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DUE PROCESS FOR SERVICEMEN–THE MILITARY JUSTICE ACT OF 1968

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Military establishments throughout history have had their own systems of criminal law, radically different from the civilian law in substance, in tribunals, in procedure, in origin, in aims, and in other respects. The establishment and general observance of a system of criminal justice to include rights for the accused is one of the tests to be passed by a society emerging from barbarism to civilization. But there is no requirement in this "test" that persons within the military establishment accused of crimes be extended either the same rights as civilian members of the society or indeed any due process at all. The Roman Empire is a prime example: its high degree of civilization in general and its legal system in particular have been extolled for two thousand years, but the soldiers of Rome's legions, when accused of violations of the military laws, were tried summarily and punished brutally as a matter of course.[1]

The imposition on servicemen of a stricter criminal law, with less due process than enjoyed by civilian defendants, is not the result of mere caprice or of any innate harshness on the part of senior military commanders. Rigid standards for the military, strictly enforced, are vital to the safety, even the continued existence, of a civil society. Soldiers undeterred by the realization that desertion and battlefield derelictions will bring prompt and drastic punishment may not provide effective defense against foreign enemies. Civil governments, whether democratic or not, are on unstable ground as long as cliques of military officers feel safe in plotting coups. Finally, few worse fates can befall a society than to be at the mercy of either hostile or "friendly" troops who are not deterred from violence by the expectation of swift trial and prompt punishment.

What is called for is the achievement of a fair and sensible dividing line between the sphere of action of the necessarily strict and summary system of criminal justice administered within the military establishment and the sphere of action for the normal civil court system with its full

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1. C. BRAND, ROMAN MILITARY LAW 23, 63-82 (1968).

panoply of due process. Within the military's sphere of action it is desirable to designate areas of law in which defendants might receive substantially, even fully, certain of the rights accorded in civilian courts, while at the same time preserving the harsher deterrence-and-punishment oriented approach for appropriate situations.

Substantive military law traditionally dealt with offenses of a military nature such as desertion, disobedience to lawful orders, sleeping on guard duty, or failure to meet prescribed standards of dress. Throughout American history such violations of a strictly military nature have been tried exclusively within the military establishment, either by court-martial with its system of review by commanding officers, or by commanders acting alone.[2] The regular civilian court system, both state and federal, has always had jurisdiction over servicemen who violated the state or federal criminal law,[3] and accords them the same due process as it accords a civilian. This article, however, is not concerned with servicemen tried in such civilian courts.

Civilian and military courts share concurrent jurisdiction over a wide area of offenses. Prior to the Civil War the military authorities could try servicemen for various offenses punishable by civilian courts provided the charges could be made to fit into an offense over which Congress had granted jurisdiction to the military. For example, in some situations a murder, triable in the civilian courts, could be classified as conduct "prejudicial to good order and discipline" and then be dealt with by court-martial.[4] During the Civil War the Federal Congress gave concurrent jurisdiction over certain civilian-type crimes of violence committed during wartime by military personnel to courts-martial;[5] meanwhile the Confederate army's military justice system held even wider jurisdiction, not only over strictly military offenses but over any offense against the Confederate national law or against the law of the state in which the offense was committed.[6]

The 1950 statutory Uniform Code of Military Justice[7] subjects American military personnel in either war or peace to court-martial for a wide range of civilian-type offenses which if committed within a state or a United States territory would also be punishable by the civil au-

2. *See generally* W. WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920) [hereinafter cited as WINTHROP].

3. *Id.* at 671; Coleman v. Tennessee, 97 U.S. 509, 513-14 (1878).

4. WINTHROP, *supra* note 2, at 667.

5. Act of Mar. 3, 1863, ch. 75, 12 Stat. 731; WINTHROP, *supra* note 2, at 667.

6. W. ROBINSON, JUSTICE IN GREY 368 (1941).

7. Uniform Code of Military Justice, 10 U.S.C. § 801 (1950).

thorities. The Military Justice Act of 1968[8] makes no change in this provision. This provision of the 1950 Uniform Code of Military Justice is a continuation of pre-existing statutes which since 1916 had made serious encroachments on what had previously been the exclusive jurisdiction of civilian courts over peacetime, non-military offenses committed within the United States.[9] Two examples of offenses included are rape and various categories of homicide.[10] The June, 1969 landmark decision of the United States Supreme Court in *O'Callahan v. Parker*[11] has, however, in effect held unconstitutional any prosecution by court-martial under the Uniform Code of Military Justice for any peacetime offense cognizable by an American civilian court, having no military significance, committed off post while neither the accused nor the victims were performing any military function, which crime neither involves the security of military posts or of military property or flounts military authority.[12]

It has been manifestly unfair, in trying a civilian and a serviceman for identical non-military offenses committed in the same state, to withhold from the serviceman the due process protections afforded to the civilian. Unfair as this was in our all-volunteer military establishment from the end of World War I to the start of World War II, it has been unjustifiably discriminatory against the millions of servicemen who have been called to service involuntarily since the implementation of the draft

8. Pub. L. No. 90-632 (Oct. 24, 1968). With the exception of the immediately effective amendments to the Uniform Code of Military Justice Art. 69 and Art. 73, the Act is to become effective on 1 August 1969. *Id.* § 4. These amendments to the Uniform Code of Military Justice have been codified in the Feb. 1969 supplement to title 10 U.S.C.A.

9. Article of War 93, 39 Stat. 650 at 664 (1916), continued by Act of June 4, 1920, ch. 2, § 1, 41 Stat. 805 continued again by Act of June 24, 1948, tit. II, § 236, 62 Stat. 640. This article of war covered the Army alone until 1947; in that year the Air Force was separated from the Army but continued using the Army's then current Articles of War. An enabling statute, 62 Stat. 1014 (June 25, 1948), authorized such continued use by the Air Force of the Army's Articles of War. Article 8 of the Articles for the Government of the Navy, Rev. Stat. 1875 § 1624 pages 276 and following, provided for punishment by court-martial of various non-military offenses whenever and wherever committed, including *inter alia* drunkenness, fraud, theft, "or any other scandalous con duct tending to the destruction of good morals," dueling, onshore "plundering, abusing, or maltreating any inhabitant or injuring his property in any way." All of these provisions were retained, 34 U.S.C. § 1200 art. 8 (1946), but were finally replaced by the Uniform Code of Military Justice, 34 U.S.C. § 1200 art. 8 (1946), (Supp. V, 1952) (*see* page 2117).

10. Uniform Code of Military Justice arts. 118 and 120, 10 U.S.C. §§ 918, 920 (1964).

11. 89 S. Ct. 1683 (1969).

12. *Id.* at 1685, 1691.

law and the call-up of reserves in the pre-Pearl Harbor days of World War II. For the volunteer who endangers his unit by getting drunk on sentry duty[13] or hurls barracks-language insults at his company commander,[14] military-style justice is appropriate; it is indeed surprising, though, that military-style justice has been applied from 1940 to June, 1969 to the draftee who, off base, seduces a fifteen year old girl[15] or attempts rape.[16]

The *O'Callahan*[17] decision has gone a long way toward ending this unequal and unfair treatment of military personnel, and further cases augmented by executive initiative are to be expected which will continue this long overdue start toward "equal justice under law" for military personnel accused of offenses of no military significance. It is important that the *O'Callahan* decision makes no distinction as to whether the suspect is a volunteer, draftee, reservist, or prospective career man, nor whether he is an enlisted man or an officer.

The hesitance of the courts and of the Department of Defense and its precursors to extend constitutionally guaranteed rights—guaranteed at least to civilians—to military defendants has long been a major factor in the continuation of the double standard of due process, with one standard for the general public and a harsher standard for military personnel. Surprisingly, until the recent *O'Callahan* decision, the United State Supreme Court gave no clear indication as to which, if any, of the Constitution's enumerated civil rights applied directly and unequivocally to military defendants. Even that far-reaching decision leaves many unanswered constitutional questions.

The gap between due process for civilians and due process for military personnel has been greatly narrowed by statutes, court decisions, and executive actions starting in 1950, and now the military defendant enjoys most of the constitutionally guaranteed due process rights accorded to civilians. Notable exceptions are the right to indictment by grand jury and trial by petty jury, the right to bail, and the right to be confronted in non-capital cases with adverse witnesses.

In focusing on the Military Justice Act of 1968[18] this article deals with various rights of American servicemen and with several areas of

13. Uniform Code of Military Justice art. 113, 10 U.S.C. § 913 (1964).

14. *Id.* art. 89, 10 U.S.C. § 889 (1964).

15. *Id.* art. 120, 10 U.S.C. § 920 (1964).

16. *Id.* art. 80, 10 U.S.C. § 880 (1964). This was one of the offenses for which the defendant had been convicted in *O'Callahan.*

17. O'Callahan v. Parker, 89 S. Ct. 1683 (1969).

18. Pub. L. No. 90-632 (Oct. 24, 1968).

due process. Few of the protections covered by the 1968 Act were officially recognized as rights of American servicemen prior to World War II. Some of the protections had long been treated as customary privileges to be granted on a discretionary basis and others were foreshadowed in an evolutionary progression by recognizable forerunners. The establishment and expansion of these rights for servicemen has been accomplished since the end of World War II. The Uniform Code of Military Justice, enacted in 1950,[19] was a major revolutionary step in providing due process in the military's "Court of General Criminal Jurisdiction," the general court-martial, the only type of court-martial empowered to adjudge the death penalty, dishonorable discharge or dismissal, or imprisonment for over six months. Since 1950 many decisions of the United States Supreme Court, the lower federal courts, and the United States Court of Military Appeals have amplified and extended some of the rights granted by that Code to the military defendant and have also extended to such defendants certain rights which have come into existence for the general population since 1950. The Military Justice Act of 1968[20] has extended to defendants tried by the strictly circumscribed special courts-martial most of the protections formerly limited to defendants tried by general courts-martial, has taken a major step toward providing judges who are both legally trained and free from influence by the local military "brass" to preside over both general and special courts-martial, and in general has raised the standard of due process within the military justice system.

