matter . . .
> While General Lee reduced the sentence, who can say what, if any, additional remission might have been made by one who had no interest in the matter.
> .....we find substantial rights of the accused were materially prejudiced . . .[29]

In another case involving the convening authority, two Navy hospital men (enlisted), were charged personally by their commander, a Navy captain, for a regulation violation. The captain forwarded the charges to his superior, the Commander, Naval Forces, Far East. This latter officer then referred the case to the Officer Commanding the Naval Base at Pusan, Korea. This Base Commanding Officer, whose rank was commander convened a special court-martial for the trial. Of course in the Navy the rank of commander is inferior to captain. This, the Court of Military Appeals ruled, was contrary to the intent of the Code,[30] in that only a "superior" could be a "competent convening authority." The court held: "The provisions with which we deal require

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[29] United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1952).

[30] UCMJ, 23(b).

a superior to convene the court; and these provisions having been violated, the tribunal designated was not authorized by law to try these accused and render a judgement against them."[31] This was clearly a case of the court's concern for enforcing a procedure that had been adopted to lessen command control.

In civil life the court is taken much for granted. Rarely is a judicial appointment or election questioned, and rarely are judicial acts declared void because the court was not duly constituted. In contrast we have seen some of the problems in this regard in the military justice system. So too with personal jurisdiction. The question is much more likely to occur in the military sphere. Rare exceptions[32] emphasize the general rule in civil life, that, exemption from criminal jurisdiction cannot be predicated upon the status of the accused. Under civil law the locus of the offense is all important; the status of the accused is not. Under military law, in contrast, quite the reverse is true. Unlimited geographic jurisdiction of the court-martial has been traditional and supported by U. S. Supreme Court decision.[33] The Uniform Code expresses this inrefutable view with appropriate conciseness: "This code shall be applicable in all places."[34]

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[31] United States v. LaGrange and Clay, 1 USCMA 342, 3 CMR 76 (1952).

[32] Such exceptions are Ambassadors and other diplomats, and infants under seven.

[33] Ex Parte Milligan, 4 Wallace (U. S.), 2 (1867). Chief Justice Chase said, "and wherever our Army or Navy go beyond our territorial limits neither can go beyond the authority of the President or the Legislation of Congress."

[34] UCMJ, 5. An exception is the third clause of Article 134, The General Article, "crimes and offenses not capital." For example, a person subject to military law cannot be prosecuted under this clause for having committed a crime or offense, not capital, when the act occurred in occupied foreign territory, merely because the act would have been an offense against the law of the District of Columbia if it had been committed there. MCM, 1951.

This simplicity of place is in sharp contrast to the elaborate specific provisions of the code with respect to what persons, in what status, at what time are subject to military jurisdiction.[35]

In discussing the next question, "Did the court-martial have jurisdiction of the person tried?" we enter one of the most controversial issues of The Uniform Code. The United States Supreme Court invalidated those provisions applying to the jurisdiction over civilians.[36] This created a jurisdictional gap for which legislation has been proposed several times.[37] This problem will be discussed in the next chapter. With respect to military personnel, USCMA has had relatively few cases to decide.

It should be remembered that military personnel, in general, continue to be subject to civil court jurisdiction for offenses against ordinary criminal law. Courts-martial have exclusive jurisdiction over purely military offenses.[38] But a person subject to the code is, as a rule, subject to the law applicable to persons generally. We have seen in the discussion of protection against double jeopardy,[39] that aside from policy consideration, military personnel may be tried before a court-martial and a civil court for the same offense, provided

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[35]UCMJ, 2 and 3.

[36]UCMJ, 2(11), Reid v. Covert, 354 U. S. 1, 77 Sup. Ct. 1222 (1957). Kinsella v. Singleton, 361 U. S. 234, 80 Sup. Ct. 297 (1960). Gresham v. Hagan, 361 U. S. 278, 80 Sup. Ct. 310 (1960). McElroy V. Guargliardo, 361 U. S. 281, 80 Sup. Ct. 305 (1960). Toth v. Quarles, 350 U. S. 11, 76 Sup. Ct. 1 (1955).

[37]S. 761, 89th Congress 1st Sess.

[38]Examples of purely military offenses are: absence without leave, desertion, disrespect toward officers, willful disobedience.

[39]Chapter IV. Supra. Also statement by General Todd, Appendix.

the courts derive their jurisdiction from different sovereigns. Our concern now is, simply, does the court-martial have jurisdiction of the person, and need not be complicated by determining whether the jurisdiction is exclusive or concurrent.

If we now limit this discussion to military personnel we also narrow our concern for what persons. It is obvious that military personnel would be subject to the code, and we can summarize the categories of military personnel to include: (1) personnel on active duty with any of the Armed Forces, (2) cadets attending any of the service academies, (3) reserve personnel voluntarily accepting inactive duty training, when the orders specify they are subject to the code, and (4) prisoners of war.

The requirements for discipline demand that all such persons in the above list be subject to court-martial jurisdiction. The questions usually under consideration are what status, and what time. A military person cannot be tried by court-martial for a criminal offense committed by him before he acquired military status, even though the offense is contrary to military law. This demands a precise rule for determining the instant a person ceases to be a civilian and acquires military status. As a result of numerous draft-dodging incidents subsequent to the Selective Service Act of 1940,[40] the U. S. Supreme Court supplied the precise rule.

The case was Billings v. Truesdale,[41] Billings, a teacher at the University of Texas, who claimed to be a conscientious objector,

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[40] 54 Stat. 894 (1940).

[41] Billings v. Truesdale, 321 U. S. 542, (1944).

was ordered by both his draft board and appeal board to report for induction at Fort Leavenworth, Kansas. He did so and the next morning was found physically and mentally qualified, whereupon he refused to take the oath of induction and refused to submit to fingerprinting. For this latter refusal, he was tried and convicted by court-martial for wilful disobedience of a lawful order. The Supreme Court, on habeas corpus attack, granted certiorari and held the court-martial was without jurisdiction; since Billings had not taken the oath of induction, he had not been "actually inducted" into the Army. It pointed out that Billings was subject to criminal prosecution in the federal district court, for a violation of the Selective Training and Service Act in refusing to be inducted. This was wholly consistent with a Supreme Court statement of 1890, "that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier."[42]

The Court of Military Appeals has applied the oath test in finding that a court-martial was without jurisdiction to convict an accused of desertion.[43] In another desertion case it extended the rule in affirming jurisdiction, by holding that the taking of the oath of allegiance was not necessary. In this case the accused, a Mexican citizen, without objection reported for induction and remained in a military status for ten days before deserting.[44] Additionally, the Court has held that a person below the minimum age of enlistment is, under the law, incompetent to acquire military status, and any such

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[42] In Re Grimley, 137 U. S. 147, (1890). Actual delivery of discharge terminates military jurisdiction, U. S. v. Scott, 11 USCMA 646 29 CMR 462.

[43] United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952).

[44] United States v. Rodriguez, 2 USCMA 101, 6 CMR 101 (1952).

enlistment is considered void.[45] Furthermore, there is no jurisdiction to try such underage enlistees for desertion, an offense presupposing military status.[46] The court held that such enlistment is void even if the individual stayed in service beyond the age of lawful enlistment.[47]

Court-martial jurisdiction over cadets and midshipmen has been a settled matter for many years. For a period of time, however, midshipmen (then referred to as cadets) were held to be in a class by themselves and not subject to courts-martial jurisdiction. The Attorney General in 1877 wrote such an opinion, basing his reasoning upon lack of statutes on the subject applicable to the Navy as distinguished from the Army.[48] This untenable situation was corrected, however, in 1895.[49] A cadet case decided by the United States Court of Military Appeals in 1958 discussed jurisdiction from a historical point of view, but the emphasis was upon a related but different problem, that of determining the kind of punitive separation a court could adjudge in such a case. The opinion referred to cadets as "inchoate" officers and decreed that dismissal was the only legal punitive separation for them.[50]

The reservist who voluntarily accepts written orders for inactive duty training submits to the jurisdiction of courts-martial if his orders specify that he is subject to the Code. He is in a poor position to contest jurisdiction to which he has submitted. In short,

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[45] United States v. Blanton, 7 USCMA 664, 23 CMR 128 (1957).

[46] United States v. Taylor, 8 USCMA 24, 23 CMR 248 (1957).

[47] United States v. Overton, 9 USCMA 684, 26 CMR 464 (1958).

[48] 15 OP. Atty. Gen. 634 (U. S.).

[49] 28 Stat. 838 (1895), 34 U. S. C. 1061.

[50] United States v. Ellman, 9 USCMA 549, 26 CMR 329 (1958).

when the provisions of UCMJ[51] are complied with, the reservist becomes in every sense of the word a member of the "land and naval forces" within the meaning of the Constitution.[52]

The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949,[53] recognizes that the detaining power should and does have jurisdiction over prisoners of war in its custody. To be more specific, the Convention prescribes that unless the detaining power has jurisdiction to try its own Armed Forces in civil courts for the particular crime involved, the prisoner of war must be tried by a military court. This, of course, is a recognition of court-martial jurisdiction. Our Armed Forces were instructed during the Korean conflict to abide by the principles of the Geneva Convention, though the United States did not formally subscribe to the Convention until 1955.

Questionable categories of persons are retired regulars on pay status and retired reservists in service hospitals. There are few cases contesting jurisdiction in these two categories. A case involving a retired regular naval officer was viewed by the United States Court of Military Appeals in 1958. The jurisdictional question was decided against him.[54] A retired regular is not only subject to duty if recalled but has the continuing obligation that attaches because of his pay status and because of the rights and privileges due his rank. In short he is considered still in the service and is subject to dual pay prohibition applicable to Federal employment. A reservist, however, is

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[51]UCMJ, 2 (3).

[52]United States, Constitution, Art. 1, Sec. 8.

[53]Geneva Convention, ch. 3, Arts. 82 and 84 (pow), 1949.

[54]United States v. Hooper, 9 USCMA 637, 26 CMR 417 (1958).

looked upon in an entirely different light. He is often referred to as a civilian in uniform. Thus when he is no longer on active duty or no longer subject to inactive duty training as previously discussed, he is, generally speaking, not subject to court-martial jurisdiction. The Code provides for jurisdiction in the case of retired reservists, however, when they seek and obtain the services of our Armed Forces hospitals. The Uniform Code of Military Justice is a public law, and knowledge of its contents may be presumed. Thus the hospitalized reservist may be said to have voluntarily submitted to jurisdiction. In a sense he has returned to duty when hospitalized, for he has again become part of a community made up almost entirely of military personnel. Since discipline must be maintained in military hospitals as in other military organizations and agencies, the exercise of courts-martial jurisdiction in this instance is reasonable.[55]

Another questionable area of jurisdiction is that over discharged servicemen. UCMJ, Article 3(a) provides that, subject to the statute of limitations, a person charged with committing, during his term of service, an offense against the Code punishable by confinement at hard labor for five years or more and for which the person cannot be tried in any United States, State, or Territorial court, or the District of Columbia, is not relieved from amenability to trial by court-martial by reason of the termination of such term of service. This area of jurisdiction was not seriously contested until 1955. The question is now settled that, after normal discharge and serverance of all military connection, jurisdiction over ex-servicemen does not exist. The

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[55]UCMJ is not the first statutory provision for this jurisdiction. Former statutes relating to Army and Navy hospitals were: 34 Stat. 255 (1906), and 35 Stat. 748 (1909).

unconstitutionality of article 3(a) as applied to certain cases can best be discussed by reference to the leading cases arising both prior and subsequent to enactment of the Code.

The following case is of historical interest, having occurred prior to enactment of the Code. The accused, a member of the Navy, was captured during World War II by the Japanese. He was liberated in 1945 and returned to duty with the Navy in January 1946. In March of the same year his enlistment expired. He was returned to the United States and was honorably discharged but re-enlisted the following day. About one year later he was tried by court-martial for offenses including mal-treatment of fellow prisoners while a prisoner of the Japanese. Upon conviction he was sentenced to dishonorable discharge and a period of confinement. Military appellate agencies upheld his conviction, but in a habeas corpus proceeding in a Federal District Court he was ordered released. This judgement was reversed upon the first appeal, but upon appeal to the Supreme Court the judgment was in favor of the accused. After pointing out that jurisdiction ceased upon his discharge and that under no theory would the Navy have considered bringing him to trial except that the accused chose to re-enlist in the Navy, the Court stated "Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies." The Court in its short opinion observed that there was no congressional authorization for such jurisdiction and quickly concluded that jurisdiction once dead is not revived by subsequent re-enlistment.[56] Of interest also is the District Court's reasoning in the same case that each contract of enlistment is a

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[56]United States ex rel Hirschberg v. Cooke, 336 U. S. 210 (1949).

separate entity and that subsequent enlistment, since it did not make reference to the prior contract, could not preserve jurisdiction obtained under it but lost it by its expiration.[57] This case established the "Hirschberg" rule.

Another striking application of this jurisdictional gap is the case of former Sergeant Lo Dolce[58] in which a confessed killer was permitted to go free. The murder and robbery were committed in Northern Italy in 1944 when that area was occupied by Germany as a hostile belligerent and after Italy had entered into an armistice with the United States. The accused, then on active duty as an American army sergeant, killed his commanding officer, an American major, and threw the body into a mountain lake. The offenses were not discovered until long after Lo Dolce had returned to the United States, been discharged and reverted to civilian status. No attempt was made to try Lo Dolce by court-martial. The effort made by Italy to extradite was rejected by the federal district court upon dual grounds. First, that since at the time of the crimes Italy had capitulated, and American forces were present as friendly visiting forces, the rule of Schooner Exchange v. M'Faddon[59] vested jurisdiction of the offense in the military authorities of the United States, and not Italy. Second, that, following the rule of Coleman v. Tennessee,[60] even if a state of belligerency still existed between Italy and the United States,

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[57] United States ex rel Hirschberg v. Macanaphy, 73 F. Supp. 990 (D. C. E. D. N. Y., 1947).

[58] In Re Lo Dolce, 106 F. Supp. 455 (W. D. N. Y., 1952).

[59] Schooner Exchange v. M'Faddon, 7 Cranch (U. S.), 116 (1812).

[60] Coleman v. Tennessee, 97 U. S. 509 (1878).

jurisdiction over its own forces vested exclusively in the United States as a hostile occupant. Since the exercise of this jurisdiction by the United States was impossible due to Lo Dolce's fortutious change of status from soldier to civilian, and because murder committed in Italy normally is not punishable by any American civil court, federal or state, complete immunity resulted for this confessed homocidist.[61] This fantastic situation has arisen many times.[62]

Article 3(a) of the Uniform Code was designed to remedy this glaring jurisdictional hiatus. The following case arose after the Code went into effect. Toth, the accused (an ex-serviceman legally discharged from the Air Force and living as a civilian), was apprehended and returned to his former base in Korea, the scene of his alleged crimes of murder and conspiracy to murder, to stand trial by court-martial. His sister instituted habeas corpus proceedings to obtain his release. The Government's theory of jurisdiction was, of course, Article 3(a) of the Code. A United States District Court ordered his release, and the case thereafter went before the Supreme Court on appeal. The Supreme Court affirmed the decision of the District Court. "The powers granted Congress 'to make rules' to regulate 'the land and naval forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the Armed Forces. . . Any expansion of court-martial

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[61]Lo Dolce and a co-accused, Icardi, were tried in absentia for this offense by the Italian Government. On November 6, 1953 they were found guilty of murder by a trial court at Novara, Italy. Lo Dolce was sentenced to seventeen years confinement; Icardi to life imprisonment. New York Times, November 8, 1953, p. 2E.

[62]William B. Aycock and Samuel W. Wurfel, Military Law Under The Uniform Code of Military Justice (Chapel Hill: The University of North Carolina Press, 1955), pp. 43-44.

jurisdiction like that in the 1950 act necessarily encroaches on the jurisdiction of Federal courts set up under Article 3 of the Constitution where persons on trial are surrounded by more constitutional safeguards than in military tribunals."[63]

In the following closely related case, the accused allegedly committed offenses contemplated under Article 3(a) while a prisoner of war in Korea. His term of enlistment expired while he was a prisoner. After his release he was returned to the United States where he requested re-enlistment. He was therefore discharged but re-enlisted the following day. Charges were preferred following his re-enlistment. The United States Court of Military Appeals distinguished this case from Hirshberg, stating that by enactment of the Uniform Code of Military Justice, Article 3(a), Congress intended to provide for continuance of jurisdiction in cases such as this and that as applied to a discharged serviceman who has re-enlisted, this statutory provision is constitutional. As applied to persons in accused's position, it held that the cited Article may be sustained under Article 1, Section 8, Clause 14, of the Constitution, empowering Congress to make rules for the government and regulation of the land and naval forces. The concurring opinion declared the Toth case to be applicable only to ex-servicemen who have severed all connection with the military.[64]

Since status and time are so closely related, the applicable ruling for termination of military status is the time of presentation

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[63] United States ex rel Toth v. Quarles, 350 U. S. 11 (1955).

