Michigan Law Review

Volume 50 | Issue 7

1952

THE UNIFORM CODE OF MILITARY JUSTICE-NEW RIGHTS AND A MEANS TO ENFORCE THEM

John F. Spindler
University of Michigan Law School

THE UNIFORM CODE OF MILITARY JUSTICE—NEW RIGHTS AND A MEANS TO ENFORCE THEM—The Uniform Code of Military Justice, designed to govern the entire military establishment of the United States, was enacted May 5, 1950, replacing the three separate systems of law theretofore applied to the Army, Navy, and Air Force.[1] Pressure for a uniform code was a reflection of the great surge toward unification of the Armed Services which followed World War II. The new Code, however, is not just a revision and consolidation of the prior systems of military law. World War II, with its great increase in the size of the Armed Services and in the percentage of the population under the jurisdiction of military law, exposed many of the inadequacies of the old system to heavy public criticism. Consequently the new Code represents not only unification but also substantial reform in the system of military law.

The strongest and most recurring attacks upon the military law have been leveled at its failure to provide military personnel with the benefit of adequate protection for the right to a fair trial, a right which in civilian courts is accorded the highest possible protection. The new Code has by no means escaped such criticism,[2] for there are serious defects in the military law which remain substantially unchanged by its provisions. This is not surprising, for military law is regarded by the Armed Services primarily as an instrument of discipline and only secondarily as a system of justice.[3] It has always been recognized that the necessity for discipline in the Armed Services requires a system essentially more arbitrary than may constitutionally be imposed upon civilians. Prior to the last decade, public pressure for reform in military law was virtually non-existent, for except in time of war the Armed Services were limited to a very small group of professionals. It has become apparent in the past few years that in spite of the traditional antipathy in this country toward a large standing army, a relatively large and essentially civilian standing army will have to be maintained. In war or peace, it seems clear that a much larger proportion of our population may anticipate becoming subject to the jurisdiction of the military law for some period in their lives. Accordingly, the need has become more pressing

[1] 64 Stat. L. 108 (1950), 50 U.S.C. (Supp. III, 1950) §§551-736, effective May 31, 1951.

[2] Principally by Arthur J. Keefe, Professor of Law, Cornell University, who aided in the preparation of the new Code. See Keefe and Moskin, "Codified Military Injustice," 35 CORN. L.Q. 151 (1950). For other general discussions of the Uniform Code of Military Justice, see Snedeker, 38 GEO. L.J. 521 (1950); Re, 25 ST. JOHN'S L. REV. 155 (1951); Butts, 21 MISS. L.J. 203 (1951); 2 WEST. RES. L. REV. 147 (1950); 29 TEX. L. REV. 651 (1951).

[3] Snedeker, "The Uniform Code of Military Justice," 38 GEO. L.J. 521 at 521 (1950).

for a system of military law which provides, in addition to discipline, adequate machinery to effectuate justice. It is not the purpose of this comment to discuss at any length reforms in the system of justice which have been proposed, but only to discuss to what extent changes effected by the new Code have cured the more important defects in the military law as a system of justice. The majority of failures in military justice in the past have stemmed primarily from these defects: command control over courts-martial, an insufficient number of legally trained personnel, and inadequate means for securing appellate review.

I. Command Control

Command control is a term applied to the extensive power over military disciplinary and judicial machinery which is vested in officers with command responsibility. Since discipline, a commander's responsibility, is a fundamental necessity to an effective military force, command control over the means of enforcing it and thereby carrying out that responsibility is deemed imperative.

The Code requires the commander to appoint the members of the court,[4] the law officer,[5] and counsel,[6] all of whom are members of his command and responsible to him. The commander also has the power to disapprove findings and sentence and order a re-hearing,[7] and to remit or suspend sentence.[8] Thus the means to exert a strong influence over the whole proceedings are in his hands. Recognizing the problem, Congress provided in the Code that he shall not censure, reprimand, or admonish those performing judicial functions, and that neither he nor anyone else subject to the Code shall attempt to coerce or, by any other unauthorized means, influence judicial action.[9] An intentional violation of this provision is made a punishable offense by the Code.[10] As a practical matter, the effectiveness of these provisions for the restriction of command control is questionable. In most cases the influence of the commanding officer would be too subtle to fall within the express prohibition of the Code. Even where there is a flagrant violation, it is too much to expect that one of his subordinates will prefer charges against him. The only efficient way in which the commander's influence can be eliminated is by taking away his powers of appointment and review and placing them in an independent body, thereby removing most of the