The Right of an Accused to a Lawyer as Defense Counsel

Since adoption of the Uniform Code of Military Justice in 1950[21] the military justice system has been exemplary in providing lawyers to those in need of trained defense counsel. This has been a drastic improvement over the system prevailing through World War II, under which an accused was provided with free "defense counsel," but in even the most serious cases this "defense counsel" could be an officer without legal training.

The 1950 Code required that lawyers be assigned as defense counsel in all cases before general courts-martial, the courts-martial of "general jurisdiction" which have jurisdiction to adjudge any authorized sen-

19. Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1950).

20. Pub. L. No. 90-632 (Oct. 24, 1968).

21. 10 U.S.C. §§ 801-940 (1964).

tence including the death penalty.[22] There is no test of indigence; all persons tried by general court are entitled to a free assigned lawyer as defense counsel. As long as a general court-martial is involved, the basic 1950 Code guarantees a lawyer as defense counsel not only at the trial itself[23] but before trial from the time charges are filed[24] and, in certain cases, following trial through the review and appellate system within the military establishment.[25] There is no statutory requirement that the military furnish a free lawyer for petitioning civilian federal courts for remedies such as habeas corpus. It is interesting that thirteen years elapsed between the granting of the right to a free defense lawyer under the 1950 Code and the Supreme Court's 1963 decision in *Gideon v. Wainwright*[26] which gave a similar right to indigent defendants accused of felonies within the civilian state court systems.

The United States Court of Military Appeals, which was established under the 1950 Act, has broadened considerably the right to a free, appointed lawyer as defense counsel. In a line of forward-thinking decisions[27] it established protections for a suspect under interrogation similar to the civilian's rights established by the Supreme Court in *Escobedo v. Illinois*[28] and *Miranda v. Arizona*.[29] Incidentally, in its *Miranda* decision the United States Supreme Court commented favorably on the military's practice of furnishing lawyers as free defense counsel.[30]

The basic 1950 Uniform Code of Military Justice stopped short of requiring free lawyers as defense counsel in all trials before special courts-martial; instead it only required such lawyers in the rare cases where the "trial counsel," *i.e.* the prosecutor, was a lawyer. The 1950 Code accorded defendants before special courts-martial only the old right to a non-lawyer officer to serve as their defense counsel.[31]

22. Uniform Code of Military Justice art. 27 (a)-(b), 10 U.S.C. §§ 827(a)-(b) (1964).
23. *Id.*
24. *Id.* art. 32(b), 10 U.S.C. § 832(b) (1964).
25. *Id.* art. 70, 10 U.S.C. § 870 (1964).
26. 372 U.S. 335 (1963).
27. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); United States v. Powell, 13 U.S.C.M.A. 364, 32 C.M.R. 364 (1962); United States v. Brown, 13 U.S.C.M.A. 14, 32 C.M.R. 14 (1962); United States v. Odenweller, 13 U.S.C.M.A. 71, 32 C.M.R. 71 (1962); United States v. Tomaszewski, 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957); United States v. Gunnels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).
28. 378 U.S. 478 (1964).
29. 384 U.S. 436 (1966).
30. *Id.* at 489.
31. Uniform Code of Military Justice art. 27(c), 10 U.S.C. § 827(c) (1964); Sherman, *The Right to Competent Counsel in Special Courts Martial*, 54 A.B.A.J. 866 (1968).

At first glance it might seem that this practice is in line with or even ahead of the civilian courts, where in misdemeanor cases an accused still has no right either to a free lawyer or even to a free non-lawyer as defense counsel. The fact that special courts-martial can not order confinement for periods of over six months and that they usually deal with relatively minor offenses, invites such a comparison. But it would be a mistake to assume that special courts-martial hear only misdemeanor cases, and that therefore there is no more need to supply a free lawyer to an accused before a special court-martial than to a civilian being tried for a misdemeanor in a civilian court. There is no felony-misdemeanor dichotomy in the military justice system. And special courts-martial are authorized to try any non-capital offense that general courts-martial may try.[32] Felony-type cases including offenses involving moral turpitude are tried by special courts-martial, and the Uniform Code of Military Justice allows special courts, under certain circumstances, to order the severe penalty of a bad conduct discharge.[33]

A federal district court in *Application of Stapely*, a 1965 habeas corpus case[34] which has received considerable comment,[35] focused attention on the injustice of withholding a free lawyer as defense counsel to defendants appearing before special courts who were charged with serious offenses. In that case the military, complying with statutory requirements,[36] had furnished two non-lawyer officers as defense counsel to a defendant charged before a special court-martial with a series of offenses including fraud and the passing of several worthless checks. The accused's timely request for representation by a lawyer was refused, and he was convicted. The court spoke of the good faith of all concerned, but also commented on the inadequacy of representation by inexperienced officers representing an accused charged with serious offenses, and granted the writ of habeas corpus.

The *Stapely* case did not go so far as to require a lawyer in all cases before special courts-martial, but only dealt with cases involving serious charges. Indeed, the holding did not directly require an actual lawyer in even the serious cases, but implied that a trained, experienced, capable non-lawyer might satisfy the requirement of due process.

32. Uniform Code of Military Justice art. 19, 10 U.S.C. at § 819 (1964).

33. *Id.*

34. 246 F. Supp. 316 (D. Utah 1965).

35. 15 AM. U. L. REV. 376 (1966); 54 GEO. L.J. 1011 (1966); 79 HARV. L. REV. 1302 (1966).

36. Uniform Code of Military Justice art. 27(c), 10 U.S.C. § 827(c) (1964).

The United States Court of Military Appeals missed an excellent opportunity to anticipate the *Stapely* decision in its 1963 decision in *United States v. Culp*.[37] An enlisted marine had been convicted by a Navy special court-martial on charges of theft and had been ordered discharged on the basis of bad conduct. At the court-martial he was represented by non-lawyer counsel. The Navy's Board of Review reversed the conviction on the ground that the accused was entitled as a matter of right under the sixth amendment of the Constitution to counsel qualified in the law, unless he competently and intelligently waived such right. The Board of Review thus went further than the later *Stapely* holding, but the United States Court of Military Appeals in affirming the Board of Review's reversal of the conviction did so on grounds unrelated to the constitutionality of trial without a lawyer as defense counsel. In separate opinions all three judges on that court agreed that in general the protections of the Constitution applied to servicemen being tried by courts-martial, but two judges were satisfied that the non-lawyer counsel furnished the defendant was sufficient "counsel." The third judge expressed strong objections on constitutional grounds to trial by special courts-martial without legally trained defense counsel, but commented that in the case before them the accused had waived that right by agreeing to be represented by non-lawyers.

Even though the *Culp* decision did not confirm a constitutional right to a lawyer as defense counsel in special courts-martial, and the *Stapely* decision was limited both in its holding and its geographical applicability, the military authorities have in recent years held to a minimum the number of special courts-martial without lawyers as defense counsel.[38]

The 1968 Military Justice Act does not extend to an accused appearing before special courts-martial the absolute right to a lawyer as defense counsel which is the rule in general courts-martial. Instead it gives a conditional right, depending on geography or exigencies of the service. The 1968 Act adds the following paragraph to Article 27 of the Uniform Code of Military Justice:

> [T]he accused shall be afforded the opportunity to be represented at the [special court-martial] trial by [a lawyer-counsel with the same additional qualifications as pertain in general courts-martial]

37. 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

38. O'Malley, *Broader Justice for Military Personnel*, TRIAL, Dec.-Jan. 1968-69, at 45.

> unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why such counsel could not be obtained . . . .[39]

This 1968 amendment looks two ways. In granting the right to free lawyer counsel in special courts-martial where military lawyers are available for such duty, the military justice system again has become more progressive than the civilian court system. Coupled with another 1968 Act amendment[40] allowing an accused to refuse trial by the still lawyerless summary court-martial (to be covered later in this article) it means that even for the most insignificant misdemeanors an accused must be furnished free lawyer counsel unless such counsel is not available.

This 1968 Amendment looks backward, however, in allowing the huge loophole by which the newly extended right to a lawyer as defense counsel can, and no doubt frequently will, be circumvented. It is to be expected that, operating under these 1968 guidelines set by Congress, the Navy and Marines will continue uninterrupted their policy of holding special courts-martial without lawyers aboard vessels which do not carry assigned lawyers. Only a few of the Navy's vessels, such as the battleship *New Jersey* and the largest aircraft carriers, have assigned lawyers aboard. The Army and Air Force may take this amendment as authorization to disregard the *Stapely*[41] decision and, in situations where military lawyers are not available, revert to the earlier practice of holding special courts-martial without providing a free lawyer as defense counsel.