[64] United States v. Gallagher, 7 USCMA 506, 22 CMR 296 (1957). Jurisdiction also extends to service personnel who having been relieved from active duty and transferred to a reserve component for completion of their military service deligation, have been voluntarily recalled to active duty. United States v. Wheeler, 10 USCMA 646, 28 CMR 212 (1959).

of discharge. Within the time span of oath to discharge numerous other problems of status have arisen and will probably continue to arise. An accused may not terminate jurisdiction by his own wrongful act. For example, the contention of an accused that his three-year term of enlistment having expired while he was in disertion negated jurisdiction, was disallowed. Similarly, where an accused after arraignment, voluntarily absents himself from his trial the court-martial retains jurisdiction to complete the trial, findings and sentence. This doctrine has received the approval of the U. S. Court of Military Appeals, even in a capital case. The Court made this observation:

> Of necessity military personnel are highly mobile, and on occasion are scattered to the four winds within a matter of hours. In oversea theaters, and particularly in combat areas, witnesses, both military and civilian, are exposed to uncommon hazards which make their assembly for trial difficult always and too often impossible. Certainly the degree of prosecution hardship sharply increases as the time of trial is delayed. The capital offense escapee may thus gain great advantage, which will vary directly with the length of time he is able to prolong his absence. This is, of course, true in all areas of law enforcement, but it is greatly intensified in that of military judicial administration. We discern no reason for impending (sic)-perhaps even defeating the prosecution of those who choose not to be present for trial, regardless of the offense with which they are charged. This would, we believe, be distinctly in derogation of the just claims of the military society, an interest often disregarded in febrile evaluation of the rights of frequently undeserving individuals."
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> "....In the civilian community there is no rigid rule demanding that a convicted man be sentenced only by the judge who presided over his trial. However, There is no provision in military criminal law procedure for the imposition of any sort of sentence save by the court which tried and convicted the accused. As a practical necessity, the court which convicts a man in absentia must have the power to sentence him as well, otherwise the conviction will have gone for naught. It will always be difficult,

> and usually impossible, ever to reassemble a court-martial-and the longer the delay, the greater the difficulty and threat of impossibility."[65]

Consideration of the variety of cases under the question of jurisdiction of the person tried is further complicated by concurrent or discretionary jurisdiction. The determination of jurisdictional responsibility in cases arising in countries visited by military personnel is frequently subject to agreement. The members of the North Atlantic Treaty Organization have entered into such an agreement.[66] There is also an agreement between the Departments of Justice and Defense,[67] as well as informal arrangements at local level in civilian communities. Since arrangements of this type concern the offense as well as the person let us proceed to the next question.

The question of jurisdiction of the offense is answered in simplest terms by recognizing that a court-martial's jurisdiction is confined to those offenses expressly denounced by Congress in the punitive Articles. Congress has also specified in UCMJ, Article 18: "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal. . ."[69] This latter jurisdiction, by natural derivation of the law of war must extend to offenses as well.

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[65]United States v. Houghtaling, 2 USCMA 230, 8 CMR 30 (1953).

[66]Status of Forces Agreement, NATO, Art. VII par. 80, 1953.

[67]Memorandum of Understanding between the Departments of Justice and Defense relating to the investigations and prosecution of crimes over which the two Departments have concurrent jurisdiction, July 19, 1955.

[68]UCMJ, 77-134.

[69]This does not apply to Special or Summary courts-martial.

Let us limit this discussion of offenses to those denounced in the punitive Articles of the Code. We must remember that certain offenses can be committed only by certain categories of persons. For example, conduct unbecoming an officer and a gentleman[70] pertains only to a commissioned officer, cadet, or midshipman. The offense of insubordinate conduct in Article 91 pertains only to enlisted persons; contempt toward government officials, of Article 88, pertains to officers. But with few exceptions the punitive Articles apply to anyone subject to the Code.

In general, the concern of the Court of Military Appeals is whether the offense charged is one denounced by the Code and is it properly identified. The general rule as to the sufficiency of the wording of a specification is that it must fairly inform the accused of the offense of which he stands charged, and must be sufficiently definite to prevent the accused from being tried again for the same offense, but it need not be framed in technical language nor with the exactitude of a common law indictment.[71] The Court has aptly observed, "Sight must not be lost in the fact that the prosecution of crime-military or civilian-is not a fox hunt, and that rather different ground rules should obtain."[72]

On the other hand, the Court is especially wary when the right of the accused is involved in jurisdiction of offense. Of course general courts-martial have jurisdiction over all offenses made punishable by the Code, from the most serious capital offenses, such as

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[70]UCMJ, 133.

[71]United States v. Marker, 1 USCMA 393, 3 CMR 127 (1952).

[72]United States v. Aldridge, 2 USCMA 330, 8 CMR 130 (1953).

murder, to the most minor, such as failure to report for a routine duty. Special and summary courts-martial have specific limitations.[73] The following case illustrates the Court's concern.

During the Korean conflict the accused was tried and convicted by Navy special court-martial for sleeping on post, which in time of war is a capital offense. The case had been referred to trial by an officer having special court-martial jurisdiction. There had been no action on the part of any officer exercising general court-martial jurisdiction or of the Secretary of the Navy which would vest jurisdiction for such cases in special courts-martial. USCMA held: The Korean conflict constituted a state of war within the meaning of the Code. Though not mandatory, capital punishment is authorized for the offense. While special courts-martial may exercise jurisdiction over nonmandatory capital cases, it is necessary that all the prescribed requirements be met. Since the court was convened by an officer whose authority extended only to special court-martial and he had not been authorized to refer a case of this nature to such court, jurisdiction was lacking and the proceedings were void.[74]

The question of the offense itself frequently enters into the area of constitutional rights of the accused. The case regarding restriction against marriage was mentioned in the general discussion of constitutional rights above.[75] An example of violation of an order, which infringed on the accused's right of freedom of speech, was

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[73]See Table 1.

[74]United States v. Bancroft, 3 USCMA 3, 11 CMR 3 (1953).

[75]Chapter IV, p. 117, Supra.

United States v. Voorhees.[76] In this case the Court held that the right of a military superior to impose silence on a subordinate is not absolute. In part, the principal opinion by Chief Judge Quinn is as follows:

> Plainly AR 360-5 imposes restrictions on the free expression of ideas by Army personnel. The question then is whether those limitations set out in the regulation constitute an illegal departure from the Constitutional prohibition on legislation 'abridging the freedom of speech,' which is contained in the First Amendment.
> "The right to free speech is not an indiscriminate right. Instead, it is qualified by the requirements of reasonableness in relation to time, place, and circumstance. Schenck v. United States, 249 US 47, 63 L ed 470, 39 S Ct 247. Thus, there is no doubt that restraints which reasonably protect the national interest do not violate the Constitutional right of free speech. See Dennis v. United States, 341 US 494, 95 L ed 1137, 71 S Ct 857. With these principles for our frame of reference, we proceed to inquire into the legality of the regulation.[77]

In United States v. Wysong,[78] the Court held that an order by a commanding officer to a subordinate to refrain from talking to other persons under any and all circumstances for an indefinite period of time was an illegal and unenforceable restraint on the subordinate's freedom of speech. And in United States v. Milldebrandt,[79] the Court held a commander could not compel a member of the command to disclose information of his financial actions during leave when such actions were not related to military duty or discipline. In a separate concurring opinion Chief Judge Quinn said:

> Persons in the military service are neither puppets nor robots, They are not subject to the willy-nilly push or pull of a capricious superior, at least as far as trial and punishment by court-martial is concerned. In that

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[76] United States v. Voorhees, 4 USCMA 509, 16 CMR 85 (1954).

[77] Ibid.

[78] United States v. Wysong, 9 USCMA 249, 26 CMR 29 (1958).

[79] United States v. Milldebrandt, 8 USCMA 635, 25 CMR 139 (1958).

> area they are human beings endowed with legal and personal rights which are not subject to military order. Congress left no room for doubt about that. It did not say that the violation of any order was punishable by court-martial, but only that the violation of a lawful order was.[80]

The Court has been especially alert to offenses against Article 134, the General Article. It has stated that this article is limited to recognized military offenses and those crimes not specifically delineated by the other punitive articles. The Court has reversed cases where it appeard that Article 134 was being used as a catchall to supply a basis for punishment where some essential element of an offense covered by some other article of the code was missing either in the pleading or proof. In this regard, it has stated, "We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."[81] The possible constitutional violation of this article continues to be the subject of considerable criticism due to the vagueness of some of the offenses alleged.[82]

As the question of jurisdiction of person is related to offense, so too is offense, as well as person, related to punishment. This is because of the authority within the Code[83] to increase the penalty for certain offenses in time of war. For example, during the Korean conflict Executive Order no. 10247 suspended the Table of Maximum Punishments for certain offenses in the Far East area in 1951. The normal limitations

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[80] Ibid. The case referred to UCMJ, 92.

[81] United States v. Norris, 2 USCMA 236, 8 CMR 36 (1953).

[82] Senate Hearings 1962, CRMP op. cit. p. 785.

[83] UCMJ, 85, 90, 101, 106, 113.

were restored in 1955.[84] By making certain offenses capital, the jurisdiction of the summary court-martial is thereby negated. As we have seen in the case above,[85] special courts-martial must be given particular authorization.

Therefore, with respect to the question of the sentence being within the prescribed maximum limit, the Court of Military Appeals must consider time, place, persons, and other special circumstances, in order to judge the jurisdiction of the court-martial. The prescribed maximum punishments are specifically listed in the manual;[86] courts-martial must be briefed as to their own authority before determining sentence; Congress has directed the convening authority to approve, ". . .such part or amount of the sentence as he finds correct in law and fact;"[87] and the board of review must affirm, ". . .such part or amount of the sentence as it finds correct in law are fact."[88] With all of the above it is unlikely that the Court would have much exercise in this regard. There have been some interesting decisions none-the-less.

In United States v. Whitman,[89] the record of trial in a special court-martial case was in part a narrative summary and in part a verbatim record. The Court said: "The punitive discharge . . . cannot stand without the support of a verbatim record. This portion of the

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[84]Executive order no. 10628, Aug. 1955.

[85]United States v. Bancroft, supra., n. 74.

[86]MCM, 1951, 127.

[87]UCMJ, 64.

[88]UCMJ, 66(c).

[89]United States v. Whitman, 3 USCMA 179, 11 CMR 179 (1953).

sentence is, therefore, illegal."[90]

In the period of transition between the old Articles of War and the new Uniform Code, this case came to the attention of the Court: Lieutenant Colonel Downard was charged under Article of War 95[91] with conduct unbecoming an officer and a gentleman, which involved assaulting and cursing his wife in the vicinity of the Fort Monroe Officers' Club. The acts involved occurred prior to May 31, 1951, the effective date of UCMJ, but the case was tried thereafter. The mandatory penalty upon conviction prescribed by Article of War 95 was dismissal, whereas the successor Article 133[92] prescribed that punishment shall be as a court-martial may direct. The law officer instructed that dismissal was mandatory and the court imposed that sentence. The Court of Military Appeals reversed, held this instruction constituted prejudicial error, and stated that a proper instruction would have been that the court might assess punishment at its discretion, not in excess of dismissal. It pointed out that anything in excess of dismissal would constitute an ex post facto application of the new Code, but that the accused was entitled to the benefit of the possibility of a lesser sentence under it.[93] Jurisdiction was not directly involved since under proper instruction the court could have imposed dismissal.

The Court has also invalidated certain provisions of the Manual as a result of its ruling and concern for a constitutional right.

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[90]UCMJ, 19. A bad conduct discharge shall not be adjudged unless a complete record of the proceedings and testimony before the court has been made.

[91]Articles of War, 1920; 41 Stat. 806 (1920).

[92]UCMJ, 133.

[93]United States v. Downard, 1 USCMA 346, 3 CMR 80 (1952).

Article 55 of the Code, in part, provides that "cruel or unusual punishment, shall not be adjudged by any court-martial . . ." However, Article 15(a) (2) (F) thereof expressly permits, "if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days." The Manual purported to prohibit Army and Air Force courts from imposing bread and water punishment but to authorize Navy and Coast Guard courts to adjudge confinement on bread and water for up to exceed thirty days,[94] in keeping with unbroken Navy practice. In the case of Marine Private Wappler, shore-based at Camp Pendleton, California, a special court in an absence without leave and missing movement case, as part of its sentence included a bad conduct discharge and thirty-days confinement on bread and water with a full ration every third day. This set the stage for one of the more spectacular decisions rendered by the Court of Military Appeals. It held confinement on bread and water was cruel and unusual punishment prohibited by Article 55 and that accordingly that part of the sentence "was illegal and void." It further held that since confinement on bread and water was included in the Table of Equivalent Punishments it could in no event be imposed as part of a sentence which also included a punitive discharge. The Court stated:

> Although we do not believe that the proscription against punishments of this nature contained in the Constitution's Eighth Amendment-if applicable-would bar the punishment adjudged here, it is to be noted that the Amendment does not necessarily define the limits of 'cruel and unusual' as used by Congress in Article 55.

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[94]MCM, 1951, 126a. Medical certificate, that serious injury to health would not result, was required; a full ration could not be deprived for more than three consecutive days.

> Use of the phrase by Congress, therefore, raises a problem of legislative rather than constitutional construction. Certainly Congress intended to confer as much protection as that afforded by the Eighth Amendment . . . we believe it intended to grant protection covering even wider limits. Accordingly, we think Article 55 quite broad enough to bar confinement on bread and water, except to the extend permitted by Article 15.[95]

This last decision must have come as a shock to the Navy. Something that was accepted punishment for 175 years suddently became "cruel and unusual." We must remember, however, in the study of this and other decisions in this discussion, that the Court is primarily concerned about those areas that create a substantial prejudice against the accused. The court itself has stated in substance:

> It is true that courts-martial are special tribunals of a limited jurisdiction, and strict compliance with the creative statute is required.
> . . . However, we have repeatedly held that not every violation of a statutory provision with respect to court-martial proceedings constitutes a jurisdictional defect. . . .On the contrary we have said that proceedings are rendered void only by a failure to comply with those provisions which constitute "indispensable prerequisites" to the exercise of court-martial jurisdiction. . .[96]

We have seen in earlier discussion[97] that the United States Supreme Court has extended its traditional interest in military courts-martial beyond jurisdiction into the area of Due Process.[98] It should be fitting therefore to follow the same road. As one military lawyer commented:

> While the decisions since Burns do not support definitive analysis, they are at least consistent with

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[95] United States v. Wappler, 2 USCMA 393, 9 CMR 23 (1953).

[96] United States v. Vanderpool, 4 USCMA 561, 16 CMR 135 (1954).

[97] Chapter IV, supra.

[98] Burns v. Wilson, 346 U. S. 137, 346 U. S. 844 (1953).

> the conclusions that: (1) The administration of military justice since Burns, either at the trial or appellate level, has been more in line with the constitutional requirements of due process than in the decade proceding Burns.[99]

The Supreme Court, in an earlier case upholding the action taken by military authorities stated; "to those in the military or naval service of the United States the military law is due process."[100] Let us now turn to the "G I Supreme Court" and due process.

USCMA In Action: Military Due Process

Certain rulings and opinions of the United States Court of Military Appeals have been referred to above in chapter IV. Because Military Due Process is such an inclusive grouping of categories of rights, there are a number of additional cases worthy of discussion. On the other hand, because of the vast number of cases and the scope of interest, only a cursory examination can be within the purview of this thesis.

Describing Military Due Process in a legal periodical, Chief Judge Quinn stated:

> It can be said, therefore, that Military Due Process begins with the basic rights and privileges defined in the Federal Constitution. It does not stop there. The letter and background of the Uniform Code add their weighty demands to the requirements for a fair trial.
> Military Due Process is, thus, not synonomous with Federal Civilian Due Process. It is basically that and something more and something different. How much

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[99]Captain Rudolph G. Kraft, Jr., "Collateral Review of Courts-martial by Civilian Courts," JAG Bulletin, USAF, Vol. V, no. 2, 1963, p. 21.

[100]Reeves v. Ainsworth, 219 U. S. 296, 31 Sup. Ct. 230 (1911).

more and how much different is indefinable in general terms for all possible situations.[101]

In keeping with the Clay[102] case in which the Court first aspoused Military Due Process, we can include almost every action in a judicial proceeding. In that case in addition to mentioning all of the safeguards granted by Congress to a military accused, Judge Clay said, "Due Process, means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights."[103]

The Court of Military Appeals, preempting the Supreme Court Miranda[104] decision, held that an accused could not be deprived of the right to consult a lawyer when he is held for interogation by law enforcement agents.[105] The accused is not entitled to appointed military counsel prior to the Article 32 investigation, but he has the right to retain civilian counsel at any time he is a suspect. He also is entitled to consult generally with the Staff Judge Advocate, in the role of impartial advisor for the command. This has become an especially significant pronouncement for the military, because the Court dismissed the charges for deprivation of counsel.

". . . It seems to us to be a relatively simple matter to advise an uninformed and unknowing accused that while he has no right to appointed military counsel, he does

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[101]Robert E. Quinn, "The United States Court of Military Appeals and Military Due Process," St. John's Law Review, XXXV (1961), 225.

[102]United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

[103]Ibid.

[104]Miranda v. Arizona, 348 U. S. 436, 86 Sup. Ct. 1662 (1953).

