# The Uniform Code of Military Justice in Transition

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*Editor's Note: The following article was written in 1968, when the author was a colonel in the Judge Advocate General's Corps. Colonel Hagopian was assigned by Major General Hodson, The Judge Advocate General, to serve as the executive agent to Congress during the legislative process of creating the Military Justice Act of 1968.* The Army Lawyer *is pleased to present this article in its continuing series commemorating the Fiftieth Anniversary of the Uniform Code of Military Justice.*

The Uniform Code of Military Justice (Code)[1] became law on 31 May 1951. It has been authoritatively cited as comparing favorably with the most advanced criminal codes.[2] Like other criminal codes and procedures, the Code is now in a time of transition, contemporary standards replacing old concepts. In recent years Representative Charles E. Bennett has introduced a number of bills in Congress reflecting his forward looking ideas in the administration of military justice.[3] After many years of effort, his bill, House Resolution 15971, was recently signed into law by the President as the Military Justice Act of 1968.[4]

When the Military Justice Act of 1968 was originally introduced, it contained many of the military justice provisions of Bennett's omnibus bill, House Resolution 226. Congressman Bennett sought by this duplication to expedite enactment in the 90th Congress of those badly needed procedural reforms that were considered non-controversial. Indeed, he succeeded during the final days of the 90th Congress in securing for millions of service personnel serving on active duty the most modern system of criminal justice obtainable.

As enacted into law, House Resolution 15971 contains provisions virtually identical with the bill as originally introduced, and it contains a number of significant amendments added in the Senate by Senator Sam Ervin, Jr. Many of these Senate amendments were also contained in, or are similar to, various provisions of Representative Bennett's omnibus bill on military law.

The Military Justice Act of 1968 makes significant changes in the Code. The Act provides that an accused at a special court-martial must be afforded the opportunity to be defended by legally qualified counsel unless the commander certifies in

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1. 64 Stat. 108-49 (1950) (codified as amended at 10 U.S.C. §§ 801-940 (1964)).

2. Mr. Justice Clark said of the Code "[I]n addition to the essentials of due process, the Uniform Code of Military Justice includes protections which this court has not required a state to provide and some procedures which would compare favorably with the most advanced criminal code." Kinsella v. Krueger, 351 U.S. 470 (1956). In *Miranda v. Arizona*, 384 U.S. 436, 489 (1966), the majority opinion of the Supreme Court again cited the safeguards of the Code provisions and decisions of the Court of Military Appeals as an experience which should be applied to a civilian accused. There the Supreme Court said, "Similarly, in our country the UCMJ has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him . . . ." (citing 10 U.S.C. § 831b). "Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals . . . ." (citing United States v. Rose, 24 C.M.R. 251 (C.M.A. 1957); United States v. Gunnels, 23 C.M.R. 354 (C.M.A. 1957)).

3. On 10 January 1967 he introduced House Resolution 226. On 30 August 1967 he introduced House Resolution 12705 which contained some of the noncontroversial sections of House Resolution 226. Hearings were held on the latter bill before Subcommittee Number 1 of the House Armed Services Committee, chaired by Representative Philip J. Philbin. The subcommittee voted to report the bill with certain amendments to the full committee. The full committee approved the amended bill, House Resolution 15971 on 21 May 1968, and the House passed it on 3 June 1968. The bill was amended and passed by the Senate on 3 October 1968 and repassed by the House on 10 October 1968. President Johnson signed it on 24 October 1968 as Public Law 90-632.

4. 82 Stat. 1335 (1968). Representative Bennett's more comprehensive military law bill, House Resolution 226, would have made changes in administrative boards, discharges, and jurisdiction over certain civilians and former servicemen in order to fill a void created by decisions of the Supreme Court. Article 2(11) of the Code, which confers courts-martial jurisdiction over persons serving with, employed by, or accompanying the armed forces outside the United States, has been declared unconstitutional with respect to peacetime military jurisdiction over civilians abroad. Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guargiliardo, 361 U.S. 278 (1960); Kinsella v. Singleton; 361 U.S. 239 (1960); Reid v. Covert, 354 U.S. 1 (1957). *Cf.* Article 2(10) providing courts-martial jurisdiction over persons serving with or accompanying the forces in the field in time of war. Another provision of House Resolution 226 created a Judge Advocate General's Corps for the Department of the Navy. This provision was enacted into law separately as Public Law 90-179, 81 Stat. 545 (1967).