The judge who wrote the *Stapely* decision set out a better standard than Congress did in the matter. There was no urgent necessity for Congress to guarantee a free lawyer, if one is available, for every soldier, sailor, or airman involved in any minor offense. On the other hand, there should be an absolute rather than a conditional right to an appointed military lawyer as counsel for anyone charged with a serious offense.

The 1968 Act makes a major improvement in removing the pos-

39. Uniform Code of Military Justice art. 27(c), 10 U.S.C.A. § 827(c) (Supp. Feb. 1969).

40. *Id.* art. 20, 10 U.S.C.A. § 820 (Supp. Feb. 1969).

41. Application of Stapely, 246 F. Supp. 316 (D. Utah 1965).

sibility of a lawyerless defendant being issued a bad conduct discharge. It provides that "[a] bad-conduct discharge may not be adjudged [by a special court] unless . . . [legally trained and certified] counsel . . . was detailed to represent the accused . . . ." [42]

QUALIFIED LAWYERS AS JUDGES TO PRESIDE OVER COURTS-MARTIAL

The right of an accused to a lawyer to serve as defense counsel is a basic constitutional right, recognized in various ways early in civilian prosecutions and more recently in trials by courts-martial. Closely related to this right is the equally important matter of providing judges who are fair, honest, impartial, responsible, free from outside influence and control, and "learned in the law," to preside over criminal trials including courts-martial. Indeed, a defendant without a lawyer who is tried by a fair judge "learned in the law" might receive more protection than would a defendant with an attorney who is tried not by a legally-trained judge but by a group of non-lawyers selected, in effect, by the prosecutor's boss to serve on an ad hoc basis.

The Magna Carta of King John expressly provided that judges would be learned in the law. As translated, its forty-fifth chapter states: "We will not make *justiciars*, constables, sheriffs, or bailiffs except such as know the law of the realm and are well inclined to observe it [emphasis added]." [43] But this right to have a learned judge preside over one's trial did not take root in the Anglo-American legal system. King John's son and successor, Henry III, omitted that provision from his own Great Charter,[44] and the right was lost. Even now there is no constitutional prerequisite of a legal education for appointment to any federal court, even to the United States Supreme Court. Many persons without formal legal education serve as judges in state and local courts, though few if any federal judges lack a legal education.

Until the Uniform Code of Military Justice went into effect in 1950[45]

42. Uniform Code of Military Justice art. 19, 10 U.S.C.A. § 819 (Supp. Feb. 1969).

43. AMERICAN BAR FOUNDATION, SOURCES OF OUR LIBERTIES 18 (R. Perry & J. Cooper eds. 1959) sets forth this language from the original document of June 15, 1215. The introductory materials therein note that this original document differs substantially from the reissue of 1225 (9 Hen. 3, c. 1-37) which is the document to which scholars believe the term "Magna Carta" originally applied. *Id.* at 4-5, 11 n.35. A. E. HOWARD, THE ROAD FROM RUNNYMEDE, 147 (1968).

44. 9 Hen. 3, c. 1-37; SOURCES OF OUR LIBERTIES, *supra* note 43, at 18 n.79.

45. 10 U.S.C. §§ 801-940 (1964).

there was no assurance and little chance that a trained lawyer would serve as a member of a court-martial trying an American serviceman. Instead, he would almost always be tried by a group of officers whose principal legal "training" had been the quick scanning of some manual on military justice and courts-martial. The new Code made a tremendous innovation by requiring that trained lawyers, called "law officers," participate in a quasi-judicial capacity in general courts-martial.[46] Nonlawyer officers continued to serve as members of the general court and to perform many important functions.[47] That Code made no provisions, however, for law officers for either special or summary courts-martial, which were accordingly left to continue without trained lawyers to serve in any judicial or quasi-judicial status. This lack at the level of special and summary courts-martial was compounded by the absence of lawyers as counsel for either the defense or prosecution.[48]

The Military Justice Act of 1968 authorizes three types of special court-martial:

(A) not less than three members; or
(B) a military judge and not less than three members; or
(C) only a military judge, if one has been detailed to the court. . . .[49]

The term "military judge" is a new title, established by the 1968 Act, and has replaced the previously designated post of law officer.[50] An earlier requirement of membership in a federal or state bar remains.[51] Thus the 1968 Act gives a renewed lease on life to the old style court composed of officers without legal training, but the Act takes much of the sting from a court so composed by depriving it in most cases of what had been its most severe punishment, that of ordering a bad conduct discharge. The 1968 Act provides:

> A bad-conduct discharge may not be adjudged unless . . . a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies.[52]

46. Uniform Code of Military Justice art. 26(a), 10 U.S.C. § 826(a) (1964).
47. *Id.* art. 25(a), 10 U.S.C. § 825(a) (1964).
48. *Id.* art. 27(c), 10 U.S.C. § 827(c) (1964).
49. Uniform Code of Military Justice art. 16(2), 10 U.S.C.A. § 816(2) (Supp. Feb. 1969).
50. *Id.* art. 1 (10), 10 U.S.C.A. § 801 (10) (Supp. Feb. 1969).
51. Uniform Code of Military Justice art. 26(a), 10 U.S.C. § 826(a) (1964).
52. Uniform Code of Military Justice art. 19, 10 U.S.C.A. § 819 (Supp. Feb. 1969).

The issuance of a bad conduct discharge is a drastic penalty, which can have serious effects on the recipient for the rest of his life. The Army for many years has as a matter of policy withheld this possible punishment from its special courts-martial, but Navy and Marine Corps special courts-martial regularly issue bad-conduct discharges. Time will tell whether the Navy and Marine Corps will try to continue their practice of issuing bad-conduct discharges through special courts without military judges, using the new Act's escape clause of "any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies." Prompt hearings followed immediately by appropriate punishment are essential to maintenance of discipline, especially at sea, but the bad-conduct discharge is too severe and lasting a punishment to be left, at least in peacetime, to line officers without legal training.

Except for the above restriction as to bad-conduct discharges, the 1968 Act does not change the penalties which may be imposed by a special court-martial sitting without a military judge. Article 19 of the Uniform Code of Military Justice still provides:

> Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months.[53]

The same article continues to confer on special courts-martial "jurisdiction to try persons subject to [the Uniform Code of Military Justice] for any non-capital offense made punishable by [that Code] and, under such regulations as the President may prescribe, for capital offenses." The great bulk of the caseload of special courts sitting without military judges will probably continue to consist of routine, cut-and-dried prosecutions for purely military offenses which do not involve moral turpitude, such as absence without leave or insubordinate conduct towards a sergeant. Such military offenses have traditionally fallen within the exclusive jurisdiction of our military court system. It is appropriate to leave jurisdiction over them to the military system, with the built-in protections that only courts-martial with military

53. 10 U.S.C. § 819 (1964).

judges may order penalties more severe than those established by Article 19.

It is unfortunate that the 1968 Act left undisturbed the jurisdiction of special courts without military judges over serious civilian-type offenses involving moral turpitude, such as larceny, robbery, sodomy, burglary, and perjury.[54] Such non-military offenses, if committed within the United States could well have been left by Congress to the exclusive jurisdiction of the regular civilian authorities. Fortunately the Supreme Court's *O'Callahan* decision has gone a long way toward remedying that deficiency, at least in peacetime. It is to be hoped that high level policy will require that a military judge be assigned to every special court-martial where the defendant is charged with a serious offense involving moral turpitude.

Situations will arise in which only one properly qualified lawyer is available to participate in a special court-martial. He may not serve as prosecutor (trial counsel); Article 27(c) of the Uniform Code of Military Justice has forbidden that since 1950.[55] But the question may arise as to whether the single qualified lawyer is to be the military judge or the defense counsel. Article 27 as amended requires that if a qualified lawyer is available he must be assigned as defense counsel;[56] the discretionary authority to appoint a military judge to serve with a special court-martial under Article 16[57] as amended could hardly be construed as qualifying or weakening the right to a lawyer, if available, as defense counsel. Regardless of unavailability of a lawyer, a bad-conduct discharge may not be ordered unless the defendant is represented by a qualified lawyer.[58]

Trial by a Judge Sitting Alone

The establishment of the right of an accused to a trial by jury, as distinct from a trial by a judge or judges alone, and the extension of this right from its limited early confines, have been two of the outstanding developments of Anglo-American jurisprudence. There has been little interest shown in developing a correlative right to trial by a judge alone, however, despite the occasional advantage to a defendant of avoiding foreseeable prejudice on the part of any available

54. Uniform Code of Military Justice arts. 118-31, 10 U.S.C. §§ 918-31 (1964).
55. 10 U.S.C. § 827(c) (1964).
56. 10 U.S.C.A. § 827(c)(1) (Supp. Feb. 1969).
57. *Id.* § 816(2) (Supp. Feb. 1969).
58. *Id.* § 819 (Supp. Feb. 1969).

jurors. Perhaps the best known instance of deliberate waiver of trial by jury was in the joint trial of Richard Loeb and Nathan Leopold, in which Clarence Darrow realized that, because of widespread public outrage, any foreseeable jury would be apt to be so prejudiced against his clients that it would send them to the gallows.[59]

Rule 23 (C) of the Federal Rules of Criminal Procedure allows a case to be tried without a jury, but neither the United States Constitution, the federal statutes, nor the Federal Rules of Criminal Procedure grant a defendant in a criminal prosecution any right to trial without a jury. The federal courts often allow defendants in criminal cases to waive jury trial, but appellate courts consistently uphold denials by federal district courts of defendants' requests for trials without juries.[60]

The military justice system never allowed trial of an accused at the general or special court-martial level by a judge alone. Instead, trial was held before "The Court-Martial," which consisted of a group of officers whose minimum number was set by law. The Uniform Code of Military Justice introduced the legally-trained law officer into the world of the general court-martial (but not the special court-martial) but made no provision for the law officer to function as a judge sitting alone.[61] The Military Justice Act of 1968 introduces into the military justice system the opportunity for an accused to request trial by the military judge alone. Article 16 of the Uniform Code of Military Justice as amended provides that general courts-martial may consist of:

> Only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests in writing a court composed only of a military judge and the military judge approves. . . .[62]

and the 1968 Act adds:

> However, a general court-martial [with a military judge sitting alone] shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.[63]

59. C. DARROW, THE STORY OF MY LIFE (1932).

60. *E.g.*, Singer v. United States, 380 U.S. 24 (1965); United States v. Igoe, 331 F.2d 766 (7th Cir. 1964), *cert. denied*, 380 U.S. 942 (1965); Dixon v. United States, 292 F.2d 768 (D.C. Cir. 1961).