[105]United States v. Gunnels, 8 USCMA 150, 23 CMR 354 (1957).

> have a right to have his counsel present with him during an interogration by a law enforcement agent."[106]

The SJA erroneous refusal to provide proper information to accused was held to preclude any use of a statement subsequently obtained from him.

The Court has stated it considers the pretrial, Article 32, investigation as a fundamental part of Military Due Process.[107] It has further stated that the investigation constitutes a "discovery proceeding," and as such the accused is entitled to "qualified" legal representation.[108] Prior to the enactment of The Uniform Code it was the commonly accepted view that counsel at the pretrial investigation did not have to be a lawyer. This view prevailed during the first several years of operation under the Code.

Consider this case, which involved an Air Force sergeant with almost 19 years of military service who, had declined to exercise his right to counsel at the Article 32 investigation. During the course of the investigation the accused made an incriminating statement which was subsequently received into evidence at the trial. During the trial the defense counsel objected to the evidence because the accused was deprived of qualified counsel at the investigation.

The Court of Military Appeals, in reversing the conviction 2 to 1, held that if an accused desires counsel and selects neither civilian nor particular military counsel, the convening authority must appoint a lawyer qualified in the sense of Article 27(b) of the Code. "It would

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[106] Ibid.

[107] United States v. Allen, 5 USCMA 626, 18 CMR 250 (1955).

[108] United States v. Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957).

defeat that purpose if a person unskilled in the requirements of proof, or knowledge of legal defenses represents the accused."[109]

The holding in the Tomaszewski case was the signal for numerous appellate decisions based upon alleged failure to provide certified counsel at the Article 32 investigation.

The Court's concern for the right to counsel was further emphasized by the pronouncement concerning qualifications of counsel selected and provided by the accused at a general court-martial.

> Even at his own insistence and with full advice as to his right to be represented by qualified counsel, an accused cannot be permitted to elect to be represented by a nonlawyer before a general court-martial. It is imperative that only qualified lawyers be permitted to practice before a general court-martial. Accordingly, it is directed that the practice of permitting non-lawyers to represent persons on trial before a general court-martial be completely discontinued. However, this is not to be construed in any manner as prohibiting an accused from conducting his own defense should he desire to do so without the assistance of counsel. Nor does it in any manner infringe upon his right to consult with a nonlawyer, or even have a nonlawyer present at trial and seated at the counsel table.[110]

The Court also insisted that the accused must be advised of his right to counsel during appellate procedure and denounced an Army policy of discouraging representation at boards of review.[111]

The right to counsel is so closely guarded because it is up to the counsel, in discharging his official duties, to be concerned about all of the rights of the accused. The Court has reversed cases where in its judgement, the defense counsel did not adequately protect the

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[109] Ibid.

[110] United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958).

[111] United States v. Darring, 9 USCMA 651, 26 CMR 431 (1958).

rights of the accused.[112]

We have seen some references to USCMA rulings in the discussion in chapter IV above on self-incrimination, search and seizure, and other rights. Most of the categories are included in the Court's summation of Military Due Process.[113] Search and seizure is not, but since federal rules apply in general, the right is adequately provided for. The Court has not ignored this area. The illustrations in the following discussion describes the Court's point of view.

It is well established that where property is owned or controlled by the United States, the commanding officer having jurisdiction of the place concerned has authority to search or to authorize others to do so for him. Likewise, in foreign countries or occupied territories, the commander having jurisdiction over the person concerned may search or authorize search of that person's off-base quarters.

The power of a military commander in this field has long been recognized, and numerous decisions of the United States Court of Military Appeals uphold it.[114] He has great responsibilities with regard to property entrusted to him, as well as responsibilities of command and discipline. Additionally, someone must be readily available to exercise this extraordinary power. There being no one comparable to the civilian magistrate in the military community, it must devolve upon someone who can exercise it in a dispassionate manner. The commander is the best choice. However, the commander, too, is bound by the requirement

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[112] United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956). United States v. McFarlane, 8 USCMA 96, 23 CMR 320 (1957).

[113] Chapter IV.

[114] United States v. Florence, 1 USCMA 620, 5 CMR 48 (1952). United States v. Doyle, 1 USCMA 545, 4 CMR 137 (1952).

that probable cause must exist for belief that an offense had been committed by the person searched for possession of the criminal goods sought. Mere suspicion, without factual basis, will not support this requirement. He may delegate his authority with discretion.

Consider this case. The accused and nine other soldiers, while on pass, were transported by an Army truck. Six or seven of the ten were suspected narcotics users and one of them was reputed to have been previously "caught" with narcotics but never tried for the offense. Still another was known to have borrowed money before leaving on his pass. Upon return of the truck to the unit area, the commander ordered the apprehension and search of all ten soldiers based upon the foregoing information. This was done and two bottles of heroin were found on the accused's person. The Court of Military Appeals held that, search and seizure was illegal and its product was inadmissible in advance. Reasonable or probable cause was lacking for both the apprehension and the search. The commander acted on mere suspicion in ordering a wholesale search of a group which included "suspects" and those regarded as innocent. The search was general and exploratory in nature and "wholly lacking in reasonable cause."[115]

In the following case a search was made by the provost marshal of a Marine Corps Supply Center. The commanding general of the center had, by general order, delegated search authority to certain personnel, including the head of the administrative branch of the center. The provost marshal conducted the search after permission from the head of the administrative branch. The Court held that the search was properly authorized.[116]

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[115] United States v. Brown, 10 USCMA 428, 28 CMR (1959).

[116] United States v. Weaver, 9 USCMA 13, 25 CMR 275 (1958).

Often searches are conducted by persons, who assume that they have authority to act and who do so in good faith, without receiving specific approval of one with unquestionable authority. Such instances have produced a volume of legal controversy. Cases in this category have been upheld on appeal where it could be determined that under the particular circumstances of the case the person either had sufficient authority or the need for immediate action made the search reasonable.

The Constitution protects only against unreasonable searches. If immediate action is required to prevent destruction or removal of criminal goods, it is reasonable that such action be taken. On the other hand, it takes only a short time, ordinarily, for law enforcement officers to arm themselves with appropriate authority. The peculiar circumstances of the case (each case is decided on its own facts) will determine reasonableness. Thus when six law enforcement officers expecting to seize a storage of narcotics had staked out the accused's shack for 24 hours without result and rushed in to search without warrant when he was subsequently apprehended approaching it, the United States Court of Military Appeals felt the search was unreasonable. There were sufficient officers present that one could have gone for the warrant while others restrained the accused and waited.[117]

The Court of Military Appeals defined the nature of a serviceman's "home", the place in which he had a right to be free from the uninvited and unauthorized intrusion of others.

> A dwelling house is not a mere physical structure of a particular kind; it is a place in which human beings live. It may be a hotel room, an apartment, an entire building, as in the case of a single family residence, or a tent.

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[117] United States v. Alaniz, 9 USCMA 533, 26 CMR 313 (1958).

> State v. Holbrook 98 Or. 43, 188 Pac. 947. Cf. United States v. Love, 4 USCMA 260, 15 CMR 260. Generally a military person's place of abode is the place where he bunks and keeps his few private possessions. His home is the particular place where the necessities of the service force him to live. This may be a barracks, a tent, or even a foxhole. Whatever the name of his place of abode, it is his sanctuary against unlawful intrusion; it is his castle. And he is there entitled to stand his ground against a trespasser to the same extent that a civilian is entitled to stand fast in his civilian home. No reason in law, logic or military necessity justifies depriving the men and women in the armed forces of a fundamental right to which they would be entitled as civilians. Consequently, when the accused retired to his own tent, he retreated as far as the law demands. The law officer erred in failing to make that clear to the members of the court.[118]

The trial procedure in courts-martial has been carefully monitored. This encompasses a complete review of all rights up to the appellate level. We have seen how many of the decisions discussed up to this point are based on discovery by the Court in reviewing the record of the trial. Here is a case on illegal testimony; this appears in a service newspaper:

> WASHINGTON - The Court of Military Appeals has just reversed the conviction of an airman second class because his wife was illegally compelled to testify against him.
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> In his unanimous (3-0) opinion, Chief Judge Robert F. Quinn came out strongly in favor of preserving a marriage rather than ending it because of occasional "bouts" between spouses. The airman was accused of "cuffing" his wife.
>
> Court-martial testimony revealed that the airman slapped his wife only after she beat him in the head with a shoe. Quinn noted that the wife's testimony raised a serious doubt about whether the airman should have been charged in the first place with assault and battery.
>
> The airman testified at his trial that he loved his wife very much. She indicated she felt the same about him.

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[118] United States v. Adams, 5 USCMA 563, 18 CMR 187 (1955).

> "To burden (the airman) with a bad-conduct discharge in these circumstances borders on the unconscionable," Quinn wrote.
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> At the court-martial, the wife said repeatedly that she did not wish to testify against her husband, but the prosecutor told her she had to. Quinn held that the prosecutor was wrong and ordered the conviction set aside. Quinn wrote:
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> ". . . the general rule is that, as to offenses against third persons, one spouse cannot testify against the defendent-spouse . . . as to offenses against the spouse, the victim-spouse may testify voluntarily, but cannot be compelled to testify over her protest."[119]

The law officer in a general court-martial has gradually assumed the status comparable to that of a trial judge in the civilian federal system. This has had the complete approval of the Court; in fact the Court has largely contributed to his concept.[120] It has held that the law officer must always be completely impartial, should never be placed in a partisan status and must function as a judge at all times.[121] The Court has reversed numerous cases because it found the law officer's rulings and instructions prejudicial to the accused. On the other hand if it found the error not sufficiently serious, there would be no reversal. Such cases have been a major contribution to improving military judicial proceedings. Obviously a fair trial is a vital part of Military Due Process.[122]

The law officer's functions are discharged by the president of a Special court-martial. Since this officer presides by right of

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[119] The Air Force Times, July 15, 1964, p. 8.

[120] United States v. Biesak, 3 USCMA 717, 14 CMR 132 (1954).

[121] United States v. Renton, 8 USCMA 697, 25 CMR 201 (1958). See Judge Ferguson's dissent for a discussion of law officer's duties in United States v. Mortensen, 8 USCMA 233, 24 CMR 43 (1957).

[122] United States v. Jenkins, 1 USCMA 329, 3 CMR 63 (1952).

seniority only, he frequently has no legal training. The Court of Military Appeals carefully evaluates the president's behavior, in those limited cases which reach the Court. The Clay case, referred to several times above as the basis of the Military Due Process Doctrine, was reversed because of the omission by the president of a Navy special court-martial. He failed to instruct as to the presumption of innocence, burden of proof and the elements of an offense to which the accused had pleaded not guilty.[123]

Aside from the legal complexities, even conduct comes under scrutiny. In United States v. Lynch,[124] a conviction on a guilty plea was nullified due to the conduct of the president of the Court. He remonstrated in open court saying, "you, as a civilian lawyer, may not be aware that an officer of the United States Army is bound to tell the truth."

We recall our own anxieties as president of special courts-martial in numerous serious situations. The decisions involved, when punitive discharge and confinement may be adjudged, are not to be taken lightly. As president of a general court-martial we welcomed the secondary role, subordinate to the law officer. In contrast to those serious cases the one we recall most vividly was a ludicrous incident.[125] A young lady, who had allegedly been molested by the accused, was called in by the trial counsel to testify, and to identify the accused. We had always wondered about the setting of the courtroom which almost labels the accused by his position. The trial counsel had elicited the

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[123]United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

[124]United States v. Lynch, 9 USCMA 523, 26 CMR 303 (1958).

[125]Burtonwood, United Kingdom, 1952-1954.

testimony about the alleged molesting. He then asked the witness to look around the courtroom to see if the person who had molested her was present, and if so to point him out. She looked all around the room, at the spectators, the counsel, the accused and finally at the court. Then with perfect confidence she pointed to a lieutenant seated at the table as a member of the court. "There he is," she said, "That's the one." After order was restored-even the accused joined in the laughter- the witness realized her mistake and properly identified the accused. But a reasonable doubt was established and the accused was found not guilty. The poor innocent lieutenant who was our squadron adjutant, with good nature, enjoyed the notoriety for a long time.

In considering trial procedure as a part of Military Due Process we must include the protection against self-incrimination and the right to remain silent. The Court of Military Appeals has of course been particularly alert to enforce these rights and pays special interest to confessions. Confessions must be affirmatively shown as voluntary. Since this is not an interlocutory question, the law officer must instruct the court that it must decide if voluntariness is in issue.[126] Since confessions are seldom made during the trial, they are more likely obtained in the investigation stage of Military Due Process. Early in its tenure in reversing a conviction the Court made this exceptionally strong pronouncement:

> At the outset of the investigation, the officer conducting it did not fully advise petitioner of his rights under Article of War 24, supra. This was a clear violation of that Article. Nor did he advise petitioner of the nature of the investigation, or of the charges against him. This officer then conducted a searching and inquisitorial examination utilizing all the devices of an

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[126] United States v. Minnifield, 9 USCMA 373, 26 CMR 153 (1958).

> expert prosecutor cross-examining a hostile witness, accompanied by shouting, accusations of falsehood, reprimands, and castigations of character. All these factors inevitably lead to the conclusion that petitioner was, in effect, compelled to incriminate himself. This smacks too much of Star Chamber proceedings. Petitioner does not have a free choice to admit or deny his guilt or to refuse to answer the questions asked.
>
> It follows automatically that the testimony given at this investigation should not have been received in evidence at the trial. Article of War 24, supra, and Article 31 of the Uniform Code of Military Justice, 50 U. S. C. Sec. 602, so command. Further, it matters not that there may be other evidence of guilt. The right here violated flows, through Congressional enactment, from the Constitution of the United States. Military due process requires that courts-martial be conducted not in violation of these constitutional safeguards which Congress has seen fit to accord to members of the Armed Forces, United States v. Clay, 1 USCMA 74, decided November 27, 1951. These safeguards are for the protection of all who are brought within the military disciplinary system, and are not to be disregarded merely in order to inflict punishment on one who is believed to be guilty.[127]

There are innumerable cases, which we cannot discuss here, where the Court of Military Appeals demonstrated that disregard for substantial rights or activity prejudicial to the accused cannot be tolerated. The Code states that "a finding or sentence of a court-martial shall not be held incorrect on the ground of an error of law unless materially prejudiced the substantial rights of the accused."[128] In this respect, the Court has frequently disagreed with boards of review in recognizing the extent of error as harmless or prejudicial. The totality of harmless error cannot become prejudicial by mere cumulative effect. The Court so held in this case:

> Appellate defense counsel, admitting arguendo that, considered individually, none of the errors listed above prejudiced the accused, argues that their cumulative

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[127] United States v. Welch, 1 USCMA 402, 3 CMR 136 (1952).

[128] UCMJ, 59a.

> effect was such as to warrant a finding of prejudice. Counsel refers to several Federal cases in support of this proposition. Without analyzing those decisions in detail, we note that the individual errors in each of them contained some, although slight, possibility of prejudice. Such is not the case here. The errors discussed above are formal in nature and we fail to see how, individually or collectively, they could have in any way materially harmed the accused. Since we find no substantial prejudice, we are bound by Article 59 of the Uniform Code of Military Justice, 50 USCMA Sec. 646, to hold that the errors considered by the board of review 129 do not require disapproval of the findings and sentence.

The Court is certainly more alert than the boards of review and thereby justifies its existence as a civilian supervising agency. The following testimony before the Senate hearing on constitutional rights should emphasize the value of the Court.

> . . . it is impossible to expect the services without the supervision of the Court of Military Appeals to stamp out the endemic existence of command influence, and I have here a list of the horribles. I don't want to go into them in detail, Mr. Chairman, perhaps if I either submit the citations to the reporter or submit them separately. These are shocking cases that weren't caught by the Board of Review.
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> There is the Deain case (5 USCMA 44), a Navy case. They had a permanent general-court. I think the Navy has now got away from that. The admiral who was president of the general court was challenged and on challenge admitted that when "I see him come in there, I know he is generally guilty otherwise he wouldn't be here," and then he made out the fitness reports on the members of the court.
>
> Well, you can imagine how much dissent you were going to get from the members of the court in that situation. Passed by a board of review, reversed by the Court of Military Appeals.
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> Whitley (5 USCMA 786): The president of a special court was ruling in favor of the defense. At a recess he was relieved and another officer was substituted in his place. Passed by the Board of Review, reversed by the Court of Military Appeals.
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> Sears (6 USCMA 661): There was an Air Force special court-martial in England. The accused hired an English solicitor who, of course, has the right of audience.

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[129] United States v. Zimmerman, 1 USCMA 160, 2 CMR 66 (1952).