Sections 3, 7, 9(a), and 15 of House Resolution 226 would have made several changes in the operation of administrative discharge and separation boards. The acts for which a person has been tried judicially could not again be used for administrative separation. H.R. 226, § 7. See 5 U.S.C. § 555 (1964). Section 9(a) of the bill would have given subpoena powers to administrative boards and would have extended Article 37 of the Code, which deals with unlawful command influence concerning a court-martial case, to these administrative boards as well. Article 37 of the Code prohibits a court convening authority or any commanding officer from attempting to coerce or influence the action of a court-martial. The bill would have created a Department of Defense Board for the Correction of Military Records in lieu of the individual service boards now in existence. H.R. 226 § 18(a)(1). *See* 10 U.S.C. § 1552 (1956); Army Regulation 15-185 (1962). The board would also have authority to correct any military record, including authority to correct the findings and sentence of a court-martial not reviewed by a board of review. H.R. 226, § 18(b). A similar procedure would be authorized for the Department of Transportation to correct the records of members and former members of the Coast Guard.

writing that physical conditions or military exigencies prevent such counsel from being obtained.[5] The Act requires that an accused be defended by legally qualified counsel, with no exceptions, if a special court-martial awards a bad conduct discharge.[6] The new law changes the composition of special courts-martial by permitting a law officer, whose title is redenominated by the Act to that of military judge, to preside.[7] The Act requires a military judge at a special court-martial which awards a bad conduct discharge, unless the commander certifies that physical conditions or military exigencies prevent such judge from being obtained.[8] It makes mandatory a certified and trained judiciary at the general court-martial level for each of the services, responsible only to their respective judge advocates general.[9]

The Act abolishes the present boards of review and replaces them with one court of military review for each service. The court may sit in panels or *en banc*, and its judges, appointed by The Judge Advocate General, may be either civilians or military officers.[10] Rather than abolishing the summary courts-martial (the limited-jurisdiction courts composed of one officer),[11] the Military Justice Act gives an accused an absolute right to object to trial by summary court.

The new law brings much needed additional modernization to military trial procedure. The military judge will have many of the prerogatives of a federal district court judge; he will have authority to rule with finality on those matters that are currently determined by a civilian judge.[12] The rulings of the military judge on some matters—for example challenges of court members [13] and motions for findings of not guilty[14]—will no longer be subject to overruling by the members of the court-martial, untrained in the law, who are in reality the military jury.[15] The Act also provides for open recorded sessions by a military judge outside the presence of the military jurors.[16] The military judge will hear and determine motions, rule on interlocutory questions which can be determined without trial on the general issue,[17] hold arraignments, receive the pleas of the accused,[18]

5. 82 Stat. 1337 (1968). A special court-martial is an inferior tribunal composed of at least three members, which may include enlisted persons if the accused so requests. It is jurisdictionally limited to imposing a punishment no greater than confinement at hard labor for six months, two-thirds forfeiture of pay per month for six months and a bad conduct discharge.

6. *Id.* at 1335-36. A bad conduct discharge may be awarded as punishment only where a verbatim record of trial has been made. A conviction with such an approved sentence must be reviewed by a court of military review pursuant to Article 66 of the Code.

7. *Id.* at 1335.

8. *Id.* at 1335-36.

9. *Id.* at 1336. The Army has taken the lead in establishing an independent field judiciary to provide law officers for all general courts-martial. By *Army Regulation 22-8* (14 October 1964), the United States Army Judiciary was created to provide trained, experienced, judicial officers to serve as trial appellate military judges. In the Air Force and Navy, judge advocates of an installation are assigned to sit as trial judges along with their other functions which may include the prosecution and defense of cases.

10. 82 Stat. at 1341.

11. The summary court-martial has no jurisdiction to try officers or warrant officers; it cannot impose punishment in excess of 30 days' confinement, nor adjudge a dismissal or dishonorable or bad conduct discharge. An accused may waive trial by summary court-martial and request trial by a superior court-martial for the alleged misconduct. In many respects, the summary court-martial is similar to the trial of petty offenses by United States Commissioners. The jurisdiction of a United States Commissioner for the trial of petty offenses is dependent upon an election of the accused to such jurisdiction and upon a corresponding waiver of trial in federal district court. 18 U.S.C. § 3401 (1948). Generally, petty offenses triable by a United States Commissioner are punishable by imprisonment for not more than six months or a fine of not more than $500 or both. 18 U.S.C. § 1(3). A recent survey disclosed that one-third of the United States Commissioners are not lawyers. Would the abolition of the summary court-martial place a burden on the military justice system? What would be the burden placed on the federal judicial system if trial by United States Commissioner or comparable magistrate were to be abolished?

12. 82 Stat. at 1340.

13. *Id*. at 1339.

14. *Id*. at 1340.

15. *Cf.* FED. R. CRIM. P. 29.

16. 82 Stat. at 1338.