61. Uniform Code of Military Justice art. 26, 10 U.S.C. § 826 (1964).

62. 10 U.S.C.A. § 816(1)(B) (Supp. Feb. 1969).

63. Uniform Code of Military Justice art. 18, 10 U.S.C.A. § 818 (Supp. Feb. 1969).

and Article 16 of the Code as amended provides that special courts-martial may consist of:

> Only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed [for a general court-martial] so requests. . . .[64]

It should be noted that the new Act gives the military judge the discretionary power to grant or deny the defendant's request for a trial by jury alone. In general courts-martial, which by law must have a military judge, there is no way for the "Convening Authority" (the higher commander who established the court martial) to prevent a trial by a military judge sitting alone, but a commander who appoints a special court-martial can preclude the possibility of a defendant being tried by a military judge sitting alone by not appointing a military judge to the special court-martial.

It will be interesting to watch the development of defense strategy and of counter-strategy under this new provision. Except for the military judge, the officers who compose a court-martial are almost always from the same major unit (vessel, division) as the accused, are familiar with "local" problems, including those related to enforcing discipline in general, and with any special problems connected with particular types of offenses. It may develop that a large proportion of defendants will seek trial by judge alone rather than face a group of "local" officers, hand picked by the local commander.

The Summary Court, the Lowest Court in the Military Justice System

The summary court-martial is the lowest court in the military justice system. In several ways it is roughly equivalent to the criminal "side" of a justice of the peace court. A single, part-time judge constitutes the court; there is no requirement that such a judge have a legal education and it is extremely rare that a trained lawyer will actually serve as such a court; the court may issue only light sentences. Article 20 of the Uniform Code of Military Justice withholds from summary courts any power to issue punitive discharges, limits its sentences of confinement to one month, and its "fines" to two thirds of one month's pay.[65]

64. 10 U.S.C.A. § 816(2)(C) (Supp. Feb. 1969).

65. Uniform Code of Military Justice art. 20, 10 U.S.C. § 820 (1964).

So far, no right to free legal counsel has developed for defendants being tried by summary courts.

The summary court differs in important ways from the typical civilian justice of the peace court. The summary court judge receives no extra compensation in any form for his activities as a judge; he does not seek or, usually, even want the job, but is assigned to it as an extra duty by his commanding officer; and his "term of office" is usually of short duration and can be terminated at any time by the officer who appointed him.

Despite its inferior status and scanty sentencing power, a summary court conviction can be a serious matter because the record follows the convicted defendant throughout his military career and into civilian life, and, unlike the lowest civilian courts, it has jurisdiction not only over relatively petty offenses but over any non-capital offense under the Uniform Code of Military Justice. This includes such serious offenses as grand larceny.[66] The practice, however, is to refer only minor offenses for trial by summary court.

The 1968 Act amends the summary court article of the Uniform Code of Military Justice by providing that:

> No person . . . may be brought to trial before a summary court-martial if he objects thereto. . . . If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as appropriate.[67]

A proper understanding of the effect of this amendment requires consideration of an article of the Uniform Code of Military Justice which was not directly amended by the 1968 Act, namely Article 15, the so-called "Non-judicial Punishment" article. This article recognizes and governs the age-old power of a commanding officer to investigate suspected offenses by members of his command and to order punishment, all with few more formalities than are observed by a harried young mother when investigating and punishing the unauthorized removal and consumption of cookies from the cookie jar by her preschool offspring. Now strict limits are set on possible punishments to be inflicted under the commanding officer's power, and only minor offenses are supposed to be punished thereunder.[68] The strictly limited quasi-

66. *Id.*

67. Uniform Code of Military Justice art. 20, 10 U.S.C.A. § 820 (Supp. Feb. 1969).

68. Uniform Code of Military Justice art. 20, 10 U.S.C. § 820 (1964).

judicial powers of modern commanders are pale reflections of their awesome predecessors, the absolute life and death power of Roman generals over their troops,[69] and the license to tyrannical sadism exercised by the infamous Captain Bligh.

The non-judicial punishment article allows persons who are about to be punished under it to demand trial by court-martial in lieu of receiving punishment from their commanding officer. (This right is not available to persons embarked upon vessels.)[70] An officer who demands trial by court-martial rather than submit to "non-judicial punishment" by his commanding officer runs no risk of being tried by a summary court because summary courts-martial have no jurisdiction to try officers. An enlisted suspect who has been ordered to stand trial by summary court without having been involved in "non-judicial punishment" for that offense can avoid being tried by a summary court by making timely objection to such a trial. In these two situations there is no difference between the practice before and after the 1968 amendment to the summary court article. The difference is that prior to the 1968 amendment an enlisted man who had been caught up in the non-judicial punishment mill was placed in a dilemma: he had to either accept the impending non-judicial punishment by his commanding officer or run the risk of being tried by a summary court without a right to demand trial by a higher court instead. The 1968 Act eliminates this dilemma; the enlisted man now (unless embarked on a vessel) may refuse to submit to non-judicial punishment and then, if ordered to stand trial before a summary court, he may refuse such trial as well.

In this matter, as in others, the military justice system is well ahead of the civilian systems prevalent in many states. It would be a major improvement in the administration of justice if a civilian involved in some relatively minor offense could avoid trial by the justice of the peace, the police court, or comparable non-lawyer, non-jury courts by exercising a right to trial by a higher, presumably better trained judge, with a jury. Such a change would not put an end to inferior courts, but would encourage most of their "judges" to follow the judicial norms observed by the higher trial courts. It would also tend to eliminate greedy, unfair, fine-oriented, arbitrary, ignorant, and otherwise undesirable characters from the ranks of inferior court judges.

69. C. BRAND, *supra* note 1, at 23, 63-82.

70. Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1964).

THE INFLUENCE OF COMMANDING OFFICERS OVER PERSONNEL OF COURTS-MARTIAL

In civilian life the struggle to free the judiciary from control by the executive has had a long history. The executive retains considerable powers in connection with original appointments to judicial vacancies, *de jure*, as in the appointment of federal judges, or *de facto*, as in states where judges are elected but where many were originally appointed by a governor to fill an unexpired term. Aside from the executive's continuing power of at least original appointment of judges, the public now takes for granted the judge's freedom from executive control over the judicial process. Sir Edward Coke's famous claim to such freedom from King James I, though unsuccessful, paved the way for the less famous growth of such judicial freedom following the deposition of King James' son and successor, Charles I.

A comparable movement toward a "judiciary" free from executive influence over judicial decisions has been in progress within our military establishment for decades.[71] The 1968 Act furthers this laudable trend both by codifying recent judicial decisions and by introducing new limitations on the executive, *i.e.*, the senior officer, who commands a major unit or large vessel and also appoints the personnel of courts-martial.

The "convening authority," who appoints the personnel of a court-martial[72] and who orders particular cases to be on its docket,[73] is in a strategic position to influence the course of action to be taken by courts-martial. He has the power of original appointment, there is no life tenure or set term of office on courts-martial, and he may, as he chooses, remove individual members from duty on courts-martial,[74] or terminate completely a court-martial panel.[75] These powers remain unaffected by the 1968 Act, and are thus far unchallenged. It is only natural that commanders appoint as members of courts-martial officers who they expect will in general be concerned about the maintenance of discipline and who will not be unduly swayed towards

71. *Id.* art. 37, 10 U.S.C. § 837 (1964).

72. *Id.* art. 22-24, 10 U.S.C. §§ 822-24 (1964); MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶ 36, 33 Fed. Reg. 13551-52 (1968).

73. Uniform Code of Military Justice art. 34, 10 U.S.C. § 834 (1964); MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶ 5 (6), 33 Fed. Reg. 13516 (1968).

74. MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶ 37, 33 Fed. Reg. 13552-53 (1968).

75. MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶ 5 (6), 33 Fed. Reg. 13516 (1968).

leniency. Service on courts-martial is always a temporary duty and often is only a part-time responsibility. The members are, for most if not all purposes, under the command of the senior officers who appointed them to serve on the court-martial, and are mindful of all that such a subordinate relationship entails in the military. For an ambitious, career-minded officer, the wrath of the higher commander is to be avoided if at all possible.