> The convening authority put two lawyers on the court on the special court, who advised the president to overrule every one of the solicitor's objections. Passed by the Air Force Board of Review, reversed by the Court of Military Appeals.
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> Parker (6 USCMA 75): A soldier put on trial for a capital case, death sentence adjudged, 1 day to prepare for trial. Passed by the Board of Review, reversed by the court.
>
> McMahan (6 USCMA 708): A soldier on trial for a capital offense. His counsel, a major, J. A., made no closing argument although it was a very thin case on premeditation, said nothing in mitigation when the question before the court was whether it should be a death sentence or a life sentence. Death sentence was adjudged, passed by the Board, reversed by the court.
>
> Kennedy (8 USCMA 251): A cooked-up scheme, I don't think any other characterization would be accurate, between trial counsel, the law officer and the staff judge advocate to get a conviction. Passed by the Board, reversed by the court, and finally Kitchins (12 USCMA 589), when an Army lieutenant made a spirited defense his superior, the staff judge advocate, gave him a low efficiency report. Passed by the Board, reversed by the court.
>
> So, I am convinced you need a court not only to take you gentlemen and the Congress out of the court-martial business so you don't have to go see the Secretary on behalf of constituents but also to look over the shoulders of these people who just can't be relied upon to do a completely decent job by themselves.[130]

The cases, opinions and statements cited in this chapter are not inclusive enough to be considered as a valid survey. Nor have they included all the areas of interest. We do believe, however, that a firm conclusion can be drawn that the United States Court of Military Appeals is indeed a protector of the rights of the service personnel. We have come a long way since the case described here.

> In a rather bizarre case involving a young Army lieutenant named Shapiro, a federal district court decided that the Army conducted its court-martial with more speed than due process allowed. Shapiro, an Army defense

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[130]Frederick Bernays Wiener (before the Senate Subcommittee on Constitutional Rights) Hearings, CRMP, op. cit. pp. 780-81.

> counsel, had substituted one Mexican for another who was charged with rape, which caused the chief government witness at the court-martial to identify the pretended defendant as the guilty party. Shapiro revealed the hoax only after the party was convicted. The Army, thrown off stride by this ingenious defense tactic only momentarily, freed the innocent defendant and charged the "original", who was then convicted. There is no need to speculate about the Army's feeling toward Shapiro. It then charged him with delaying a general court-martial, a violation of that military catchall, the ninety-sixth Article of War. Shapiro was arrested at 12:40 P.M., and the tiral was set for 2:00 P.M., at a place forty miles away. At that time and place Shapiro's request for continuance was refused. This treatment was held to be a denial of counsel and of due process in what apparently was an enjoyable case for the district court, whose opinion lashed military "justice" thoroughly.[131]

In contrast to that horrible example of military justice, compare this case, tried under the old Articles of War but reviewed by the Court of Military Appeals under the Uniform Code.[132]

> In the past year and a half the Court of Military Appeals has protected the constitutional rights of more than 2000 servicemen. The DeCarlo case involved a typical case the court will not tolerate.
>
> Private DeCarlo was moving up to the front with his infantry regiment in March 1951 (in Korea) when he asked Poe Kaiwan, a Korean boy working in the outfit's supply branch, for a bar of candy. Poe frequently had given candy to the soldiers but on that occasion said he had none. All witnesses testified that private deCarlo was kidding when he told Poe, "If you don't give me some candy I'll shoot you" - and then his gun went off.
>
> Just before Poe died he said he knew the shooting was accidental. The law officer (Judge) of the court that tried private DeCarlo on May 15, 1951, refused to admit Poe's statement in evidence and private DeCarlo was found guilty of unpremeditated murder. The law authorizing C. M. A. to review court-martial convictions went into effect May 31, 1951. The Court of Military Appeals whose decisions are final, ruled that the supression of Poe's voluntary statement was a prejudicial error and ordered another trial. Private DeCarlo was tried with

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[131] William M. Beaney, The Right to Counsel in American Courts. (Ann Arbor: University of Michigan Press, 1955), pp. 51-53.

[132] United States v. DeCarlo, 1 USCMA 91, 1 CMR 90 (1951).

> negligent homicide at the retrial and received a sentence of six months. He since has returned to active duty (original sentence was 25 years).[133]

The balance between the military's concern for discipline and the Court's concern for the accused is a perplexing problem. As the late Judge Brosman put it in the early days of the Court:

> We can't solve it simply by giving the accused the benefit of every possible doubt. There are times when military considerations of necessity are overriding factors in a case. It is essential for the public to remember that military service takes place in an abnormal social situation governed by limitations growing out of the realities and necessities of military operations . . . each case involves considerations peculiar to itself.[134]

The Court has well deserved the praise heaped upon it. Let us turn now to the effects of its case law on the Uniform Code and future military justice.

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[133] Stanley Frank, "The G I's Day in Court," Nations' Business January 1953, p. 36.

[134] Ibid.

CHAPTER VI

TRENDS IN MILITARY JUSTICE

Progress Under the Uniform Code

We have seen how the Uniform Code of Military Justice was developed to cure many of the ills of former military codes. We have also seen that the Code in action is an extremely effective device, and a protector of the basic rights of an accused. We have examined the legislative history, structure and operation of the United States Court of Military Appeals. We have also examined some of its decisions and observed how the Court strives to maintain a balance between the military requirement for discipline, and the constitutional requirement for the protection of individual rights. Let us turn to the effects of the Court on the Code, by noting some of the provisions of the Code that have undergone modification as a direct result of judicial review. The power of judicial review is usually associated with the United States Supreme Court,[1] and in fact we shall see that the Supreme Court has also had an impact on the Code. The judicial review of the Court of Military Appeals has resulted in the invalidation of certain provisions of the Manual for Courts-Martial, which is an executive order forcing the executive to promulgate new orders to be in consonance with military case law, and causing Congress to amend the law.

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[1]Rocco J. Tresolini, American Constitutional Law, (New York: The Macmillan Company, 1959), p. 55.

The Uniform Code of Military Justice was originally Section 1 of Public Law 506, 81st Congress, Act of May 5, 1950, and was codified as part of Title 50 U. S. C. (Chapter 22). The Act of August 10, 1956[2] revised, codified, and enacted the Uniform Code into law as part of Title 10 U. S. C. (Chapter 47). This change was effective January 1, 1957. Chapter 47, titled Uniform Code of Military Justice, contains sections 801[3]- 940, which are synonomous with Articles 1-140, UCMJ. All subsequent changes to the Uniform Code are therefore amendments to the Act of August 10, 1956, and are codified in the appropriate section of Title 10[4] U. S. C. Four minor amendments changed some language due to the status changes of Hawaii and Alaska, and extended the power to administer oaths.[5] There have been only three significant amendments in fifteen years of operation under the Uniform Code.

The first major change was the insertion of Article 58a[6] in the Code. This Article provided statutory authority for automatic reduction of enlisted persons to the lowest grade. Upon approval by the convening authority, any sentence that includes (1) a dishonorable or bad-conduct discharge; (2) confinement; or (3) hard labor without confinement; will automatically effect reduction to the lowest grade. The usual appellate procedures remain; if the sentence is set aside, or as finally approved

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[2]P.L. 1028, 84th Cong., 70 A Stat. 1 (1956).

[3]See appendix for sec. 801, chapter 47 (UCMJ, Art. 1), 10 U. S. C. 801.

[4]e.g. 10 U. S. C. 815 (UCMJ, Art. 15) was revised by P.L. 87-648 in 1962.

[5]P.L. 86-70, 73 Stat. 142 (1959); P.L. 86-624, 74 Stat. 411 (1960). P.L. 86-589, 74 Stat. 329 (1960), oaths, UCMJ, 136. There should be another language change due to transfer of the Coast Guard from Dept. of Transportation.

[6]P.L. 86-633, 74 Stat. 468 (1960).

does not include any of the punishments listed above, all rights and privileges will be restored retroactively.

The Article 58a amendment to the law, the first significant change in the Uniform Code, was a direct result of judicial review by the United States Court of Military Appeals. The Court's reasoning followed a general pattern.[7] Certain provisions of the Manual appeared to be in conflict with the Code, or at least what the Court determined to be the intent of Congress in adopting the Code. In the 1953 Wappler decision,[8] noted above, the Court first held a provision of the Manual to be invalid, when a long recognized punishment in the Navy was declared "cruel and unusual." That decision, by invalidating a provision of the Manual, negated part of an executive order. In 1958 in the Varnadore[9] decision, the Court again took issue with the same section in the Manual, concerning punishment. UCMJ, Article 56, authorizes the President to prescribe maximum punishments. This is implemented in the Manual by a table relating punishments to specific violations. In the same paragraph the Manual[10] states that a sentence of confinement for a period greater than six months results in automatic punitive discharge as part of the sentence. In the Varnadore case the Court reasoned that this was setting a minimum limit in conflict with Article 56.

Apparently the Court applied the same reasoning in invalidating a long standing practice[11] that confinement resulted in automatic reduction

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[7]Major General Stanley W. Jones, "What's the Law Today," Army, X (1960), 52-58.

[8]United States v. Wappler, 2 USCMA 393, 9 CMR 23 (1953).

[9]United States v. Varnadore, 9 USCMA 471, 26 CMR 251 (1958).

[10]MCM, 1951, par. 127.

[11]Since 1917.

to the lowest enlisted grade, and that total forfeiture resulted in punitive discharge. The writer can recall specific instructions by the Staff Judge Advocate on many occasions (not in court), to be sure to include the reduction or discharge as part of the sentence, if that was the intent of the court. If the court failed to include the proper sentence it would be corrected by the convening authority in his review of the case. However the automatic features created administrative problems.[12] An Executive Order,[13] amending the Manual in 1956, was promulgated to clarify the automatic reduction provision. The Court, however, invalidated that Executive Order and the automatic feature of the Manual in United States v. Simpson.[14] The Court recognized that an accused sentenced to an extended period of confinement is worthless and perhaps a liability to the services; but it held that reduction, if added by the convening authority, operates to increase the sentence and is therefore invalid. Reduction must be part of the sentence. By this ruling a senior non-commissioned officer conceivably could be sentenced to confinement and discharge and continue to receive full pay and allowances. The average time for full appeal in 1959-1960 was 344 days.[15]

These decisions worked a real hardship on the services and were severely critized by many legal authorities.[16] Relief was granted by

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[12]A case is not final with the pronouncement of the court-martial's sentence.

[13]Executive Order 10652, 1956.

[14]United States v. Simpson, 10 USCMA 229, 27 CMR 303 (1959). United States v. Littlepage, 10 USCMA 245, 27 CMR 319 (1959).

[15]Jones, loc. cit.

[16]William G. Fratcher, "Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals," N.Y.U. Law Review, XXXIV, (1959), 861.

the Amendment to the Code which, in effect, placed the invalidated Executive Order within UCMJ, Article 58a.[17] This legislation was sponsored by the Department of Defense as a result of an Army study of the first seven years operations under the Uniform Code.[18]

The second significant change was implemented by inserting Article 123a,[19] the "bad check" provision. Before this amendment became effective, the services had struggles for ten years with the inadequate provisions of the Uniform Code. It was especially difficult to obtain a bad check conviction due to the lack of specific language in the Code. Serious violations were prosecuted as larceny under Article 121, while less serious offenses were charged under Article 134, the General Article. The new Article spelled out the offense with clarity, and of course required a new Executive Order[20] to revise the table of maximum punishments and other parts of the Manual. It is interesting to note here, that USCMA decisions were not the motivating force in this instance. In fact, the Court, as part of the Code Committee[21] recommended legislation to correct this inadequacy ten years earlier.[22] The Code Committee recommended legislation similar

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[17]Note 6, supra.

[18]The Committee on the Uniform Code of Military Justice Good Order and Discipline in the Army, Report to Honorable Wilber M. Brucker, Secretary of the Army, 18 Jan. 1960, known as "The Brucker Report." See Appendix C for extract summary. Note the critical letter to Congressman Kilday, later to become USCMA judge.

[19]P.L. 87-385, 75 Stat. 814 (1961).

[20]Executive Order 11009, 1962.

[21]The Code Committee includes the USCMA, the Judge Advocates General of the Armed Forces and the General Counsel of the Dept. of the Treasury.

[22]USCMA Annual Report, June 1, 1952--Dec. 31, 1953, p. 9.

to the District of Columbia bad check law. The services welcomed the new law and the word soon circulated that there was a "crack down" on bad check offenses.

The third and perhaps the most significant change was the improvement of Article 15,[23] non-judicial punishment. This amendment to the Uniform Code resulted in a sharp reduction in summary courts-martial,[24] and has received popular acceptance by all the services. The Code Committee expressed approval with this comment:

> Although in effect less than one year, the new Article 15 has already reduced the court-martial rates in the Armed Forces substantially. Most minor offenses are now appropriately punished non-judicially without imposing the stigma of criminal convictions.[25]

The new Article 15, was a major revision in non-judicial punishment. It has been extensively used by all the services since it went into effect February 1, 1963. The attendant reduction in summary courts-martial is especially noteworthy.[26] The following comments express typical approval:

> There was a sharp reduction in summary courts-martial trials, from 43,542 last year to 32,316, or approximately 30 percent. This decrease can be attributed primarily to the amended article 15 of the Uniform Code of Military Justice, which was in effect during 5 months of the reporting period, and which provided commanders with more extensive and effective non-judicial punishment authority.[27]

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[23] P.L. 87-648, 76 Stat. 447 (1962).

[24] See Table 8, Chap. IV.

[25] USCMA Annual Report, 1963, p. 1.

[26] Army - 61 percent, Navy - 65 percent, Marines - 57 percent, Air Force - 56 percent (estimate).

[27] USCMA Annual Report, 1963, p. 61.

Courts-martial of all types--general, special, and summary--convened within the Navy and Marine Corps totaled 39,033 in fiscal year 1963 as compared to 45,529 in fiscal year 1962. This represents an overall decrease of 6,496 cases, or 14.2 percent. Since service strengths have remained relatively unchanged, a decrease in courts-martial case-load may be attributable to Public Law 87-648 which increased the Article 15, UCMJ, non-judicial punishment authority of commanding officers. The new article 15 has received universal command approval, with many noting an improvement in discipline. Despite the relatively short period of time that the new article 15 has been in effect, it is apparent that not only are we saving many of our people from criminal records, but discipline and morale are being enhanced.[28]

The first months of experience with the operation of the new Article 15, Uniform Code of Military Justice, indicates that the powers granted by the article are being employed with discretion and that a beneficial effect on discipline has resulted. Of more importance is the fact that the drastic reduction in the number of cases tried by summary courts-martial is due primarily to the use of the powers granted by the new article. During the last quarter of fiscal year 1963, the only period for which I have complete statistics, the authority granted by the new article was used by commanders on 51,683 occasions. No information is available with respect to the number of times the powers granted under the former article 15 were employed in the last quarter of the previous fiscal year. However, during that quarter, 11,143 cases were tried by summary courts-martial, while only 4,419 cases were tried by that forum in the last quarter of fiscal year 1963. The summary court-martial rate per thousand dropped from 9.96 in the last quarter of fiscal year 1962 to 4.39 in the last quarter of fiscal year 1963. There was, however, no significant change in the special court-martial rate during the same periods.[29]

Courts-martial of all types--general, special, and summary--convened within the Navy and Marine Corps totaled 25,041 in FY 1964 as compared to 39,033 in FY 1963. This represents an overall decrease of 13,992 cases or 36 percent. The decrease in case load cannot be attributed to a decrease in service strengths since they have increased slightly, but may be attributable to PL 87-648 which increased the Article 15 UCMJ non-judicial punishment authority of commanding officers. A comparative analysis of the first two quarters of FY 1963 (before the new

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[28] Ibid., p. 89.

[29] Ibid., pp. 66-67.

> Article 15 became law) with the first two quarters of FY 1964 (during which time the new law was in effect) shows a 65 percent decrease in Navy and a 57 percent decrease in Marine summary courts-martial cases.[30]
>
> . . . a remarkable reduction in summary court-martial trials from 32,316 last year to 16,926, or approximately 47 percent. The decreases may be attributed primarily to the amended Article 15 of the Uniform Code of Military Justice, which was in effect for the entire fiscal year as compared with only 5 months during Fiscal Year 1963. There were 61 percent fewer summary court-martial cases in Fiscal Year 1964 than in a similar period immediately preceding the amendment of Article 15.[31]

The recommendations by the Code Committee had included dispensing with the summary court-martial, as well as increasing the authority of Article 15. Note the following testimony, by Chief Judge Quinn, USCMA, before the Senate Subcommittee on Constitutional Rights:

> MR. CREECH. Sir, with regard to the Uniform Code, are there any suggestions which you would care to make in regard to amendments to it in areas in which your experience has indicated that perhaps amendments should be made in order to safeguard the constitutional rights of the service personnel?
>
> JUDGE QUINN. I think Mr. Chairman, that perhaps those rights are adequately safeguarded as far as we are able to safeguard them. Certainly we will and have, to the best of our ability, protected the constitutional rights of every serviceman. We have recommended some 17 rather minor changes in the code, and those recommendations are before the Armed Services Committee for consideration.
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> . . . . . .
>
> Now, I have not before me the other 17 changes that we have recommended, but we are on record in our annual report several different times as to what we think ought to be done to somewhat streamline the Uniform Code.
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> . . . . . .
>
> MR. CREECH. It has been indicated to us that there is no right to counsel in summary courts-martial, and I wonder, Sir, what your feeling is with regard to the lack of counsel in view of the sixth amendment guarantee of the right of defendants to counsel in criminal cases?

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[30] USCMA Annual Report, 1964, p. 65.