17. *See* FED R. CRIM. P. 12. A typical matter, which could be disposed of at a pretrial session is the resolution of a disputed question of admissibility of a purported confession. This frequently results in a lengthy hearing before the law officer alone that requires the finders of fact to withdraw from the courtroom. By permitting the military judge to rule on this question before the fact finding members of the court have assembled and have been enpanelled, the members would not be required to spend time waiting for the decision of the judge. The law officer is constitutionally required to make a preliminary determination of the voluntariness of a purported confession. Jackson v. Denno, 378 U.S. 368 (1964); United States v. King, 37 C.M.R. 475 (C.M.A. 1966). If he sustains the objection, the issue is resolved, and the facts and innuendoes surrounding the making of the confession will not reach the members by inference or otherwise. If the military judge determines to admit the confession, the issue of voluntariness will normally, under federal court and military practices, be re-litigated before the finders of fact who will determine the factual question of voluntariness under appropriate instructions(as they would any other fact).

and consider and dispose of other procedural matters. He may consider such items as the admissibility of a purported confession,[19] the legality of a search and seizure,[20] and the capacity of the accused to stand trial,[21] as well as matters such as jurisdiction of the trial court, venue and speedy trial. Mental responsibility as to the act charged is the only interlocutory matter that remains subject to objection by the military jurors.[22] These procedures will save the valuable time of military jurors, who will no longer be required to assemble just to legally constitute the proceedings and vest the military judge with jurisdiction to conduct a hearing out of their presence.[23] The procedure, when coupled with unlimited military discovery,[24] goes somewhat further than most criminal pretrial proceedings.

The military judge will also be able to hold post trial sessions without first assembling the military jurors.[25] This is a much-needed procedural reform. The absence of authority under present military law to convene a court-martial composed only of a law officer makes it difficult to carry out the mandates of the appellate courts in cases remanded for further proceedings at the trial level. The Act cures this weakness in the military system because under its provisions there will always be a court open just as there is in the federal civil system.[26] The Act also provides for additional post-conviction relief. The Judge Advocate General may vacate or modify any findings or sentence (unless reviewed by a court of military review) on grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, or error prejudicial to the substantial rights of the accused.[27] The period within which an accused convicted of an offense may petition for a new trial is extended from one to two years, and the right is extended to all cases.[28]

The Act also provides authority, with necessary safeguards, whereby an accused person can waive a hearing before a military jury and be tried by the military judge alone[29] in non-capital cases.[30] This is the equivalent of the right of the accused to waive trial by jury in the federal courts.[31] The defendant is entitled first to know the identity of the military judge and to consult with counsel.[32] Only the military judge can approve the request for trial by a judge alone. In federal courts, Federal Rule of Civil Procedure 23(a) gives the prosecution the right to veto requests for trial by a judge alone, but Congress felt that this procedure would not be appropriate for the military services.[33]

Waiver of a military jury trial will streamline the administration of military justice. A large percentage of courts-martial cases are disposed of on guilty pleas.[34] Most of these cases, as

18. 82 Stat. at 1338.

19. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 37 C.M.R. 249 (C.M.A. 1967).

20. *See* FED. R. CRIM. P. 41(e).

21. The capacity of the accused to stand trial under the *Manual for Courts-Martial* was determined by the court members. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 122 (1951) [hereinafter MCM].

22. *See id.* ¶ 122. In the military the law officer rules on interlocutory questions of mental responsibility subject to being overruled by vote of the court members.

23. *See* United States v. Robinson, 55 C.M.R. 200 (C.M.A. 1968).

24. Known in the military as the open file policy, the procedures are required by the MCM. MCM, *supra* note 21, ¶ 33(i)(2). This policy accounts for the paucity of cases in military law under the Jencks Act, 18 U.S.C.A. § 3500 (West 1958). *See generally* Major Luther C. West, *The Significance of the Jencks Act in Military Law,* 30 MIL. L. REV. 83 (1965).

25. 82 Stat. 1338 (1968).

26. 28 U.S.C.A. § 452 (West 1963).

27. 82 Stat. at 1342.

28. *Id*. at 1343.

29. *Id*. at 1335.

30. *Id.* The wording prevents the danger of the provision being declared unconstitutional. A similar provision in the Lindbergh Law was declared unconstitutional in *United States v. Jackson, 390 U.S. 570 (*1968). The court held a provision of the Lindbergh Law that permitted the accused to choose between trial with a jury or one without a jury and without possibility of the death penalty as unconstitutional. The effect of the choice was to compel the accused to choose a trial without a jury since it could not result in the death penalty.

31. FED. R. CRIM. P. 23a.

32. 82 Stat. at 1335.