The 1950 Uniform Code of Military Justice took one step toward limiting improper "command influence." It provided in Article 37:

> No authority convening a . . . court-martial . . . may censure, reprimand, or admonish the court or any member, military judge or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions. . . . No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case. . . .[76]

Since 1950 many over-zealous commanders have violated both the spirit and the literal wording of the above article, and many convicted defendants have sought to enlarge loopholes on appeal by claiming undue "command influence" over the members of the court-martial which had convicted them.

The 1968 Act makes two additions to the command influence provision (Article 37).[77] It seeks to minimize possible adverse effects on the career of a subordinate officer who, as a member of a court-martial, as a military judge, or as defense counsel takes actions which displease his commanding officer, the convening authority. An addition to Article 37 reads:

> In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used . . . for . . . determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member

76. 10 U.S.C. § 837 (1964).

77. *Id.*

> of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.[78]

The foregoing addition, if followed conscientiously, would go far toward freeing court members to follow their own convictions, and might indirectly prove beneficial to many accused. But what ambitious subordinate officer can be sure that his own commander, who holds such awesome powers over his career, will completely disregard a vote for acquittal in what the commander had considered an "open-and-shut" case, especially if a serious crime was involved? This well-meant amendment will come into full effect at the same time that all jurors in civilian courts actually disregard improper comments that judges instruct them to disregard. A more effective solution to this problem of "command influence," but one far more complex and costly to implement, would be to maintain panels of officers available for temporary duty with units to which they are not assigned, whose commanding officers have no control over their careers, for service as members of courts-martial. By using serious, conscientious reserve officers for staffing such panels during short tours of active duty a great load of extra court-martial duty would be taken from the "regular." Reserve officers, many of whom find it administratively difficult to obtain short tours of annual duty (needed for retention in the reserves) would have this new area open to them, and, most importantly, the accused would have a better chance of having truly independent members of the court-martial deciding his fate.

Another provision of the 1968 Act dealing with command influence amends Article 37 of the Uniform Code of Military Justice to authorize the convening authority or other commanders to conduct or to otherwise provide for the members and other personnel of courts-martial ". . . general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial. . . ." [79]

This provision is based on decisions from cases in which personnel had appealed their convictions on the grounds that such instructions or "courses" furnished to court-martial personnel prior to or during

78. 10 U.S.C.A. § 837(b) (Supp. Feb. 1969).

79. 10 U.S.C.A. § 837(a) (Supp. Feb. 1969).

trial amounted to prejudicial, improper command influence. One recent decision, *United States v. Clayton*,[80] approved of a general orientation briefing by the staff judge advocate, shortly before the court-martial convened, where the briefing did no more than acquaint the court members with the nature and importance of a court-martial and the responsibilities of serving on a court, and did not mention specific crimes or that certain types of criminals, such as thieves, should be eliminated from the military service. A recent decision of the United States Court of Military Appeals declared it improper "command influence" for a staff judge advocate to lecture to court-martial personnel after they were assembled with the accused and were ready to convene formally, and added that he entered on dangerous ground when in his instruction he strayed from a general orientation on trial procedure to other matters such as special interests of the military community.[81] One of the judges in a concurring opinion in that case restated his long-held position that "so called orientation lectures constitute command control. . . . The 'education' involved . . . becomes one of pointing courts towards convictions and heavy sentences regardless of the evidence." The concurring judge concluded with the comment:

> One can hardly imagine a police chief or prosecutor being allowed to deliver a lecture to a jury in civilian life immediately before trial. . . . Nothing has ever persuaded me that the rigors of military discipline require a different procedure. Fundamental fairness is the same in either milieu, and it ill behooves any officer sworn to uphold the laws to engage in what is nothing less than common jury fixing.[82]

The 1968 Act amendment to Article 37[83] gives congressional sanction to what the concurring judge labeled "common jury fixing." The military courts may decide that this part of the 1968 Act, and the legislative intent which prompted it, were merely to confirm the line of decisions exemplified by the *Clayton* decision,[84] in which eventuality no major change should be expected from within the military court system. But more could become involved here than interpreting the 1968 Act and searching for legislative intent. The above concurring

80. 37 C.M.R. 883 (1967).
81. United States v. Wright, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967).
82. *Id.* at 114, 37 C.M.R. at 378.
83. 10 U.S.C.A. § 837(a) (Supp. Feb. 1969).
84. 37 C.M.R. 883 (1967).

opinion in the *Wright* case[85] was based on the judge's interpretation of the Uniform Code of Military Justice, but makes sound analogies which could be used as points of departure in arguing unconstitutional deprivation of due process.

Freedom of courts-martial personnel from command influence has been an important issue in many cases since adoption of the Uniform Code of Military Justice in 1950. Law officers (now called military judges) were included with members of the court in the list of persons who were to be free from command influence.[86] No special safeguards were provided for law officers in this respect; they were subordinate officers under the command of the convening authority in all respects, as were the members of the court. The 1968 Act gives military judges far more effective safeguards against vindictive convening authorities than it gives to regular members of the court. As amended, Article 26 of the Uniform Code of Military Justice has the following new provision:

> The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee . . . for detail by the convening authority, and, unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. . . .[87]

It will be noted that the above amendment applies only to military judges detailed to general courts-martial. It would serve the interests of justice if the military services would, on their own initiative, extend similar protections to military judges assigned to special courts-martial.

The Use of Depositions and the Absence of a Right to Confrontation

One of the most glaring differences between civilian criminal procedure and procedure under the Uniform Code of Military Justice is

85. United States v. Wright, 17 U.S.C.M.A. 110, 113, 37 C.M.R. 374, 377 (1967).
86. Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (1964).
87. 10 U.S.C.A. § 826(c) (Supp. Feb. 1969).

the admission into evidence against defendants at courts-martial of depositions given by persons who are not themselves present at the court-martial. Civilian courts, both state and federal, abide by the directive of the sixth amendment that "in all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." [88]

The military does not abide by this directive. Congress treats this constitutional directive as being inapplicable to the military justice system. Article 49 of the 1950 Uniform Code of Military Justice provides in general for the taking of depositions, and it allows the prosecution to read properly taken depositions as evidence against the accused at courts-martial, provided the death penalty may not be adjudged, if:

> (1) the witness resides or is beyond the State, territory, Commonwealth or District of Columbia in which the court . . . is ordered to sit, or beyond . . . 100 miles from the place of trial . . .
> (2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or
> (3) that the present whereabouts of the witness is unknown.[89]

The 1968 Act makes no drastic change to this continuing lack of a right to in-court confrontation of hostile witnesses. The 1968 Act improves a structure which stands in need, not of improvement, but of removal. The improvement in this area consists of an amendment to Article 49 to allow military judges "for good cause" to forbid the taking of depositions in particular cases.[90] Prior to this salutory amendment this power to prohibit the taking of depositions rested exclusively with "an authority competent to convene a court-martial for the trial of those charges," [91] that is, the commanding officer who in almost all cases had no legal training and who naturally was more concerned with maintaining discipline than with extending constitutional protections.

The theory that the sixth amendment does not apply to military trials is gradually dying,[92] but this segment of the 1968 Act shows that Con-

88. U.S. CONST. amend. VI.
89. Uniform Code of Military Justice art. 49(d), 10 U.S.C. § 849(d) (1964).
90. 10 U.S.C.A. § 849(a) (Supp. Feb. 1969).
91. Uniform Code of Military Justice art. 49(a), 10 U.S.C. § 849(a) (1964).
92. Reid v. Covert, 354 U.S. 1, 37 (1957); Burns v. Wilson, 346 U.S. 137, 152 (1953)

gress is still trying to breathe life into it. It would have been better if Congress, instead of "passing the buck" to individual military judges, had either completely withdrawn the power of the military to deny defendants the right to confrontation of hostile witnesses, or at least limited such practice to cases which do not involve moral turpitude and in which no severe penalty could be adjudged.

Like Congress, courts within the military justice system have failed to apply to courts-martial the sixth amendment guarantee of confrontation of witnesses. But, like Congress, they have established certain laudable but minor rights for defendants in this matter of depositions. The United States Court of Military Appeals has held that a defendant has a right to consult with privately-retained civilian counsel concerning the taking of depositions and to be represented by such civilian counsel at the taking of depositions even though he had been provided with qualified military counsel.[93] Guidelines for law officers to follow in instructing members of courts-martial about depositions have been established in three recent decisions.[94] In enforcing Article 49(a) of the Uniform Code of Military Justice, depositions have been held completely unauthorized where taken before formal charges against a suspect had been signed.[95]

The 1968 Manual for Courts-Martial, which is the "Bible" for personnel involved in court-martial activities, follows Article 49 of the 1950 Uniform Code of Military Justice and decisions within the military court system in instructing its readers as to the taking and use of depositions.[96] It does not mention the "right to confrontation," and it can be predicted that court-martial personnel, relying on this manual, will continue to assume that the right to confrontation does not apply to courts-martial.

(dissenting opinion); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); Bishop, *Civilian Judges and Military Justice: Collateral Review of Courts-Martial Convictions*, 61 COLUM. L. REV. 40 (1961); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Sherman, *The Right to Competent Counsel in Special Courts Martial*, 54 A.B.A.J. 866 (1968).

93. United States v. Donati, 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963). United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960), had established an accused's right to be represented by counsel at the taking of depositions.

94. United States v. Brown, 17 U.S.C.M.A. 390, 38 C.M.R. 188 (1968); United States v. Griffin, 17 U.S.C.M.A. 387, 38 C.M.R. 185 (1968); United States v. Dunn, 39 C.M.R. (1969).