[31] Ibid., p. 57.

JUDGE QUINN. This is before summary courts? Of course, we have more or less concurred in recommendations that article 15 punishment be increased to some extent, and that the summary court be dispensed with.

So that perhaps would obviate any necessity for counsel.

Of course, I am a firm advocate of the right of counsel, and I think if any boy, whether it is before a summary or special or general court, asks for counsel, that he ought to have it, if it is reasonably available.

MR. CREECH. Sir, with regard to changing article 15, there have been some proposals made for the increase of article 15 authority of the commanding officer to impose non-judicial punishment.

Do you feel, Sir, that this would be desirable?

JUDGE QUINN. Yes, I do.

MR. CREECH. Do you care to elaborate on your statement, Sir?

JUDGE QUINN. Well, of course, whatever punishment he gets under article 15 would leave no record and, after all, I think that perhaps conviction in a summary court which leaves a boy with a record is far more dangerous than maybe even a little more severe punishment in the matter of fine or 8 or 10 days in jail.

So that I think, at least to some extent, it is a lesser punishment. And most of the commanding officers around the world that we have talked to--and Judge Ferguson and I have been in many parts of the world: Judge Kilday has just come on the court and has not had an opportunity to get out into some of the theaters of war; he undoubtedly will--they have indicated to us that a little more power in the field of non-judicial punishment would be very useful to them; that it would promote discipline, improve the situation in their commands, and, yet, would leave no record as far as the boy is concerned.

In other words, there would be no record of any conviction, and, therefore, no permanent blot upon his record.

So it seems to me that the increase in powers that we have recommended to the Armed Services Committee would actually be in the boy's favor. It would do him little or no harm, and it would remove any possibility of a conviction remaining on his record.[32]

Likewise in his testimony before the same Subcommittee Mr. Zeigel W. Neff, civilian member of a Navy board of review, noted

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[32] U. S., Congress, Senate, Subcommittee of the Committee on The Judiciary Hearings, Constitutional Rights of Military Personnel, 87th Cong., 2nd Sess., 1962, pp. 181-183.

the possibility of expanding Article 15 and thereby eliminating the summary court-martial. He pointed out;

> . . . The punishment limitations of commanding officers under article 15 of the code should be increased to include punishment reserved for the summary court-martial, and the summary court should be abolished. This change has been recommended by the judges on the Court of Military Appeals, the service Judge Advocate Generals, and other individuals who have studied the matter. The commanding officer needs this additional authority so that he can correct a youngster by taking him out to the woodshed, so to speak, without being forced to give him a summary court-martial for a minor infraction. Conviction by summary court becomes a conviction of record. Two such convictions will support a punitive discharge in a special or general court and in any event will follow an accused for the remainder of his life. Before a summary court, an accused has no right to qualified counsel as such, yet he may come out with a relatively serious conviction of record, involving such derelictions as insubordination, assault, petty larceny, et cetera.[33]

Note this comment from the report, dated 1963, by the Senate Subcommittee, which conducted the Hearings on Constitutional Rights in 1962. (The Article 15 legislation was passed before the report was completed).

> Thus, the expansion of non-judicial punishment, taken together with the continued existence of the summary court-martial, creates a threat that the serviceman will be deprived of important rights which Congress intended him to retain. Indeed, aside from furnishing commanders with a weapon to use against the rights of service personnel, the summary court-martial has no role left to play. Accordingly, the subcommittee recommends the elimination of summary courts-martial.[34]

It therefore appears that one amendment leads to another. This proposal, to abolish the summary court-martial, is one of many which

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[33] Ibid., p. 299.

[34] U. S., Congress, Senate, Subcommittee of the Committee on The Judiciary, Summary Report of Hearings, Constitutional Rights of Military Personnel, 88th Cong., 1st Sess., 1963, p. 36.

have been recommended to Congress every year since 1953. Before examining this and other proposals now under consideration, let us first review certain United States Supreme Court decisions. There is now a proposal to revise the Uniform Code with respect to jurisdiction of certain civilians, because the Supreme Court has declared UCMJ Article 3(a) and Article 2(11) unconstitutional.

Article 3(a) was discussed briefly in chapter V above.[35] It was supposed to fill the jurisdictional gap over persons who had committed a serious offense while in service, but had been discharged without prosecution.[36] The Supreme Court in effect declared it unconstitutional in United States ex rel Toth v. Quarles,[37] when it held:

> Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "The least possible power adequate to the end proposed." We hold that Congress cannot subject civilians like Toth to trial by court-martial. They like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the constitution.[38]

The Toth case concerned prosecution in a court-martial of an ex-serviceman for an offense committed by him while in an active status as

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[35]Chap. V, p. 92.

[36]UCMJ, Art. 3. "Jurisdiction to try certain personnel. (a) Subject to the provisions of article 43 (Statute of Limitations), any person charged with having committed, while in a status in which he was subject to this Code, an offense against this Code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or the District of Columbia shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status." Original article.

[37]United States ex rel Toth v. Quarles, 350 U. S. 11, 76 Sup. Ct. 1 (1955).

[38]Ibid.

expressly authorized by Article 3(a). The United States Court of Military Appeals in United States v. Gallagher[39] reasoned that Article 3(a) is constitutional when applied to service personnel who have been discharged but re-enlist. USCMA declared the Toth case applies only to ex-servicemen and civilians who have severed all connections with the U. S. Armed Forces. This ruling has not been tested by habeas corpus.

So it appears that UCMJ, Article 3(a) retains jurisdiction over those who re-enlist, but does not extend to those who are discharged and do not re-enlist. In this latter group there is a jurisdictional gap over a serviceman who commits a crime overseas which is not discovered until after he returns to the United States and is discharged. To correct this situation there have been proposals[40] to amend the Code to allow such violations to be tried by Federal District Courts. As of this writing legislation is still pending.

With respect to the Supreme Court decisions regarding Article 2(11),[41] jurisdiction over civilians, there is another jurisdictional gap. This came about by the rulings in a series of cases following the Toth decision.

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[39] United States v. Gallagher, 7 USCMA 506, 22 CMR 296 (1957).

[40] Proposals have been recommended and introduced many times. Latest proposal is S. 761 introduced by Senator Ervin, January 26, 1965. Hearings were held in January and March 1966. Parallel bills were introduced in the House. Legislation is expected in 90th Congress.

[41] UCMJ, Art. 2 "Persons subject to the Code. The following persons are subject to the Code: . . . (11) all subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the Armed Forces outside the United States and outside the following: the Canal Zone, Puerto Rico, and the Virgin Islands." Revised Article.

The Supreme Court had considerable difficulty in deciding whether or not the power granted by Congress in UCMJ, to military courts-martial to try civilians overseas should be sustained. Article 2(11) was first tested with respect to civilian dependents "Accompanying the Armed Forces without the continental limits of the United States." The Supreme Court was required to decide constitutionality in two similar cases arising from murders committed on American military installations in foreign land.[42]

Mrs. Covert killed her husband, a sergeant in the United States Air Force, at an air-base in England. Mrs. Covert was residing on base with her husband. Mrs. Smith killed her husband, an Army officer on a post in Japan where she was living with him. Neither accused as a service member. Both were tried and found guilty by general courts-martial and sentenced. The sentence in the Smith case was affirmed by the United States Court of Military Appeals. The Covert case was remanded for a rehearing on an issue of insanity, which rehearing was never held. Subsequent to the Toth decision, each brought habeas corpus proceedings in different District Courts where Mrs. Covert was ordered released and Mrs. Smith was refused the writ. Their cases came to the Supreme Court by government appeal in the Covert case and by appeal on behalf of Mrs. Smith in the other.

The cases[43] were decided together. The Court held that civilians accompanying members of the Armed Forces abroad could be tried by courts-martial. In each case, however, the decision was five to four. Justice

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[42] Tresolini, op. cit., pp. 488-489.

[43] Reid v. Covert, 351 U. S. 487 (1956).

Frankfurter wrote a separate opinion deciding that he needed more time to consider the issues.[44] Chief Justice Warren and Justice Black stated in their dissent:

> . . . The questions raised are complex, the remedy drastic, and the consequences far reaching upon the lives of civilians. The military is given new powers not hitherto thought consistent with our scheme of government. For these reasons we need more time to write our dissenting views.[45]

In the next term the Court granted a rehearing for both women. In June 1957, in the second Reid v. Covert case,[46] the Court reversed its previous stand and held that they could not be tried by military authorities. Again the justices were far from being in agreement. The majority opinion, written by Justice Black, and joined in by the Chief Justice and Justices Douglas and Brennan, concluded that the power of Congress to make rules for the government and regulation of the land and naval forces does not extend to civilians overseas, even though they be dependents living with servicemen on military bases, and that under our Constitution, courts of law alone are given power to try civilians for offenses against the United States. The Court expressed its agreement with the well-known military judicial authority, Colonel Winthrop, when he said "A statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."[47] In two separate concurring opinions Justices Frankfurter and Harlan limited their approval of the result by concluding that there was no constitutional

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[44] Tresolini, op. cit.

[45] Note 43, supra.

[46] Reid v. Covert, 354 U. S. 1, 77 Sup. Ct., 1222 (1957).

[47] Winthrop, cited extensively in this thesis.

justification for trial of civilian dependents for capital offenses in time of peace (emphasis supplied).

The following case also involved UCMJ Article 2(11), USCMA and the Supreme Court. A Mrs. Dial and her serviceman husband were tried and convicted by a general court-martial in West Germany of involuntary manslaughter in the death of their 1 year-old son, a noncapital offense. An Army board of review affirmed the conviction and the Judge Advocate General of the Army submitted the jurisdictional question to the United States Court of Military Appeals for clarification under UCMJ Article 67(b) (2). The defense urged the same arguments used in Reid v. Covert. The Court affirmed the decision of the board of review. The Court alluded to the fact that certain language of the majority opinion in Reid v. Covert, was to the effect that Congress could not subject civilian dependents, accompanying the Armed Forces in peacetime, to courts-martial jurisdiction regardless of the nature of the offense, and that certain of the justices had concurred in the result only on the ground, that the offense was capital. The Court of Military Appeals then concluded that with regard to non-capital offenses:

> Dependents of military personnel in foreign lands who are associated with the military in every way but for the performance of military duties . . . (could) constitutionally be considered by Congress as part of the Armed Forces for the purpose of regulating their conduct on the same basis as those in uniform.[48]

The Court of Military Appeals thus refused to restrict the field any further than required by Reid v. Covert, which was a capital case.

Immediately after the United States Court of Military Appeals announced its decision, Mrs. Dial obtained a writ of habeas corpus from

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[48]United States v. Dial, 9 USCMA 541, 26 CMR 321 (1958).

the United States District Court in West Virginia. The Government appealed the judgement directly to the Supreme Court under Title 28, United States Code, Section 1252, on 8 October 1958. The habeas corpus action in this case is entitled Singleton v. Kinsella. (The action was brought on her behalf by Mrs. Dial's mother, hence the name Singleton. The defendant, Miss Nina Kinsella, was the warden at Alderson Federal Reformatory for Women where Mrs. Dial was confined.) The Supreme Court held that military jurisdiction is based on the status of the accused rather than on the nature of the offense; and accordingly, trial by court-martial of civilian dependents for non-capital as well as capital offenses could not be constitutionally justified. The Supreme Court thereby ended the distinction previously made in the Covert case between capital and non-capital offenses.[49]

The Supreme Court was again called upon to act in this area, via the habeas corpus route, in Grisham v. Hagan, McElroy v. Guagliardo, and Wilson v. Bohlender, all decided on January 18, 1960.[50] Grisham, an Army civilian employee in France, was tried for premeditated murder, a capital offense, while Guagliardo and Wilson, Armed Forces civilian employees overseas, were tried for non-capital offenses. The Court held in Grisham, that there is no valid distinction between civilian employees and dependents as concerns court-martial jurisdiction over them in capital cases; the rule expressed in Covert applies. In Guagliardo and Bohlender the Court equated the status of civilian employees to that of dependents in non-capital cases such as Singleton.

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[49] Kinsella v. Singleton, 351 U. S. 234, 80 Sup. Ct. 297 (1960).

[50] Grisham v. Hagan, 361 U. S. 278, 80 Sup. Ct. 310 (1960). McElroy v. Guagliardo, 361 U. S. 281, 80 Sup. Ct. 305 (1960). Wilson v. Bohlender, 361 U. S. 281, 80 Sup. Ct. 305 (1960).

Accordingly, Article 2(11) provising for jurisdiction of courts-martial over dependents and civilian employees in both capital and non-capital cases in time of peace cannot be constitutionally applied. Presumably in time of war UCMJ, Article 2(11) would be valid.

The jurisdictional loophole created by these Supreme Court decisions is still open. No American tribunal, military or civil, can try American civilians who violate the law overseas. They must be tried, if at all, in foreign courts under foreign procedures. In order to bring such persons under the protection of constitutional safeguards, and to have them liable to the UCMJ, there have been proposals to extend jurisdiction to the Federal District Courts. This may also be unconstitutional; the matter is before Congress for further study.[51] The constitutional issue concerning the status-of-forces agreements involving military personnel was sustained by the Supreme Court. In Wilson v. Girard,[52] the Court in a unanimous opinion held that there are "no constitutional or statutory barriers" which prohibit surrendering American military personnel to foreign courts.

We have seen in a few cases, how the United States Court of Military Appeals and the United States Supreme Court have used the power of judicial review in military justice. There have been other

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[51]William A. Creech, "Serviceman's Rights," American Bar Ass'n, Journal, XCIX (Nov. 1963), 1074.

[52]Wilson v. Girard, 354 U. S. 524 (1957). Army Specialist William S. Girard was charged in 1957 with the death of a woman, who had been picking up scrap at an Army firing range north of Tokyo. The soldier's lawyers contended that since he had been carrying out the duties of a guard he could not be tried by a Japanese court. The United States, however, said Girard had not been authorized to shoot the woman. The U. S. waived jurisdiction and turned him over to Japanese authorities. He was convicted and given a three-year sentence, which was shortly suspended.

opinions and rulings of USCMA too numerous to list which have directly affected the instructions in the Manual for Courts Martial, United States, 1951. At the end of the first ten years under the Uniform Code, the services published a forty page booklet of annotations to reflect recent case law.[53] Each paragraph of the Manual was annotated if applicable. Perhaps most significant was the ruling[54] by the Court of Military Appeals, which prohibited the use of the Manual by members of the Court. This had been a well-established custom in the services. The Court reasoned that such use was prejudicial to the accused.

> Par. 33h. Court members must reach a decision on the findings and sentence on the basis of the evidence presented and the law officer's instructions, uninfluenced by any policy directives whether contained in the Manual or elsewhere. Calling the court's attention (by TC) to that part of par. 33h which states that retention in the armed forces of thieves and persons guilty of moral turpitude reflects upon the good name of the military service and its self-respecting personnel, has been held prejudicial.[55]

With the exception of a few executive orders, the writer has discussed all changes so far implemented in the Uniform Code of Military Justice and the Manual. Before turning to proposed legislation, note the following Executive Order, the most recent revision in military justice.

On December 3, 1966, President Johnson signed Executive Order 11317, which increased from one year to ten years the maximum period of confinement which may be adjudged by a court-martial for the offense of misbehavior of a sentinel.[56] The new maximum applies only when the

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[53] Military Justice: Annotations to 1951 MCM, (Air University, 1962).

[54] United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957).

[55] Military Justice Annotations, supra. p. 3.

[56] UCMJ, 113.

offense is committed in any of the areas authorizing entitlement to special pay for duty subject to hostile fire.[57] These are the areas in which critical sentinel duty takes on even greater importance. While Vietnam is the area of principal concern at this time, the Executive Order would have future application in any geographical area designated as a hostile fire area. This is the only change in the Table of Maximum Punishments which the commanders concerned have generally recommended or feel to be warranted as a result of the conflict in Vietnam. Suspension of the limitations on all offenses as to which the Table of Maximum Punishments was suspended during the Korean conflict was considered and rejected.[58]

The Uniform Code of Military Justice has worked well in the last fifteen years. It worked well in Korea and it is working well in Vietnam today. But some changes are in order; even the Judiciary Act adopted by the first Congress in 1789 is still being amended. Proposed legislation to modify the military justice system will be discussed next.

Proposed Legislation

The three major amendments,[59] were passed by Congress only after being sponsored by the Department of Defense, The Code Committee, or other interested agency or individual. While the three measures re ferred to above have been enacted into law, a greater number of proposals have not fared so well. Congress in enacting the Code clearly

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[57]As designated by the Secretary of Defense pursuant to 10 U. S. C. 310.

[58]USCMA Annual Report, 1966, p. 3.

[59]UCMJ, 58a (1960); UCMJ, 123a (1962); UCMJ, 15 (1963).

recognized that amendments to the Code would be required from time to time. It specifically provided for recommendations in UCMJ, Article 67(g).

> The Court of Military Appeals and the Judge Advocates General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense and the Secretaries of the Departments the number and status of pending cases and any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate.