33. S. REP. NO. 1601, at 4 (1968).

34. During fiscal year 1967, 67.4% of all Army court-martial cases were disposed of by guilty pleas.

well as many others, could appropriately be heard and determined with respect to finding and sentence by a military judge alone. The savings to the taxpayers in military manpower released from court duty would be significant. In addition, the military accused will also benefit by having another option available to safeguard his due process rights. The saving in military manpower is significant in another respect. The convening authority is required by Article 25(d) of the Code to appoint as court members, who sit as military jurors, such persons as in his opinion are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These are the types of individuals who are the best commanders and combat leaders. In time of war the military can ill afford to utilize such persons in non-combat roles. Freeing them from court duties of prolonged court cases can have significant effect upon overall military efficiency.

The need for the legislation contained in the Military Justice Act has developed in part from a series of decisions of the Court of Military Appeals which has expanded the role of the law officer and placed upon him responsibilities virtually as great as those borne by federal district judges in conducting criminal trials.[35] In the discharge of these responsibilities, however, law officers are now hampered by provisions of law which unnecessarily limit their authority to perform essential and customary judicial functions. For example, under present law, the law officer cannot pass on the validity of challenges for cause.[36] The court members must pass on challenges for cause even though the basis for the challenge may affect all the members. The Court of Military Appeals has on several occasions reaffirmed its belief that it would be preferable for challenges for cause to be passed on by the law officer rather than the court members.[37]

The desirability of the other procedural and substantive changes contained in this legislation has become already evident in the conduct of criminal trials under the present rules. These rules have proved to be unwieldy and cumbersome when applied to the present day concepts of the military trial forum; those concepts distinguish between the role of the law officer as trial judge and that of court-martial members as arbiters of fact.

Several recent articles have been critical of the present system of military justice.[38] Some articles have been favorable to the system.[39] At one time it was clear that the military justice system, at the general court-martial level, was vastly superior to the civilian system of criminal justice, both state and federal. The general court-martial procedure requires free legal representation by a qualified lawyer at all trial and appellate stages, verbatim transcripts, automatic right to appeal at no cost, and full and complete disclosure of all relevant evidence at every stage of the case. In recent Supreme Court decisions, many of these safeguards preserved to a military accused are now secured to an accused in state and federal criminal proceedings.[40]

The Military Justice Act received many endorsements from interested organizations in the civilian community and in the military.[41] Comparative studies demonstrate that the military accused has had more due process protection than the civilian from early times to present day. Only since the so-called criminal law revolution which began in 1964 has civilian justice begun to catch up. The military repeatedly urged the Congress to amend the Code as early as 1953. The enlightened opinions of the Court of Military Appeals, its quest for a true judge and jury system, and its profound vision and work in the codes development, clearly demonstrated the need for the Military Justice Act of 1968. This legislation places the military again in the forefront of judicial modernization and insures that military justice will continue to be a model of judicial excellence.

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35. United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954); United States v. Biesak, 14 C.M.R. 132 (C.MA. 1954). For a discussion of the role and the training of law officers, see Delmar Karlen, *How the Army Trains Its Judges*, 34 U. MO. AT KAN. CITY L. REV. 271 (1966).

36. 10 U.S.C. § 841(a) (1956).

37. United States v. Talbott, 31 C.M.R. 32 (C.M.A. 1962); ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS 11 (1960).

38. *See* Sherman, *Military Justice*, 114 Cong. Rec. H2321 (daily ed. Mar. 27, 1968); Landau, *GI Justice: A Second-Class System*, THE EVENING NEWS (Harrisburg, Pa.), Sept. 14, 1967, at 7; Landau, *GI Justice: A Second-Class System*, THE EVENING NEWS (Harrisburg, Pa.), Sept. 16, 1967, at 15.

39. *See* Jacob Hagopian, *A Case of Free Speech in the Military and Due Process*, 113 Cong. Rec. A5434 (daily ed. Nov. 6, 1967); James Labar, *The Military Criminal Law System*, 50 A.B.A. J. 1069 (1964).

40. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

41. Such organizations as the American Bar Association, the Federal Bar Association, Brooklyn Bar Association, the Florida Bar, the State Bar of Georgia, the Jewish War Veterans of the United States of America, the Reserve Officers Association of the United States, New York County Lawyers Association, Veterans of Foreign Wars of the United States, Veterans of World War I of the United States of America, and the Committee on Military Justice of the Association of the Bar of the City of New York, indicated their support and desire for speedy passage of the bill. In addition, the Code Committee under Article 67(g) of the Code endorsed the bill. This committee consists of The Judge Advocates General of the Armed Forces and the judges of the Court of Military Appeals, all of whom have had many years of experience dealing with military law.