95. United States v. Burnom, 35 C.M.R. 908 (1965).

96. MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶ 145(a), 33 Fed. Reg. 13762-64 (1968).

Surprisingly, as of 1 January 1969 the federal civilian courts had not rendered a single reported decision construing the deposition article of the 1950 Uniform Code of Military Justice.[97] Three decisions of lower federal courts since World War II arising from pre-1950 courts-martial upheld the admission of depositions in evidence against a defendant where the defendant or his counsel had during the trial consented to the introduction of the deposition but had, after conviction, sought relief from the civilian court based on such use of a deposition. In one of these cases the court in dictum commented:

> The petitioner had a constitutional right to be confronted by witnesses, but this right may be, and was, waived by petitioner by entering into written stipulations signed by his counsel and himself, agreeing to the use of written statements of witnesses in lieu of their production in court.[98]

In the other two cases the courts did not explicitly confirm the applicability in courts-martial of the right to confrontation, but in denying relief to the petitioners they commented on the petitioners' having agreed during the trial to the use of the depositions.[99]

If an accused and his counsel before and during trial were to object unequivocally to the taking and introduction in evidence of a deposition against an accused and if, despite the objection, the deposition were taken and introduced in evidence at the court-martial, a resourceful, zealous defense counsel on appeal would have the makings of what might well be another landmark decision. The Court of Military Appeals has shown itself to be receptive to the extension of constitutional protections into new areas of military law,[100] and the prevailing mood of civilian federal courts suggests that at some level they would grant relief to a petitioner in an appropriate case.

Hearings, Speedy Trials, and Continuances

In various ways the 1968 Act increases the authority, responsibility and scope of activity of military judges and brings their position more into line with that of civilian judges in criminal cases. While doing so it reduces the judicial aspects of the role of the members of general

97. Uniform Code of Military Justice art. 49, 10 U.S.C. § 849 (1964).

98. Burns *ex rel.* Burns v. Sanford, 77 F. Supp. 464, 465 (N.D. Ga. 1948).

99. Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953); Hayes v. Hunter, 83 F. Supp. 940 (D. Kan. 1948).

100. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

courts-martial and of special courts-martial with military judges, and in effect increases the resemblance of the members' collective role to that of a civilian jury.

A major example of this development is provided by the 1968 Act's amendment to Article 39 of the Uniform Code of Military Justice dealing with sessions of courts-martial. The amendment does not affect special courts sitting without military judges or summary courts which never have military judges, nor does it deal with the newly authorized practice of a military judge alone, without court members, constituting a general or special court-martial. For courts-martial consisting of both military judge and court members the 1968 amendment to Article 39 provides:

> (a) At any time after the service of charges which have been referred to trial . . . the military judge may . . . call the court into session without the presence of the members for the purpose of—
> (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
> (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;
> (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and
> (4) performing any other procedural function which may be performed by the military judge under this chapter or under the rules prescribed [by the President by regulations] . . . and which does not require the presence of members of the court.
>
> These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.[101]

The foregoing amendment does not in itself prevent an accused from being ordered to appear at one of the newly authorized hearings without time for his counsel to prepare for the hearing. The 1968 Act,

101. 10 U.S.C.A. § 839(a) (Supp. Feb. 1969).

however, meets this problem by amending Article 35 of the Uniform Code of Military Justice, which, incorporating older laws, provides:

> [I]n time of peace no person may, against his objection, be brought to trial . . . in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after [service of charges].[102]

The 1968 amendment to the foregoing Article 35 extends that article's minimum periods to cover the newly authorized "out-of-court" hearings as well as full court trials.[103] The newly authorized hearings should expedite the handling of cases without either increasing or infringing upon any rights of the accused, and without creating any serious difficulties for either the prosecution or the defense.

The military justice system has long provided for the granting of continuances for good cause to either side. The 1950 Uniform Code of Military Justice did not place the exercise of this power in the hands of the law officers of the general courts, but rather in Article 40 left it where it had been, in the hands of the members of the courts-martial.[104] By executive action this power to grant continuances was transferred to the law officer of general courts.[105] The 1968 Act confirms the executive action as to general courts and extends it to special courts with military judges by an amendment to Article 40.[106]

Congress' amendment of Article 35[107] showed consideration for the plight of the serviceman who otherwise might have faced an instant hearing. In so dealing with Article 35, however, Congress strained out the gnat but did not preclude a camel from being forced down an accused's throat. In leaving unchanged the short five-day and three-day minimum periods between service of charges and either hearing or trial in peacetime provided by Article 35, Congress in effect passes, as it does in wartime, the responsibility for seeing that adequate time for preparation is accorded defense counsel to the military judges, to be exercised under their newly acquired continuation power. In courts without military judges, this responsibility is left with non-lawyer mem-

102. *Id.* § 835 (Supp. Feb. 1969).
103. *Id.*
104. 10 U.S.C. § 840 (1964).
105. MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶58(b), (e), 33 Fed. Reg. 13580-81 (1968).
106. 10 U.S.C.A. § 840 (Supp. Feb. 1969).
107. 10 U.S.C. § 835 (1964).

bers of the courts-martial. It would be more advantageous to the accused if Congress had completely eliminated the minimum period and had forthrightly abandoned any responsibility in the matter because courts, both civilian and military, are apt to consider the five-day and three-day periods as congressionally established guidelines. Better yet, Congress should adopt a realistic minimum period to apply both in time of peace and during war. The Founding Fathers bestowed on us the guarantee of a speedy trial;[108] from time to time the military establishment has been known to provide not merely speedy, but nearly instant trials. Civilian federal courts have, as of the end of 1968, shown no inclination to bar extremely speedy trials; indeed, no federal decisions in point arising under the 1950 Uniform Code of Military Justice have been reported.

In a 1922 case which had nothing to do with criminal matters or courts-martial the Supreme Court transferred into the twentieth century a precept better suited to the spirit of bygone epochs:

> [M]ilitary Tribunals are as necessary to secure subordination and discipline in the army as courts are to maintain law and order in civil life; and the experience of our Government . . . and of the English Government [before 1776] . . . proves that a much more expeditious procedure is necessary in military [affairs] than is thought tolerable in civil affairs. . . .[109]

In 1948 a prisoner, who had been convicted by general court-martial during World War II of murdering a fellow soldier and of misbehavior before the enemy, petitioned a federal district court in Pennsylvania for habeas corpus, basing his petition in part on the claim that he had received a copy of the charges against him only five minutes prior to the beginning of his court-martial. The district judge noted, however, that the record of the court-martial showed that the accused had in reality been furnished the charges on the day before the trial, and further that at the trial prior to time for entering his pleas the defense had answered in the negative when the president inquired whether he had any special pleas or motions to offer. The district judge proceeded to hold that "in this regard there was no deprivation of any constitutional right of the defendant and no denial of due process." [110]

108. U.S. CONST. amend. VI.

109. United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343 (1922).

110. Bigrow v. Hiatt, 70 F. Supp. 826, 832 (M.D. Pa. 1947), *aff'd.*, 168 F.2d 992 (3d Cir. 1948).

Another military defendant, convicted under the Army's pre-1950 Articles of War and sentenced to life imprisonment at hard labor by a court-martial, sought habeas corpus relief claiming that he was denied effective assistance of counsel at his court-martial because, due to the denial of his request for a continuance, his counsel did not have enough time to prepare his defense. The Court of Appeals for the Ninth Circuit in 1955 upheld the denial of the habeas corpus petition, commenting that:

> [I]n view of the fact that defense counsel had had four days for preparation, the denial of the motion for continuance was within the sound judicial discretion of the court [martial] and . . . there was no showing of an abuse of that discretion.[111]

It is to the credit of the military establishment, including policy makers, appellate and review echelon officers, and personnel of courts-martial, that injustices in the nature of too speedy trials have been held to a minimum. It is time that Congress or the federal courts put a complete stop to this vestige of harsher days.

Challenges

Both the accused and the prosecution enjoy an established right to challenge the military judge and the members of a court-martial. Article 41 of the 1950 Uniform Code of Military Justice provides that either side may challenge for cause members of a general or special court-martial and the law officer, and that the court is to determine the relevancy and validity of such challenges for cause.[112] The Manual for Courts-Martial 1968, an executive document which has the force of law, requires that the trial counsel (prosecuting attorney) announce in open court every ground for challenge which he believes to exist in the case, and that he request the law officer and members of the court to volunteer any information of any matter which would constitute grounds for their being challenged for cause. In addition, each side has the opportunity to conduct a voir dire examination. Each side is then allowed an unlimited number of challenges for cause. The members of the court, but not the law officer, could be removed from the

111. Mitchell v. Swope, 224 F.2d 365, 367 (9th Cir. 1955). But in Shapiro v. United States, 69 F. Supp. 205 (1947), the court of claims awarded back pay to a dismissed officer who had been tried by court martial only three hours after service of charges and who had been denied a continuance. But prior to its decision the president had granted the defendant a complete pardon.

112. Uniform Code of Military Justice art. 41(a), 10 U.S.C. § 841(a) (1964).

court in a particular trial on the familiar jury trial ground of having "formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged." [113]

Under the 1950 Code all general courts-martial had law officers and members of the court, and all special courts consisted of members without law officers.[114] It was sensible in special courts-martial for the members to decide on challenges for cause, since they had no law officer on hand to attend to the matter. Once general courts-martial acquired law officers, however, it became anomalous for the members of the court, who had no legal training, to perform this judicial function; it was analogous to allowing a civilian court jury to determine not only each others' qualifications to sit as jurors but also to determine whether the appointed judge should be removed.