Each year many proposals have been advanced, most have obtained bill status, but we have seen that only a few have been enacted into law. The Code Committee made several valuable recommendations to Congress in its second annual report[60] for the period ending December 31, 1953. This report contained seventeen proposed amendments to the Code. Subsequent annual reports, reflected continuing study and refinements of the changes originally recommended.

The seventeen proposals were incorporated in a Defense Department sponsored bill and introduced in the 84th Congress.[61] This omnibus bill went further than the proposals advanced by the Code Committee. In fact if enacted, the power of the Court of Military Appeals would have been considerably reduced. This Pentagon action reflected some animosity then felt by high ranking military officials against the Court.[62] The American Legion opposed the proposed legislation and made some recommendations of its own.[63] No legislation was enacted.

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[60] USCMA Annual Report, June 1, 1952 - Dec. 31, 1953.

[61] H.R. 6583, 84th Congress., 2nd Sess.

[62] American Legion Report on the Uniform Code of Military Justice, 1956, p. 11.

[63] Ibid, p. 53.

The omnibus bill underwent various changes from time to time. By January 1959, all proposals, after complete screening, were incorporated into one revised omnibus bill. This bill was processed through USCMA, The Departments of Defense and Justice, the Bureau of the Budget, and introduced by the Chairman of the House and Services Committee, Representative Carl Vinson as H.R. 3387.[64] The American Legion had by this time drawn up its own proposals[65] which were introduced by Representative Overton Brooks, Louisiana. No legislation was enacted.

In October 1959 the Special Committee on Military Justice, of the Association of the Bar of the City of New York, undertook to study the bills pending in Congress, and to consider independently what changes in the Uniform Code were necessary. In its study, the Committee was extremely conscious of the necessity of striking a balance between the interest of the military in performing its mission on the one hand, and the importance of providing fundamental judicial guarantees to military persons accused of crime on the other.[66] This Special Committee found that the Vinson Bill contained many worthwhile provisions, which were designed to do away with costly and unnecessary administrative duplication, ineffeciency, and ambiguity. But it did not go far enough in enlarging substantive rights. The Committee found that a number of the American Legion's proposals (H.R. 3455) merited enactment, but concluded that they went too far in circumscribing the military judicial

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[64]H.R. 3387, 86th Cong., 1st Sess.

[65]H.R. 3455, 86th Cong., 1st Sess.

[66]Arnold I. Burns and Donald J. Rapson, "Sounding the Death Knell of Drumhead Justice," American Bar Ass'n. Journal. XLVIII (Sept. 1962) 843-847.

system. In short the Committee found provisions of merit in each of the bills, and also found each to be seriously lacking.

The Special Committee presented an alternate proposal, which was adopted by the Association of the Bar of the City of New York. In April 1961, that proposal[67] was introduced in the Senate by Jacob Javitts and in the House by John V. Lindsay. Both sponsors were members of the Association of the Bar of the City of New York.

In January 1961, the Defense Department omnibus amendments were again transmitted to Congress as part of the new Kennedy administration's legislative program. The amendments were not introduced. Since the proposed legislation appeared to be bogged down, the Defense Department abandoned the omnibus technique and established priorities in individual proposals.[68] Thus Article 123(a) and Article 15 amendments became law in the 87th Congress.[69]

The 87th Congress showed an exceptionally avid interest in military justice. In addition to enacting the two major amendments, The Senate Subcommittee on Constitutional Rights conducted extensive hearings on the constitutional rights of military personnel. The hearings[70] were prompted in part by the Supreme Court's decisions in Burns v. Wilson, Wilson v. Girard, Reid v. Covert, Kinsella v. Singleton and McElroy v. Guargliardo; all were concerned with constitutional rights, the Uniform Code and court actions. The subcommittee noted also that

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[67] S. 1553, H.R. 6255, 87th Cong., 1st Sess.

[68] This was recommended informally by the House Armed Services Committee.

[69] Notes 19 and 23, supra.

[70] Note 32, supra.

in Harmon v. Brucker,[71] the Supreme Court ruled that the character of an administrative discharge issued by the Army could be judicially reviewed. This decision paved the way for successful collateral attacks against administrative discharges by means of suits for back pay in the U. S. Court of Claims.[72]

> Despite these recent safeguards for the serviceman, provided by the courts, the subcommittee members and individual Senators continued to receive complaints concerning military justice and the issuance of administrative discharges by the armed services. In view of a decade's having passed since the Uniform Code of Military Justice was enacted, the subcommittee was disturbed by claims that abuses persisted which the code was designed to eliminate. Furthermore, there were reports that the safeguards of the Uniform Code, vigorously implemented in the decisions of the Court of Military Appeals, had induced the military to resort to administrative action, which was not subject to these safeguards.[73]
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> After the subcommittee decided to conduct hearings on the constitutional rights of military personnel, extensive research was undertaken and detailed questionaires were submitted to the Department of Defense for answer by each armed service. Moreover, copies of service regulations pertinent to military justice and administrative discharges were examined in detail. The hearings occupied 7 days, and testimony was received from spokesmen for the Defense Department and each armed service, from the judges of the Court of Military Appeals, from representatives of bar associations and veterans' organizations, and from various individuals with special experience relevant to the subcommittee's inquiry.[74]

The subcommittee also studied the responses to 7000 questionaires and members of the staff made a seventeen-day field study of military

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[71] Harmon v. Brucker, 355 U. S. 579, 1958.

[72] Clackum v. United States, Ct. Cl. 237-257.

[73] Senate Report, note 34, supra., p. IV.

[74] Ibid., p. V.

justice in Europe. The hearings were published in a 966 page volume in 1962.[75] The major part of that publication is concerned with administrative discharge procedures, although considerable testimony and factual information relates directly to the Uniform Code. The hearings have been referred to many times in this paper.

Unquestionably the hearings and the study by the Senate subcommittee are most thorough and far reaching. Since the subcommittee weighed the recommendations of the sponsors of previous legislative proposals, one would expect a resolution of most of the major differences. Generally this is so. Based on the findings and recommendations of the subcommittee,[76] eighteen legislative proposals were introduced by Senator Sam J. Ervin on August 6, 1963. The stated purpose was to protect and enhance the constitutional rights of military personnel.[77] On September 25, 1963, Representative Victor Wickersham introduced identical bills in the House of Representatives.[78] Each bill was referred to appropriate committees but no hearings were held. The House, however, did pass a bill granting life tenure to the judges of the Court of Military Appeals.[79]

In the next session, 1964, the Defense Department recommended separate legislative proposals which it preferred over the Ervin-Wickersham bills.[81] No hearings were held on any of these bills.

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[75]Note 32, supra.

[76]The Report, note 34, supra., contained twenty-four conclusions and twenty-two recommendations. S. 2002-S. 2019 88th Cong., 1st Sess.

[77]Co-sponsors with Senator Ervin were Senators: Bayh, Cooper, Fong, Humphrey, Hruska, Long, and Williams.

[78]H.R. 3179, 88th Cong., 1st Sess.

[79]H.R. 3179, 88th Cong., 1st Sess. The bill also granted Federal judiciary retirement privilege (full pay after ten years). There was no action in the Senate.

[80]H.R. 10048 and H.R. 10050, 88th Cong., 2nd Sess.

[81]Air Force Times, March 11, 1964, p. 22.

Early in the 89th Congress, on January 25, 1965, Senator Ervin again introduced eighteen bills in the Senate;[82] in addressing the Senate he made the following remarks:

> Mr. President, I send to the desk, for appropriate reference, a legislative program designed to further safeguard the constitutional rights of our Nation's servicemen and women who for so long have sacrificed so much to protect our American way of life. Senator Hruska has joined me in sponsoring some of these measures as will be indicated on the bills when they are printed.
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> President Johnson recently stated that we must make every effort to improve the status of our military personnel and to make them "first class citizens in every respect." Improved pay and retirement policies, better housing and equitable promotion systems are indeed important steps for improving working and living conditions for our Armed Forces. However, basic to the goal of making military personnel "first class citizens in every respect," is to insure that they are accorded the rights, privileges and protections guaranteed to every American citizen under the Constitution.
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> Complaints received by the Senate Subcommittee on Constitutional Rights, and the results of its extensive 4-year study, have revealed numerous inadequacies both in the Uniform Code of Military Justice, administrative discharge proceedings, and other important phases of military justice.
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> Almost without exception, the subcommittee work has pointed up a very serious need for legislation to modify our system of military justice so that it adequately protects the constitutional rights of our military personnel.
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> Protecting the rights of the individual by providing procedures in which disputes about rights and duties can be fairly and equitably decided is basic to our Nation's system of constitutional due process. This system has long been a part of the rights of every citizen. Certainly, Mr. President, it is time that the men and women of the armed services, whose sacrifices almost defy enumeration, should also be provided the protections of our Constitution which are consisten with the duty of the military to protect our Nation.[83]

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[82] S. 745 - S. 762, 89th Cong., 1st Sess.

[83] U.S., Congressional Record, 89th Cong., 1st Sess., 1965, CXI, 17-1.

On January 4, 1965, Representative Charles E. Bennett again introduced the Defense Department sponsored bills in the House of Representatives.[84] His remarks are included in the appendix. The objectives of Mr. Bennett's bills are essentially the same as Senator Ervin's; "To insure every serviceman the same rights as a person accused of committing a crime in a federal criminal proceeding."[85] No hearings were conducted on any of the twenty proposals, in the 1965 session.

Hearings on all twenty bills were held in January and March, 1966, before joint sessions of the Subcommittee on Constitutional Rights, and a Special Subcommittee of the Senate Armed Services Committee. All three judges of the Court of Military Appeals, and the Judge Advocates General testified at the hearings. No legislation was reported out of committees following the hearings. In the House of Representatives, Mr. Bennett introduced another bill[86] sponsored by the Department of Defense. Summaries of these bills[87] follow.

S. 745. A bill to further insure to military personnel certain due process protection by providing for military judges to be detailed to all general courts-martial, and for other purposes.-- This essentially makes the "law officer" a "military judge," and creates a field judiciary program for all services.[88]

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[84]H.R. 273, H.R. 277, 89th Cong., 1st Sess.

[85]Appendix.

[86]H.R. 16115, 89th Cong., 2nd Sess.

[87]Extracted from copies furnished by Senator Ervin and Representative Bennett.

[88]The Army initiated the Field Judiciary Program. The Navy followed but the Air Force is opposed.

S. 746. A bill to further insure due process in the administration of military justice in the Department of the Navy by establishing a Judge Advocate General's Corps in such Department.-- This is not opposed but will create a personnel recruiting problem for the Navy.

S. 747. A bill to protect the constitutional rights of military personnel by providing an independent forum to review and correct the military records of members and former members of the Armed Forces, and for other purposes.-- This has no direct relation to UCMJ except to clarify correction of conviction errors.[89]

S. 748. A bill to provide additional constitutional protections for members of the armed forces by establishing Courts of Military Review, and for other purposes.-- This would change the title from Boards of Review, set minimum tours for military and require one civilian member, who is not a military retiree.[90]

S. 749. A bill to insure to military personnel certain basic constitutional rights by prohibiting command influence in courts-martial cases and in certain non-judicial proceedings, and for other purposes.-- This is the old bugaboo in military justice. The Code prohibits command influence but there have been cases reversed by USCMA for this violation. There have been no prosecutions against offenders. This bill puts more teeth in the

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[89]There is general disagreement amongst the services for the correct authority to correct courts-martial convictions.

[90]The Navy has had civilian membership on boards of review. Continuity would be improved by this proposal.

measure and extends to non-judicial proceedings hitherto not covered in the Code.[91]

S. 750. A bill to protect the constitutional rights of military personnel by insuring their right to be represented by qualified counsel in certain cases, and for other purposes.-- This would add a new Article 141, to govern procedure and right to counsel in discharge board actions. It would also require qualified legal counsel for defense in special courts-martial, if a bad-conduct discharge can be adjudged.[92]

S. 751. A bill to protect the constitutional rights of military personnel by increasing the period within which such personnel may petition for a new trial by court-martial and for other purposes.-- This would extend the period for petition for a new trial from one year to two years, and grant the right in any court-martial.[93]

S. 752. A bill to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, so as to provide additional constitutional protection in trials by courts-martial.-- This is a major change. It would provide a law officer (trial judge if so phrased) in special as well as general court-

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[91]Undoubtedly there have been many cases of command influence which have not reached USCMA. The purposes of the bill are commendable. Chief Judge Quinn says this article should be grouped with the punitive articles. USCMA Annual Report, 1966,

[92]Like S. 746 this will require more lawyers for the Navy. The Army sends bad-conduct cases to a general court-martial. The Air Force provides defense counsel in special courts-martial if the charge warrants a bad-conduct discharge. The Navy special courts-martial adjudge such discharge without benefit of counsel. The right to counsel in board proceedings is new to all.

[93]This has been supported by the Code Committee and the Department of Defense for many years. The old article limits applicability to serious sentences only. The new proposal is similar to Federal Rules for Criminal Procedure. Rule 33.

martial. The accused in either court could waive trial by the court members and agree to trial by the law officer (trial judge). The requirement for law officer in the special court-martial would not apply in time of war.[94]

S. 753. A bill to implement the constitutional rights of military personnel by providing appellate review of certain administrative board decisions, and for other purposes.-- This would extend the jurisdiction of the United States Court of Military Appeals to review decisions of board for correction of military records.[95]

S. 754. A bill to insure due process in the case of certain administrative actions involving military personnel.-- This would reorganize administrative discharge boards, and revise procedure. It would require a law officer to preside, and would grant the respondent legal counsel.[96]

S. 755. A bill to further insure the fair and independent review of court-martial cases by prohibiting any members of a board of review from rating the effectivenss of another member of a

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[94]The rationale is based on the fact that special courts-martial can now adjudge a bad-conduct discharge. In some cases a defense counsel is provided, but there is now no provision for a law officer. This bill will also increase Navy personnel requirements. USCMA approved, but objects to relief in war clause.

[95]A unique proposal; USCMA considers this action worthwhile. Review would be limited to matters of law as in courts-martial. This proposal is a major gain for a board respondent.

[96]Discharge boards have been conducted as "show cause" proceedings. The respondent is at a disadvantage. In most cases, however, he is anxious to get out of the service and prefers this action to trial by court-martial. He does not realize, or chooses to ignore, the harmful effects of a less than honorable discharge. Fair hearing and right to counsel would be major protections.

board of review, and for other purposes.-- This would revise a long standing procedure of military supervisor relationships, but there has been a trend to correct this in such situations.[97]

S. 756. A bill to broaden constitutional protection against double jeopardy in the case of military personne.-- This is to circumvent administrative discharge of military personnel who have been acquitted by a court-martial for the same offense.[98]

S. 757. A bill to more effectively protect certain constitutional rights accorded military personnel.-- This would allow pretrial hearings to resolve certain issues, motions, plea, etc. The rights referred to are speedy and fair trials.[99]

S. 758. A bill to provide additional constitutional protection in certain cases to members of the armed forces, and for other purposes.-- This would require an additional article in the Code or another section of section 10 U. S. C. The purpose is to extend due process, confrontation, compulsory process and assistance of counsel to a respondent in administrative discharge proceedings.

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[97] There used to be semi-permanent courts-martial with the senior member having general supervisory responsibility and authority over the members. That procedure was abandones many years ago. In some cases this has carried over in the boards of review. The Army corrected the practice after the hearings in 1962. The Air Force still uses the old procedures. The Navy usually has a civilian as the permanent member.

[98] Protection against double jeopardy is provided in UCMJ, Article 44. This relates to criminal proceedings only. The services use administrative boards to discharge undesirables who "beat the rap."

[99] The proposal would bring military procedure still closer to that of Federal district courts. The Department of Defense has made similar proposals in the past.

He would have the right to demand trial by court-martial.[100]

S. 759. A bill to afford military personnel due process in court-martial cases involving minor offenses, to insure the right of counsel in such cases, and for other purposes.-- This would eliminate the summary court-martial and require the use of special courts if the service desires to prosecute. It would also allow an accused who elects court-martial by refusing non-judicial punishment (an existing right) to have the benefit of higher court procedure. This proposal was mentioned above in the discussion of Article 15.[101]

S. 760. A bill to amend chapter 47 (Uniform Code of Military Justice) so as to assure constitutional rights of confrontation and compulsory process by providing for the mandatory appearance of witnesses and the production of evidence before certain boards and officers, and for other purposes.-- This bill would grant subpena power to discharge boards and incidentally to UCMJ, Article 32 investigating officer.[102]

S. 761. A bill to provide for compliance with constitutional requirements in the trials of persons who are charged with having committed

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[100]The proposal is applicable to those who deny the alleged misconduct, which is the basis for the administrative action.

[101]This proposal has been advanced by the services since 1953. With the new Article 15, summary courts-martial are even less justified.

[102]Like S. 754, note 98, supra., S. 760 would make board proceedings closer to trial proceedings. There would have to be a reasonable distance limit for subpena of civilian witnesses. The Article 32 subpena power would be a major improvement in the Code.

certain offenses while subject to trial by court-martial, who have not been tried for such offenses, and who are no longer subject to trial by court-martial.-- This is to close the jurisdictional gap created by the Supreme Court Toth decision invalidating Article 3(a). The remedy, granting jurisdiction to a Federal District Court, must be staffed by the Committee on the Judiciary.[103]

S. 762. A Bill to provide for compliance with constitutional requirements in the trials of persons who, while accompanying the armed forces outside the United States commit certain offenses against the United Stated.-- This is to plug the jurisdictional loophole created by the Supreme Court decisions in several cases involving civilians tried under UCMJ, Article 2(11). The remedy, granting jurisdiction to a Federal District Court, must be staffed by the Committee on the Judiciary.[104]

H.R. 273. A bill to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by creating single-officer general and special courts-martial, provising for law officers on special courts-martial, affording accused persons an opportunity to be represented in certain special court-martial

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[103]Corrective action has been advocated ever since the Supreme Court decisions. The jurisdiction would apply to the court in whose area the offense took place; if overseas, to the area where the accused was first apprehended or taken. The accused should be protected against doublt jeopardy if tried in a foreign or State court.

[104]The Department of Defense is anxious to close the jurisdictional gap. This bill would clarify that jurisdiction extends to military tribunals in time of war. There is also a provision against double jeopardy in the event of trial by a foreign court.

proceedings by counsel having the qualifications of defense counsel detailed for general courts-martial, providing for certain pretrial proceedings and other procedural changes, and for other purposes.-- This bill "provides for pretrial proceedings, authorizes the law officer to conduct court-martial proceedings alone under certain circumstances, guarantees legal counsel in special court-martial cases, and establishes post conviction proceedings."[105] This is a combination of Senate bills 750, 752, 757. It would establish a law officer for a special court-martial and allow the law officer to be a single officer court if the accused waives trial by the full court. It would retain however, the special court without a law officer as an alternative and the summary court.[106]

H.R. 277. A bill to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, to authorize the Judge Advocate General to grant relief in certain court-martial cases, to extend the time within which an accused may petition for a new trial, and for other purposes.-- This bill "will extend the period within which a new trial may be requested from the present one year to two years, and it authorizes the Judge Advocate General of each service to set aside those convictions where fraud, illegality, lack of jurisdiction, improper venue, or newly

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[105]Appendix. Statement by Hon. Charles E. Bennett.

[106]The major difference regarding the requirement for a law officer in all or certain special courts-martial should be resolved in committee. The summary court-martial will surely be eliminated. This bill was formerly H.R. 10048 (88), and was first proposed by the Code Committee in 1959.

discovered evidence is found."[107] This bill has certain features of Senate bills 747 and 751.[108]

H.R. 16115. A bill to amend chapter 47 (Uniform Code of Military Justice) of title 10, United States Code, by permitting timely execution of certain court-martial sentences.-- This bill would insure that a death sentence should include a dishonorable discharge or dismissal, total forfeitures, and life imprisonment. This would allow all of the lesser sentence to take effect upon approval without waiting for the President's review of the death sentence.[109]

Conclusions

Even a cursory examination of the bills advanced by Senator Ervin reveals a dedicated concern for constitutional rights. The term or a derivative of it appears in each bill. The language in Representative Bennett's bills was developed from that of the Code Committee and is less dedicated; but Bennett's introduction expressed the same concern.

This concern for constitutional rights for military personnel is a great advance over the military justice system before the Code. We attribute this advance to the United States Court of Military Appeals. Even considering early interpretations of the Code when the Court[110] considered that rights stem from Congress, not the Constitution, there has

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[107] Note 107, supra.

[108] According to Mr. Bennett, the differences should be resolved in committee. This bill was first proposed by the Code Committee in 1963 and was formerly H.R. 10050 (88).

[109] The Code Committee has made a similar proposal each year since 1959. This is the first introduction as a bill to either House of Congress.

[110] United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

been a significant change of view. Now there can be no doubt. Military personnel have every right except thos particularly excluded by the Constitution.

Senator Ervin and his committee's concerns have had major effect even without legislation. The Army changed its board of review manning policy;[111] the Navy adopted the field judiciary system;[112] and the Air Force revitalized administrative discharge procedures.[113] All without legislation.

So too have Supreme Court decisions influenced military justice procedures. After the Miranda v. Arizona ruling,[114] which extended protections to accused persons in state jurisdictions, the military justice authorities corrected their own directives.[115] Even before this decision many legal experts agreed that the military system afforded maximum protection to the accused. Commissioners of USCMA participated in conferences on the impact of that decision and the Escobedo v. Illinois decision.[116]

The improved quality of military justice can be attested by Supreme Court rulings last year. In Gallagher v. Quinn et al,[117] the complainant alleged a denial of due process and equal protection of the

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[111] Congressional Record, CXI, no. 17-3.

[112] Ibid. no. 17-11.

[113] Air Force Times, Sept. 21, 1966; Air Force Manual 39-12.

[114] Miranda v. State of Arizona, 384 U. S. 436, 86 Sup. Ct. 1602 (1966).

[115] Air Force Times, July 13, 1966, p. 3.

[116] Escobedo v. State of Illinois, 378 U. S. 478, 84 Sup. Ct. 1758 (1964).

[117] Gallagher v. Quinn et al, 363 F. 2nd 301 (C.A.D.C.) (1966).

laws, in the requirement that an enlisted accused show good cause in order to obtain review by USCMA; whereas a general or flag officer's case is automatically reviewed.[118] The U. S. Court of Appeals rejected the contention; the Supreme Court denied certiorari,[119] thereby terminating the litigation. In like manner, the Supreme Court denied certiorari in Crawford v. United States[120] in which private Crawford attacked USCMA's decision that he had not been denied his right to enlisted membership on his court-martial, because of a policy of selecting members from non-commissioned officers of the first three grades.[121]

Constitutional rights and the United States Court of Military Appeals have been the subjects of this thesis. It should be apparent that the rights exist for military personnel, and that the Court is dedicated to protect them.

The Uniform Code of Military Justice has been in effect over sixteen years. Military justice has improved, numbers of cases are down, discipline is high; the case load of the Court of Appeals has diminished, all in spite of an increase in overall strength and greater demands on the armed forces. There is not only a decrease in courts-martial rates, but there is also a rising sophistication in the administration of military justice at all levels. It is fitting to conclude with these remarks by the United States Court of Military Appeals:

> . . . It is gratifying to note the increased attention being paid at the trial level--particularly among the professional law officers of the services--to procedural and

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[118] UCMJ, 67 (b) (1).

[119] Gallagher v. Quinn et al, 385 U. S. 881, 87 Sup. Ct. 167 (1966).

[120] Crawford v. United States, 380 U. S. 970, 85 Sup. Ct. 1349 (1965).

[121] United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1965).

substantive matters in order that the number of errors may be reduced and appellate reversals brought to an all-time low. Nevertheless, no system of justice is ever perfect, nor can it hope, by maintaining a static position, wholly to eliminate its faults. Hence, it is to be hoped that the Armed Services, guided by this Court, will continue to strive in every instance for the fairness and impartiality which should be the hallmark of every American judicial proceeding.[122]

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[122]USCMA Annual Report, 1966, pp. 5-6.

APPENDIX

APPENDIX A

PERTINENT CORRESPONDENCE

THE SECRETARY OF DEFENSE,
Washington, June 8, 1949.

Hon. MILLARD E. TYDINGS,
United States Senate.

DEAR SENATOR TYDINGS: As you know, I requested Prof. Edmund M. Morgan to inform your committee of my support of the Uniform Code of Military Justice when he appeared before you on my behalf.

I would appreciate it if this letter is incorporated in the record of your hearings and the committee report, because I am anxious to reiterate my strong support of the Uniform Code.

The Code was drafted and transmitted to the Congress before I assumed office. I have taken the time, however, to familiarize myself with its principal provisions and I concur in Mr. Forrestal's opinion that the Code represents an outstanding example of unification in the armed services. In my opinion, the Code provides a number of very desirable protections for the accused without interfering with necessary military functions. In addition it represents a great advance in military justice in that it provides the same law and the same rights, privileges, and obligations will apply to Army, Navy, Air Force, and the Coast Guard. I cannot emphasize too much the importance of this equality and the fact that I believe it will be an item which will enhance the teamwork and cooperative spirit of the services.

I am aware of the concientious and objective work of your committee and the House committee. I know that the bill has been improved by these constructive efforts and I wish to express to you and the members of your committee my deep appreciation. In order that the benefits of the Code may be available at the earliest possible time, I strongly urge its passage at the present session of the Congress.

With kindest personal regards, I am,

Sincerely yours,

LOUIS JOHNSON.

UNITED STATES COURT OF MILITARY APPEALS
Washington 25, D. C.

September 25, 1961

Honorable Sam J. Ervin, Jr.
Chairman, Subcommittee on
Constitutional Rights
United States Senate
Washington 25, D. C.

Dear Senator Ervin:

I have your letter of September 15 requesting a "preliminary statement" of my views on the constitutional rights of persons in the armed forces and I am glad to comply therewith.

Without attempting to analyze the basis of my conviction which includes a study of the opinions, old and recent of the United States Supreme Court, I firmly believe that accused persons in the military services "are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself." I set out that view as a controlling principle of my judicial conduct in my dissent in United States v. Sutton, 3 USCMA 220, 228, 11 CMR 220. More recently, writing not as a judge but merely as a member of the great confraternity of the legal profession, I said: "it is anomalous to say that aliens residing in the United States are entitled to constitutional guarantees, but that citizens of the United States in the service of their country are deprived of those rights simply because they wear the uniform of one of its military departments." The United States Court of Military Appeals and Individual Rights in the Military Service, 35 Notre Dame Lawyer 491, 493 (August 1960). To that I might add the question: "If sentences felons are not deprived of constitutional rights and protection (see Fulwood v. Clemmer, Court of Appeals, D. C. Circuit, August 1, 1961) surely the men and women wearing the uniform in defense of the United States are not deprived of those rights and protections?"

Should you decide to conduct hearings on the matters raised in your letter, I shall be glad to submit to your subcommittee a compilation of pertinent United States Court of Military Appeals opinions and other of my public statements on those matters.

With every good wish for continued physical and spiritual strength in the discharge of your monumental responsibilities in these difficult times, I am

Very sincerely yours,

(s) Robert E. Quinn
ROBERT E. QUINN
Chief Judge

UNITED STATES COURT OF MILITARY APPEALS
Washington 25, D. C.

January 25, 1962

Honorable Sam J. Ervin, Jr.
Chairman Subcommittee on
Constitutional Rights
United States Senate
Washington 25, D. C.

Dear Senator Ervin:

Referring to your notification of January 23rd of the hearings before the Subcommittee on Constitutional Rights on February 6th, please be advised I shall be present at the time and place indicated.

In accordance with my letter of January 9, 1962, I am enclosing a list of cases decided by the United States Court of Military Appeals, which the Subcommittee might find helpful. The essence of my personal views on some of the matters under inquiry by the Subcommittee is set out in my letter of September 24, 1961. I shall be pleased to enlarge upon them in direct testimony before the Subcommittee.

In anticipation of our early meeting, I am

Sincerely yours,
(s) Robert E. Quinn
ROBERT E. QUINN
Chief Judge

Enclosure

U. S. Court of Military Appeals,
Washington, D. C., Dec. 15, 1965.

Hon. Sam J. Ervin, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Old Senate Office Building, Washington, D. C.

DEAR SENATOR ERVIN: Thank you very much for your invitation to testify in connection with proposed legislation on constitutional rights of service personnel at the joint hearings in January 1966, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a special subcommittee of the Senate Committee on Armed Services. My brother judges and I welcome the opportunity.

At earlier congressional hearings, I pointed out that the U. S. Court of Military Appeals, which was established by Congress in the Uniform Code of Military Justice, 10 U. S. C. 801, et seq., has attempted to expunge the dictum in the military establishment that courts-martial are mere instrumentalities of the executive branch and, therefore, are not bound to accord to military accused the protections and privileges granted by the U. S. Constitution. By decision and discussion, the judges of the Court of Military Appeals have endeavored to demonstrate that military discipline is wholly compatible with, and encouraged by, equal justice under law. The war crimes trials after World War II established that, even in the field in time of hostilities, the military commander cannot disregard the rule of law.

Millions of Americans are committed to serve in our armed services in defense of our country and the free world. The preservation of their constitutional rights and privileges is imperative. I commend you, and the other committee members, for the intense interest you have shown, and the work you have done, in this important field of law.

As requested, Judges Ferguson, Kilday and I will separately send you a written statement of our respective views on the pending bills.

With warmest regards, I am,
Sincerely yours,

ROBERT E. QUINN,
Chief Judge

HEADQUARTERS

UNITED STATES AIR FORCE ACADEMY

COLORADO

TO: Lt. Colonel Thomas H. McGuigan
Professor of Air Science
AFROTC Detachment 615
University of North Dakota
Grand Forks, North Dakota

Dear Colonel McGuigan

1. The Department of Law teaches a one-year prescribed course in elementary law to all cadets in their second-class (junior) year, and three one-semester elective courses: Constitutional Law, International Law and Government Contracting. The first semester of the prescribed law course is a survey of the major fields of civil law (e.g., contracts, torts, property), and the second semester is a survey of criminal law, evidence, jurisdiction and personal estate planning.

2. Military justice is not part of any of our academic courses, and the only instruction furnished cadets relating to this topic is in the military training program, under the auspices of the Commandant of Cadets. In that program, members of the Law Faculty present a two-hour lecture on the military justice system. There are no prepared course materials for these lectures.

3. The general area of civil rights protection in the military justice system is taken up in a small part of our Constitutional Law course. The text used for that course is the commersially available Mason and Beaney, American Constitutional Law (2nd ed.).

4. I regret that we have no course materials which pertain to your thesis topic. I believe your best source for information would be The Military Law Review (DA Pamphlet 27-100-1), which is published quarterly by the Army Judge Advocate General's School, Charlottesville, Virginia. That school also has on file the thesis of its graduates, many of which pertain to your topic.

Sincerely

(s) Christopher H. Munch
CHRISTOPHER H. MUNCH
Colonel, USAF
Professor of Law

THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY

CHARLOTTESVILLE, VIRGINIA

JAG/AJ 24 May 1963

Lt. Colonel Thomas H. McGuigan, USAF
Professor of Air Science
Air Force ROTC Detachment 615
University of North Dakota
Grand Forks, North Dakota

Dear Sir:

Although the students at The Judge Advocate General's School receive extensive instruction on the procedural and substantive aspects of military justice, including the rights of a military accused, we have no available material particularly devoted to discussion of civil rights protection of military personnel.

A subcommittee of the Senate Judiciary Committee last year conducted extensive hearings on the question of the constitutional rights of military personnel. You might find the record of the hearings and the report of the Subcommittee helpful. Both documents are for sale by the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. The hearings volume costs $2.45 and is entitled, "Constitutional Rights of Military Personnel, Hearing before the Subcommittee on Constitutional Rights of the Committee On The Judiciary, United States Senate pursuant to S. Res. 260, Eighty-Seventh Congress, Second Session." The Committee Report is Senate Report No. 1455, 87th Congress, 2nd Session.

I hope you will find this information of value in your project.

Sincerely yours,

(s) Peter H. Cook

Peter H. Cook
Major, JAGC
School Secretary

UNITED STATES COURT OF MILITARY APPEALS

WASHINGTON, D. C. 20442

July 26, 1965

Lt. Col. Thomas H. McGuigan
161 E. N. Bear Creek Drive
Merced, California 95340

Dear Colonel McGuigan:

Pursuant to your request of July 21st, there is enclosed a copy of the 1964 Annual Report of the Court and the Judge Advocates General, submitted to the Congress. As there is no charge for this copy, I am returning your check in the amount of $2.50.

An inquiry was made in Judge Ferguson's office regarding the speech he made before the Federal Bar Association in April. Judge Ferguson spoke from notes and did not have a prepared speech. Therefore, of course, no copies are available.

Very truly yours,

(s) Frederick R. Hanlon

Frederick R. Hanlon
Acting Clerk of the Court

Encls.
1 - 1964 Annual Report.
2 - Check for $2.50.

UNITED STATES COURT OF MILITARY APPEALS
WASHINGTON, D. C. 20442

March 7, 1966

Mr. Thomas H. McGuigan
161 E. N. Bear Creek Drive
Merced, California 95340

Dear Mr. McGuigan:

In response to your request of February 28th, I regret that the Annual Report covering the period from January 1 to December 31, 1965 is still in the hands of the printer and will not be available before next month. A copy will be sent to you upon release.

I also regret that Judge Ferguson's remarks at the Federal Bar Association meeting at Bolling Air Force Base on Nov. 10, 1964 were not made from a prepared text and, accordingly, a copy is not available.

You may be interested in knowing that the Senate Subcommittee on Constitutional Rights recently conducted additional hearings on the constitutional rights of military personnel. Further information may be obtained by addressing the subcommittee directly.

Enclosed is a copy of a pamphlet on the Court recently released.

Very truly yours,

(s) Alfred C. Proulx

Alfred C. Proulx

Encl.
1 - Pamphlet on Court.

ACP:vbs

UNITED STATES COURT OF MILITARY APPEALS
WASHINGTON, D. C. 20442

June 2, 1966

Mr. Thomas H. McGuigan
161 E. N. Bear Creek Drive
Merced, California 95340

Dear Mr. McGuigan:

This is in response to your letter of May 24th regarding the availability of the 1965 Annual Report of the Court.