The United States Court of Military Appeals in *United States v. Cleveland* commented:

> On prior occasions when discussing the subject of challenges for cause, this Court has stated its belief that it would be preferable for the same to be passed upon by the law officer of a general court rather than the court members . . . . Indeed, we have recommended enactment of legislation to that effect . . . . Considering the facts of the present case, we strongly reaffirm that recommendation.
>
> Nonetheless, we recognize that we are powerless ourselves to alter the present procedure . . . . There can be no doubt under the Code and the Manual [for Courts-Martial] that, in military law, challenges for cause must be resolved by the court itself . . . . Moreover, this is so notwithstanding that such process results . . . in the somewhat anomalous situation whereby court members challenged on substantially the same ground are permitted to ballot on the challenges against their fellow members, even though disqualified to vote on their own.[115]

Law officers have occasionally assumed the judicial prerogative of determining the propriety of a particular member sitting on a court-martial. It has been held proper for a law officer to remove a member who under Article 25 of the Uniform Code of Military Justice[116] is

113. MANUAL FOR COURTS-MARTIAL UNITED STATES 1968, ¶ 62(f), 33 Fed. Reg. 13588-89 (1968).

114. Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (1964).

115. 15 U.S.C.M.A. 213, 215, 35 C.M.R. 185, 187 (1965).

116. 10 U.S.C. § 825 (1964).

ineligible to serve even though neither side had challenged that member of the court, for example, because that member had in the course of his duties as base information officer gathered facts about the accused's case from Air Police reports and had formulated answers to inquiries from news media about the case.[117]

It is one thing for a law officer to remove, in effect for cause, an unqualified member of the court-martial. It is quite another thing for a law officer to rule against a defendant's challenge for cause brought against a member of the court, instead of referring the matter to the members of the court for their determination. The United States Court of Military Appeals commented that such action by the law officer was patently erroneous in *United States v. Tucker*,[118] despite the fact expressed in other cases that that court favored a change in the statute to transfer to law officers the duty of considering and ruling on challenges for cause.[119]

The 1968 Act finally brings about this change long recommended by the Court of Military Appeals. It amends Article 41 of the Uniform Code of Military Justice to read:

> The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevancy and validity of challenges for cause . . . .[120]

Thus the 1968 Act brings the military practice as to challenges for cause into line with the generally approved practice of civilian courts as to challenges for cause against both judges and jurors.

The 1968 Act leaves unchanged the right of each side to one peremptory challenge of a member of the court. As in civilian courts, neither side may challenge the military judge except for cause.[121]

Right to Freedom Pending Appeal

The 1950 Uniform Code of Military Justice provided a right in some cases to freedom from incarceration following conviction and while appeal was pending. Article 71(c) provides:

117. United States v. Farrow, 38 C.M.R. 895 (1968).

118. 16 U.S.C.M.A. 318, 36 C.M.R. 474 (1966).

119 United States v. Cleveland, 15 U.S.C.M.A. 213, 215, 35 C.M.R. 185, 187 (1965).

120. 10 U.S.C.A. § 841(a) (Supp. Feb. 1969).

121. Uniform Code of Military Justice art. 41(b), 10 U.S.C. § 841(b) (1964).

> No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.[122]

Considered by itself this guarantee is clear, but Congress confused the matter by simultaneously providing in Article 57(b) of the Code that:

> Any period of confinement in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.[123]

The military authorities in considering the two articles together concluded that if they gave full force to Article 57(b) they would in effect be shortening the sentence. They did not consider Article 71(c) as providing either exceptions to or limitations on Article 57(b). Their usual response was to have prisoners begin serving any sentence to confinement immediately after the conclusion of the court-martial. They circumvented the clear meaning of Article 71(c) by using the fiction that time spent in confinement prior to the final review of the case was not really spent serving the sentence but was merely preliminary confinement. For those whose original sentences were upheld on appeal this practice did not result in any longer imprisonment than they would otherwise have undergone, it only meant that the imprisonment began and ended earlier than it would have had Article 71(c) been followed. Indeed, for them the practice of disregarding Article 71(c) resulted in a shorter total period of confinement than would have been the case had they been kept in some modified custody pending appeal and then required to serve the full period of imprisonment ordered by the court-martial. For those whose sentences to confinement were overturned on appeal, however, the practice of bypassing Article 71(c) was a severe deprivation.

The far-reaching Bail Reform Act of 1966 does not reach persons convicted by courts-martial. It explicitly excludes from its protective coverage any offenses which are triable by courts-martial.[124]

The federal courts are in the midst of construing the conflicting pro-

122. *Id.* art. 71(c), 10 U.S.C. § 871(c) (1964).
123. *Id.* art. 57(b), 10 U.S.C. § 857(b) (1964).
124. 18 U.S.C. § 3152(2) (Supp. II 1966).

visions of Articles 71(c) and 57(b) of the Code in connection with an application for habeas corpus filed by an Air Force captain who had been convicted by a general court-martial and sentenced to dismissal and confinement at hard labor for one year. The responsible commanding officer who had convened the court-martial approved the sentence and ordered that the accused, Captain Noyd, be removed to the military's disciplinary barracks at Fort Leavenworth, Kansas, pending completion of review within the appellate structure of the military justice system. This disciplinary barracks is no better than a penitentiary as far as the inmates are concerned. The petitioner turned to the federal courts for habeas corpus relief from the order directing his incarceration in that prison and sought either release on bail or continuation of his pre-trial arrest in quarters at his old base. At the district court level he won partial relief; the court agreed with his contention that to allow his transfer to the disciplinary barracks would be tantamount to an execution of the sentence in violation of Article 71(c).[125] The district court ordered the Air Force not to transfer the petitioner to the penitentiary-like disciplinary barracks at Fort Leavenworth, but left it up to the Air Force to determine the conditions of restraint to be imposed pending final determination of the petitioner's appeal. As to the request for freedom on bail pending appeal, the district court commented that the Bail Reform Act of 1966 was inapplicable.[126] The court expressed agreement with the 1967 decision of the United States Court of Military Appeals in *Levy v. Resor*,[127] that the constitutional right to bail does not apply to military personnel convicted by courts-martial, and that there was no statute giving them any right to bail.

The court of appeals reversed on the basis that the petitioner at the time of filing his petition had not exhausted his remedies within military channels and that therefore the district court acted prematurely in considering his petition. The court of appeals in deciding against the petitioner did not comment on the merits of his contentions.[128] The persistent petitioner next secured a temporary stay order from Justice Douglas,[129] which was followed by a grant of certiorari from the

125. Noyd v. Bond, 285 F. Supp. 785 (D.N.M. 1968), *rev'd*, 402 F.2d 441 (10th Cir. 1968).

126. 18 U.S.C. § 3152(2) (Supp. II 1966).

127. 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

128. 402 F.2d 441 (10th Cir. 1968).

129. 89 S. Ct. 478 (1968).

Supreme Court in January, 1969.[130] No final decision in the matter had been reported as of early June 1969.

The district court in reaching its decision in *Noyd v. Bond* considered the government's contention,[131] regularly used by military authorities, that the immediate confinement of the petitioner in strict accordance with the sentence despite Article 71(c), was required by Article 57(b) of the Uniform Code of Military Justice. The court disagreed with that interpretation of Articles 57(b) and 71(c) and held that Article 71 created specific exceptions to Article 57(b).

The 1968 Military Justice Act resolves this possible inconsistency between Articles 57(b) and 71 by amending Article 57(b) to read:

> Any period of confinement included in a sentence of court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended *or deferred* shall be excluded in computing the service of the term of confinement. [Emphasis added.] [132]

This sensible change of wording should at last secure to military defendents the protection which Congress intended in 1950 when it adopted Article 71(c).

The foregoing coverage of the statutory right to deferral of serving a sentence has dealt only with cases falling within the protection of Article 71(c), cases in which the sentence includes a punitive discharge or confinement for one year or more.

The 1950 Uniform Code of Military Justice offered no such right to persons who were sentenced to confinement for less than one year, unless they were generals, admirals, or commodores. Nor does the 1968 Act give them such a right. It does amend Article 57 to repose in designated commanding officers the discretionary power to defer service of sentences to confinement on the petition of any accused who is under a sentence to confinement which has not been ordered executed.[133] This amendment to Article 57 is reinforced by an amendment to Article 71(d) which recognizes the authority of designated officers to defer service of sentences to confinement for terms of less than one year.[134]

130. 89 S. Ct. 692 (1969).
131. 285 F. Supp. 785, 787 (1968).
132. 10 U.S.C.A. § 857(b) (Supp. Feb. 1969).
133. *Id.* § 857(d) (Supp. Feb. 1969).
134. *Id.* § 871(d) (Supp. Feb. 1969).

The changes introduced by the 1968 Act do not grant complete freedom pending appeal. The accused remains subject to military orders, and may be confined to his base or ship and even placed under some appropriate form of restraint such as restriction to his quarters or some designated area of a base. Captain Noyd was placed under guard in the base bachelor officers quarters following the granting of habeas corpus relief in *Noyd v. Bond*.[135] Actual confinement, short of the rigors of the actual sentence, may still be imposed pending appeal. The same types of deprivation of liberty may be imposed at the pre-trial stages of a case, for the constitutional right to pre-trial bail does not extend to persons appearing before military courts.