This report has just recently been received from the printer and a copy thereof is enclosed for your use.

Very truly yours,

(s) Frederick R. Hanlon

Frederick R. Hanlon
Acting Clerk of the Court

Encl.
1 - 1965 Annual Report.

FRH:vbs

Charles E. Bennett
Member, 2nd District, Florida
Committee: Armed Services

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.
February 25, 1966

Mr. Thomas H. McGuigan
161 E. N. Bear Creek Drive
Merced, California

Dear Mr. McGuigan:

Thank you for your February 15 letter. Attached are copies of my bills H.R. 273 and H.R. 277, and a recent statement I made to the Senate subcommittee on constitutional rights which sets forth my feelings on this legislation. The Department of Defense is actively supporting my bills and I am hopeful that a hearing will be granted on them by the House Armed Services Committee sometime this spring. I hope this information will be helpful to you, and if I can be of any further assistance, please let me know.

With kindest regards, I am

Sincerely,

(s)Charles E. Bennett

Charles E. Bennett

CEB/ijf
Enclosures(3)

APPENDIX B

BIOGRAPHICAL BRIEFS, USCMA JUDGES

MEMBERS OF THE UNITED STATES COURT OF MILITARY APPEALS

ROBERT EMMETT QUINN, CHIEF JUDGE; born in Phenix, Rhode Island, April 2, 1894; son of Charles and Mary Ann (McCabe) Quinn; A.B., Brown University, 1915; LL.B., Harvard, 1918; married Mary Carter, August 3, 1923; children, Norma Marie, Robert Carter, Pauline Fulton, Cameron Peter, and Penelope Dorr; admitted to Rhode Island bar and practicing attorney at Providence, Rhode Island, since 1917; member, United States Diplomatic Intelligence Service in England and France, 1917-19; member, Rhode Island Senate, 1923-25 and 1929-33; Lieutenant Governor, State of Rhode Island, 1933-36; Governor, State of Rhode Island, 1937-39; judge, Rhode Island Superior Court commencing May 1, 1941; legal officer, First Naval District, 1942-45; captain, United States Naval Reserve Volunteer legal Unit of Rhode Island, 1947-50; president, Kent County Bar Association; member, American and Rhode Island Bar Associations; member, Phi Kappa; member, Brown, Harvard, Wannamoisett, Turks Head, West Warwick Country, and Army and Navy Clubs; nominated by President Truman to chief judge of the United States Court of Military Appeals May 22, 1951, for the term expiring May 1, 1966, confirmed by Senate, June 19, 1951, and took oath of office June 20, 1951, under commission of President Truman dated June 20, 1951; Democrat; Roman Catholic.

HOMER FERGUSON, JUDGE: born in Harrison City, Pennsylvania, son of Samuel and Margaret Ferguson; married Myrtle Jones, June 20, 1913, one daughter, married, Mrs. Charles R. Beltz. Attended University of Pittsburgh; LL.B. degree University of Michigan, 1931. Admitted to bar of Michigan, 1913; practiced law, Detroit, 1913-29. Circuit Judge of the Circuit Court of Wayne County, Michigan, 1929, elected 1930, and re-elected

1935 and 1941; United States Senator from Michigan, 1943-55; Chairman, Republican policy committee, 83rd Congress; member, Foreign Relations Committee and Appropriation Committee, 83rd Congress. Honorary degrees conferred by Detroit College of Law, Kalamazoo College, Michigan State College, Muhlenberg College, Allentown, Pennsylvania; LL.D., University of Michigan, 1951. Member of the second Hoover Commission; Ambassador from the United States to the Philippines, March 22, 1955, to April 8, 1956, at which time resigned to accept Presidential appointment; nominated by President Eisenhower as judge of the United States Court of Military Appeals, January 30, 1956, for terms expiring May 1, 1956, and May 1, 1971, unanimously confirmed by Senate, February 17, 1956, and took oath of office April 9, 1956, administered by Chief Justice Warren. Member of American and Michigan Bar Associations.

PAUL J. KILDAY, JUDGE; born in Sabinal, Uvalde County, Texas, March 29, 1900, son of Pat and Mary (Tallant) Kilday; moved with his family to San Antonio, Texas, in 1904; attended the San Antonio public schools, St. Mary's Parochial School, and old St. Mary's College of San Antonio, Texas; graduated from Main Avenue High School and from Georgetown University, Washington, D. C., in 1922, with LL.B. degree; LL.D. degree, St. Mary's University of San Antonio, Texas, 1963; admitted to bar of Texas in 1922; engaged in private practice at San Antonio from 1922 to 1935; First Assistant Criminal District Attorney of Bexar County (San Antonio), 1935-38; member of bars of Texas, District of Columbia, and Supreme Court of United States; member, Texas State, San Antonio, and American Bar Associations; married Miss Cecile Newton, of San Antonio, 1932, and they have two daughters- Mary Catherine and Betty Ann (Mrs. Fred W. Drogula); elected in the 76th Congress in 1938 and reelected

to the eleven succeeding Congresses, serving from January 3, 1939 to September 24, 1961; member, Committee on Military Affairs, House of Representatives, 1939-46, and Committee on Armed Services, 1946-61; for ten years, member joint Committee on Atomic Energy; awarded "Citation of Honor" by the Air Force Association "for tireless efforts in building national armed strength and active participation in successful legislation to enhance the military service as a career" (1955); awarded "Army Times 1957 Accomplishment Award in recognition of his outstanding leadership in military personnel legislation and his unceasing concern for the welfare of the men and women of the Armed Forces"; awarded honorary membership by the Fleet Reserve Association (1958); awarded "Honor Bell" by the Military Order of the Association of the United States in Recognition of Outstanding Contribution to the Association's Programs" (1961); awarded Veterans of Foreign Wars Gold Medal of Merit "in recognition of his many outstanding historic contributions to national security" (1961); resigned from House of Representatives September 24, 1961, to accept Presidential appointment; nominated by President Kennedy as Judge of the United States Court of Military Appeals, June 28, 1961, for the term expiring May 1, 1976, unanimously confirmed by Senate, July 17, 1961, and took the oath of office September 25, 1961, under commission of President Kennedy dated September 25, 1961; Democrat.

APPENDIX C

PERTINENT STATEMENTS AND REPORTS

EXECUTIVE ORDER 10214

PRESCRIBING THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951

By virtue of the authority vested in me by the act of Congress entitled "An act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice," approved May 5, 1950 (64 Stat. 107), and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, United States, 1951."

This manual shall be in force and effect in the armed forces of the United States on and after May 31, 1951, with respect to all court-martial processes taken on and after May 31, 1951: Provided, That nothing contained in this manual shall be construed to invalidate any investigation, trial in which arraignment has been had, or other action begun prior to May 31, 1951; and any investigation, trial, or action so begun may be completed in accordance with the provisions of the applicable laws, Executive orders, and regulations pertaining to the various armed forces in the same manner and with the same effect as if this manual had not been prescribed: Provided further, That nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: Provided further, That the maximum punishment for an offense committed prior to May 31, 1951, shall not exceed the applicable limit in effect at the time of the commission of such offense: And provided further, That any act done or omitted prior

to the effective date of this manual which constitutes an offense in violation of the Articles of War, the Articles for the Government of the Navy, or the disciplinary laws of the Coast Guard shall be charged as such and not as a violation of the Uniform Code of Military Justice; but, except as otherwise provided in the first proviso, the trial and review procedure shall be that prescribed in this manual.

(s) HARRY S. TRUMAN

THE WHITE HOUSE, February 8, 1951

TITLE 10--ARMED FORCES

CHAPTER 47.-- UNIFORM CODE OF MILITARY JUSTICE

Sec. 801. Art. 1. Definitions

In this chapter:

(1) "Judge Advocate General" means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of the Treasury.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) "Commanding officer" includes only commissioned officers.

(4) "Officer in charge" means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(5) "Superior commissioned officer" means a commissioned officer superior in rank or command.

(6) "Cadet" means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) "Midshipman" means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) "Military" refers to any or all of the armed forces.

(9) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(10) "Law Officer" means an official of a general court-martial detailed in accordance with section 826 of this title (article 26).

(11) "Law specialist" means a commissioned officer of the Navy or Coast Guard designated for special duty (law).

(12) "Legal officer" means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command.

A Statement by Brigadier General Alan B. Todd, U. S. Army, Assistant Judge Advocate General for Military Justice, to the Senate Subcommittee on Constitutional Rights of Military Personnel February 20, 1962.

DOUBLE JEOPARDY

A person subject to military law does not divorce himself from his responsibilities under the civil law. On the contrary, the former is superimposed upon the latter with the result that a serviceman's misconduct frequently violates both the Uniform Code of Military Justice and the State or local laws wherein the offense occurred. The rule of law is well settled that trial by one system of laws does not impose a bar to subsequent trial for the same misconduct by a court deriving its authority from a separate sovereign. In this respect, the serviceman stands in no better and no worse position than do all the citizens of the United States, for in every State there is the possibility that an act in violation of State law, may also be a violation of a Federal law prohibiting the same activity. Nevertheless, the Department of the Army's pertinent policy provision, as set out in regulations, is that a member of the Army normally will not be prosecuted by a court-martial for misconduct which violates both the Uniform Code of Military Justice and the State or local laws if the individual has already been convicted by a civil court.

There are circumstances, however, under which it believed a military offender should be prosecuted by court-martial even though he has already been tried in a State court. Let us assume that a military policeman, who is on duty dressed in his identifying uniform, observes that a soldier is engaged in a fist fight with another individual on a public street in a civilian community, when the military policeman attempted to apprehend the soldier, the latter struck him with a beer bottle. Subsequently, the soldier was convicted of assault and battery in the local civilian court and was fined $20. The military commander of the soldier may have decided that the soldier, by assaulting a military policeman who was then in execution of his duties may have committed a serious military offense, and that the sentence of the civilian court was inadequate under the circumstances. The officer exercising general court-martial jurisdiction over the individual may, therefore, authorize disposition of the matter under the Uniform Code of Military Justice, notwithstanding the previous trial. This would be based upon his personal determination that authorized administrative action alone is inadequate and that punitive action is essential to maintain discipline in his command.

Extract from a statement by Major General Charles L. Decker, The Judge Advocate General of the Army, in his annual report, 1963, pursuant to the Uniform Code of Military Justice.

In the past, much time has been spent on discussions of improvement of substantive and procedural law. There has been substantial improvement--the greatest single improvement has been the enactment of article 15, which has provided for the correction of young soldiers by their commanders. No permanent stain left on the soldier's record. Long since, the officers of the Army have dropped the concept of the pseudo-exemplary sentence, the unfairly heavy punishment designed to scare potential offenders. With a few scattered exceptions, military men realize that, except for those who must be kept away from society indefinitely, punishment should be directed toward correction and rehabilitation. Article 15 provides small corrective dosages for expeditious administration. Normally, the soldier is not removed from his fellows and his training, thereby eliminating problems of restoration to the community after confinement. This simple provision for expeditious correction draws us closer to basic and universal concepts of good justice, because it creates a neighborhood consciousness of good order and discipline. The principle of neighborhood responsibility and keeping the administration of justice close to the community is admirably demonstrated in the use of this article. This underlying principle should be put to use in the civilian community.

In the last two decades, there has been a tendency to make the administration of justice mechanistic--to remove from the citizen an awareness of his own responsibility for law and order. This tendency can have a particularly unfortunate effect on the military community. Give to a young commander, commissioned or noncommissioned, the feeling that he can turn his disciplinary problems over to someone else and, on occasion, he will try to do so. Regarding himself basically as a budding strategist and logistician, he will turn over this "administrative aspect" of the command function to "the lawyers." Experience has proved, time and again, that morale and discipline are responsibilities of the commander. There should always be some training in the judicial process for commanders at all levels, as well as some participation. Article 15 supplies some of the requisite responsibility. I am of the opinion that participation by the younger line officers in all parts of special court-martial work is salutary. Proper supervision by judge advocates can insure substantial compliance with law.

REPORT TO HONORABLE WILBUR M. BRUCKER,
SECRETARY OF THE ARMY - 18 Jan. 1960.

by

The Committee on the Uniform Code of Military
Justice Good Order and Discipline in the Army.

Summary.

The committee was appointed by Major General R. V. Lee, by order of the Secretary of the Army, October 7, 1959. The purpose was to study and submit a confidential report on the Uniform Code and good order and discipline in the Army. The scope of the study included the date on courts-martial, discharges, pertinent USCMA decisions and analysis of the Court's function; disciplinary interest was primarily concerned with UCMJ.

Extracts.

During the period FY 52 - FY 59, 915, 369 persons were tried by courts-martial; highest rate FY 1953 113.3/1000, lowest rate FY 1959 66.2/1000. Rate is persons tried per 1000 assigned strength; definite improvement in state of discipline.

Comments on the effects of USCMA. Developed (p. 27) case law contrary to, but paramount to Manual. Cited prohibition of use of Manual during trials, Cited effects of USCMA decisions on Article 31, self-incrimination, e.g. body fluids, "statement" extended to include handing over a pass on demand. "All these interpretations have had the effect of making it extremely difficult to investigage suspected offenses in the military. They have had an (p. 87), adverse effect on good order and discipline." Criticized rulings of USCMA on search and seizure. "It is not clear what the COMA considers to be a permissable search." The committee recommended change in the Code to give commanding

officer broad power of search. (p. 89) Recommended USCMA be a five man court, with members who have had recent military-legal experience.

Extracts from letter to Hon. Paul J. Kilday, Chairman, Special Subcommittee on Amendments to UCMJ, committee on Armed Services, H.R. from Major General Stanley W. Jones Asst. Judge Advocate General. 800 Ct. 1959, (p. 181)..

> . . . Certain refinements have been introduced by judicial interpretation that tend to dilute its (the UCMJ) efficiency to support military operations.
>
> At the outset it is fair to say that a number of decisions of the (U.S. COMA) have made it unduly difficult to collect evidence and prosecute military offenders. The stated objective of the Court is "to place military justice on the same plane as civilian justice." U.S. v. Clay 1 USCMA 74, 1 CMR 74. In order to achieve this objective there has been a pronounced tendency, on the part of the Court, to import civilian rules.
>
> (cites U.S. v. Brown, the search and seizure hereoin case)
>
> (cites Article 31 "statements" - "body fluids," etc.)
>
> In recent years there has been a pronounced tendency in Court of Military Appeals decisions to downgrade the standing of the Manual for Courts-Martial which is a Presidential regulation and, in effect, to declare that many provisions of the Manual are invalid exercises of the President's authority as Chief Executive and Commander-in-Chief.

STATEMENT OF CHARLES E. BENNETT
TO THE JOINT HEARING OF THE
SPECIAL SUBCOMMITTEE OF THE SENATE ARMED SERVICES COMMITTEE
AND THE SENATE JUDICIARY SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
JANUARY 18, 1966

Mr. Chairman, it is a distinct pleasure for me to appear before this joint meeting of these two subcommittees, and I want to take this opportunity to personally congratulate the distinguished senior Senator from North Carolina for his leadership in the field of military justice. It can safely be said that no one person has contributed more than you have to the protection of the American serviceman's individual rights.

As you may know, I have been a member of the House Armed Services Committee for over a decade and a half now, having been assigned to that committee from another about the time the Uniform Code of Military Justice was adopted. Various matters before the committee over the past 15 years have shown that the Code needs further work.

In November of 1964 the Department of Defense advised it had two draft bills to overcome certain problems in modern military justice, concerning which I had contacted them. Those two proposals I introduced and they presently bear the numbers of H.R. 273 and H.R. 277 and in many respects resemble five of the Senate bills now before this committee for consideration. They in no way diminish the objects sought by the Senate bills, but if anything strengthen them.

Essentially, my bill H.R. 273 provides for pre-trial proceedings, authorizes the Law Officer to conduct court-martial cases, and establishes post conviction proceedings. H.R. 277 will extend the period within which a new trial may be requested from the present one year to two years, and it authorizes the Judge Advocate General of each service to set aside those convictions where fraud, illegality, lack of jurisdiction,

improper venue, or newly discovered evidence is found.

At this point I think I should make my position clear that I am not wedded to the language of my two proposals, because we have not had hearings on these bills in our committee yet, and perhaps your committee will report a bill better than these two I have proposed, in which case I would of course prefer to back your bill. A hearing was scheduled by the House Armed Services Committee on these two House bills for early in October of the last session, but when we learned you expected to conduct hearings ours were postponed until you had a chance to meet and report something. By way of urging action, I certainly hope this committee will report a bill to the Senate, and get it passed early in this session, because I would like the House to have a Senate bill to consider when hearings are held later this year.

Without exploring the technicalities of my bills, since I know the Department of Defense will go into this in great detail later in these hearings, I would like to say that what I am trying to do with these two bills is to streamline the military court-martial proceeding so as to insure every serviceman the same rights as a person accused of committing a crime in a federal criminal proceeding.

I want to again thank the members of these two committees for your efforts to insure a standard of military justice that all Americans can be proud of, and I greatly hope you will report and pass a bill that the House can consider promptly in this session.

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