New Trial

The 1950 Uniform Code of Military Justice allowed an accused who had been convicted by court-martial to petition for a new trial on the grounds of newly discovered evidence or of fraud on the court. This right could only be exercised within one year of the date of the approval of the sentence by the commanding officer who had convened the court-martial. The right came into existence only if the sentence extended to death, dismissal of an officer, punitive discharge of an enlisted man, or confinement for one year or more.[136] Read in conjunction with other provisions of the Uniform Code of Military Justice, this meant that no petitions for new trial could be brought from convictions by summary courts since those courts have no jurisdiction to issue any of the indicated sentences.[137] The only convictions by special court-martial from which the accused could petition for a new trial were those in which an enlisted man had been sentenced to a bad conduct discharge, because special courts-martial do not have authority to issue any of the other indicated sentences.[138]

The 1968 Act extends the time for filing a petition for new trial to two years from the date of approval of the sentence, and it allows an accused to file such a petition regardless of the nature of the sentence.[139]

Persons convicted by court-martial who hope for eventual relief from federal courts on a petition of habeas corpus must first avail them-

135. 402 F.2d 441 (10th Cir. 1968).
136. Uniform Code of Military Justice art. 73, 10 U.S.C. § 873 (1964).
137. *Id.* art. 20, 10 U.S.C. at § 820 (1964).
138. *Id.* art. 19, 10 U.S.C. at § 819 (1964).
139. 10 U.S.C.A. § 873 (Supp. Feb. 1969).

selves of this newly expanded right to seek new trial whether their conviction or petition for habeas corpus comes before or after the effective date of this section of the 1968 Act. With rare exceptions, federal courts do not act on petitions for habeas corpus from persons complaining of their conviction by courts-martial unless the petitioners have exhausted all remedies within the military system including the remedy of petitioning for a new trial.[140] This has been applied even where no right to petition for new trial existed at the time of conviction but became available to the accused before he filed his petition for habeas corpus.[141] The leading case in this area is the Supreme Court decision in *Gusik v. Schilder*.[142] The petitioner in that case had been convicted by an Army court-martial at a time when no right to petition for a new trial existed. He had exhausted all then existing remedies within the military system, and had filed a petition for habeas corpus with the appropriate district court. Congress amended the Army's Articles of War, however, to allow petitions for new trials under Article 53,[143] and this newly created privilege became available to the prisoner after he had filed his petition for habeas corpus. The United States Supreme Court held:

> If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the article had been exhausted . . . . If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless . . . . That policy is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created . . . .[144]

The Court went on to hold that the lower federal courts should, in a situation of a late-arising post-conviction remedy, hold a petition for habeas corpus in abeyance until the petitioner exhausts the newly created right, rather than deny the petition.

The 1968 Act offers still another remedy within the military justice

140. Sweeney v. Hiatt, 89 F. Supp. 416 (N.D. Ga. 1949); Cochrane v. Zuppann, 89 F. Supp. 329 (M.D. Pa. 1950); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement;* 55 VA. L. REV. 483 (1969).

141. Williams v. Humphrey, 89 F. Supp. 538 (M.D. Pa. 1950).

142. 340 U.S. 128 (1950).

143. Act of June 24, 1948, ch. 621, 62 Stat. 604, 639.

144. Gusik v. Schilder, 340 U.S. 128, 131-32 (1950).

system for persons convicted by courts-martial and later seeking redress. Article 69 of the Uniform Code of Military Justice, dealing with review in the office of the Judge Advocate General of each Service, is amended to add a provision that:

> . . . the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.[145]

No time limit is set for relief under this new provision. Presumably a defendant seeking habeas corpus relief in a federal district court would be required first to exhaust this new remedy.

Establishment of Courts of Military Review

Of the several changes which the 1968 Act provides, those of probably least interest to the accused involve a slight reorganization in the appellate system.

The 1950 Uniform Code of Military Justice established the United States Court of Military Appeals to review convictions by courts-martial either on a prescribed appeal basis or on a type of certiorari.[146] A great amount of good law has come from that court, and it has had a tremendous liberalizing effect on the entire system of military justice. The independence of the members of the court no doubt contributed to that court's pioneering decisions. Its members hold fifteen-year terms, are appointed by the President with approval of the Senate, and can not serve on active duty in any branch of the armed forces.[147] The 1968 Act does not affect this court in any way.

The 1968 Act calls for the establishment of at least one court of military review for each of the three military services by amending Article 66 of the Uniform Code of Military Justice.[148] Here, however, there is no pioneering comparable to the establishment of the Court of Military Appeals in 1950. Rather we see a splicing together of what

145. 10 U.S.C.A. § 869 (Supp. Feb. 1969).
146. Uniform Code of Military Justice art. 67(a), (b), 10 U.S.C. § 867(a)-(b) (1964).
147. *Id.* art. 67(a), 10 U.S.C. § 867(a).
148. 10 U.S.C.A. § 866(a) (Supp. Feb. 1969).

had been the boards of review within the offices of the Judge Advocates General of the Army, Navy, and Air Force. Now the name is changed from "board of review" to "panel," and each court of military review is to consist of one or more such panels. The new courts may sit either en banc or, as before, as separate panels. Article 68 is amended to allow the establishment of such courts of military review in military headquarters below the Pentagon level.[149]

Unlike members of the Court of Military Appeals, the members of these courts of military review have no real freedom of action. They remain as they were before the 1968 change of name, either active duty officers or civilian employees, assigned to duty on the court by the Judge Advocate General and removable at his pleasure.[150] The only independence given them by the 1968 Act is from each other; the Act forbids them to prepare efficiency reports or similar documents on each other.[151] The appellate jurisdiction of the new courts of military review is the same as that of their precursors, the boards of review.

The new courts of military review will probably continue along the lines of the old boards of review. The 1968 Act gives no basis for expecting any significant change in their activities or outlook.

Conclusion

The Military Justice Act of 1968 is the first important legislation in its area since the passage of the sweeping Uniform Code of Military Justice in 1950. The 1950 Code laid down a truly revolutionary basis of protection of the rights of servicemen involved in difficulties with military law. The 1968 Act builds upon the basic 1950 Code in several ways. Some of the provisions of the 1968 Act are completely original while others are little more than a codification of principles already observed, either in accordance with court decisions or because of policy decisions within the military system. The general tenor of the 1968 Act is toward bringing military judicial practice even closer into line with the practice in civilian courts, while still not according the full protection of the Constitution automatically in all areas of military law.

The new Act does not make any changes for the worse; it makes many improvements, especially in significantly extending the right to a lawyer as defense counsel, and in greatly increasing the role and authority of the legally trained military judges. Two serious shortcom-

149. *Id.* § 868 (Supp. Feb. 1969).
150. Uniform Code of Military Justice art. 66, 10 U.S.C.A. § 866 (1964).
151. 10 U.S.C.A. § 866(g) (Supp. Feb. 1969).

ings of a basic constitutional nature were touched by the Act but remain to be remedied: the complete lack of the right to confrontation of hostile witnesses at trial, and the lack of an absolute right to a lawyer as defense counsel when being tried for a serious offense by a special court-martial. Both of these rights could have been provided by the 1968 Act with a minimum of inconvenience to those charged with the enforcement of the military laws.

The 1968 Act, like the basic 1950 Code, does nothing toward extending the right to trial by jury to the military justice system. Nor have the courts questioned the propriety of trials by courts-martial without juries. Indeed, it is hard to imagine how a true jury system could be injected into the military justice system. The Supreme Court in the *O'Callahan* decision[152] has made an excellent start toward extending the right to trial by jury to servicemen by depriving courts-martial of jurisdiction over offenses committed by servicemen in many areas and thus granting civilian courts, presumably with juries for all but misdemeanors, exclusive juirsdiction in these areas. Hopefully Congress, the military authorities themselves, or court action will completely end the peacetime encroachment of the military authorities into the judicial process and return jurisdiction to what it was prior to World War I, that is, to no court-martial jurisdiction over non-military offenses committed within the United States. A further step, which would be a major innovation, would be to transfer peacetime jurisdiction over serious non-military offenses committed abroad by servicemen from the military justice system to appropriate federal or state courts for trial by jury within the United States, for example, by ending general court-martial jurisdiction over all non-military offenses committed abroad during time of peace. As to offenses of a non-military nature committed within the United States during peacetime, these changes should restore to servicemen protection of the law equal to that of civilian offenders, a right to which they are entitled and which servicemen enjoyed prior to World War I. As to serious non-military offenses committed abroad during peacetime the changes would not provide treatment equal to that of American civilians, who in many instances cannot be tried by American courts, but a jury trial would be preferable to a general court-martial. Concurrent jurisdiction, shared with the courts of the foreign country in which the offense was committed, would continue where it presently exists under status of

152. O'Callahan v. Parker, 89 S. Ct. 1683 (1969).

forces agreements or otherwise, and special and summary courts-martial would continue to deal with minor offenses committed abroad. The changes would leave unimpaired court-martial jurisdiction over military-type offenses wherever and whenever committed, over serious non-military offenses committed abroad during wartime, and over minor non-military offenses committed abroad.

Due process for servicemen has become more developed and refined and the Military Justice Act of 1968 is a significant milestone in its progress, but ever-narrowing areas of unfair, perhaps even unconstitutional, practice remain for future remedial action.