[4] Uniform Code of Military Justice, arts. 22, 23, 24, 64 Stat. L. 108 (1950), 50 U.S.C. (Supp. III, 1950) §§551-736, hereinafter cited as U.C.M.J.
[5] Id., art. 26.
[6] Id., art. 27.
[7] Id., art. 63.
[8] Id., art. 74.
[9] Id., art. 37.
[10] Id., art. 98.

opportunities for interference.[11] Doubtless the elimination of command control would destroy one of the greatest potential sources of prejudice to a fair military trial. However, the extent to which such action would impair the commanding officer's power of discipline is not clear. Thus far, Congress has accepted the view of most military men that command control is necessary to the proper functioning of a military organization and has preserved it relatively untouched in the new Code.

II. Insufficient Number of Legally Trained Personnel

The Uniform Code of Military Justice has taken some significant steps toward insuring a more competent tribunal. The Articles of War provided that the trial judge advocate (prosecutor) and the defense counsel in a general court-martial should be members of the Judge Advocate General's Corps or officers who were members of the bar of a federal court or of the highest court of a state, "if available."[12] The only absolute requirement was that, if the trial judge advocate was a lawyer, the defense counsel should have the same qualifications.[13] The Code has dropped the "if available" clause, making it an absolute requirement that trained legal personnel, certified as competent by their respective Judge Advocate Generals,[14] be appointed as trial counsel (prosecutor) and defense counsel.[15] In addition to qualified counsel, the Code provides that a law officer who is also either a member of the Judge Advocate General's Corps or a member of the bar of a federal court or of the highest court of a state shall be appointed to every general court-martial.[16] This law officer replaces the law member formerly required by the Articles of War to be a voting member of the court. Under the new Code the law officer is not a member of the court and does not vote on any of the findings of the court.[17] He rules on all interlocutory questions except challenges, and his ruling is final except on motions to dismiss and the question of sanity.[18] He must charge the court with

[11] This solution has been advanced by several writers. Keefe, "Codified Military Injustice," 35 CORN. L.Q. 151 at 158 (1950); Snedeker, "The Uniform Code of Military Justice," 38 GEO. L.J. 521 at 525, 526 (1950).

[12] Article of War 11, 62 Stat. L. 629 (1948), 10 U.S.C. (Supp. III, 1950) §1482.

[13] Ibid.

[14] While this is intended to be some recognition of the fact that not all lawyers have had sufficient experience with the military law to be competent to practice it, certification is apt to be somewhat perfunctory if the applicant is a member of the bar of either a federal court or the highest court of a state.

[15] U.C.M.J., art. 27(b).

[16] Id., art. 26(a).

[17] Id., art. 26(b).

[18] Id., art. 51(b).

the elements of the offense, the presumption of innocence, and the burden of proof.[19] All proceedings except voting by the court must be carried on in his presence, and all advice and instructions which he gives must be made a part of the record.[20] By separating the law officer from the court the similarity between the law officer and a civilian judge has been greatly increased. It is hoped that his position as impartial arbiter of the law will instill a respect for his pronouncements similar to that accorded a civilian judge.

In the case of the special courts-martial, there has been no substantial change. No legal personnel need be present, except for the provision that if the trial counsel is a lawyer the defense counsel must be one also.[21] There is no law officer on a special court-martial, but the president of the court is charged with similar duties.[22] In view of the inferior jurisdiction of the special courts-martial with respect to the crimes which it may try and the punishments which it is authorized to impose,[23] it is felt that the absence of trained personnel is not sufficiently serious to merit the maintenance of enough trained personnel to staff these tribunals.

III. Appellate Review before the Code

Prior to the Code the difficulty in securing independent appellate review of trial proceedings by an accused who contends that his constitutional or statutory rights have been violated, has been a major defect in military law. Review of courts-martial proceedings is to a certain extent automatic.[24] This feature gives potentially greater protection to the

[19] Id., art. 51(c).
[20] Id., art. 39.
[21] Id., art. 27(c).
[22] Id., art. 51(c).
[23] Id., art. 19.
[24] Military punishment may be divided into two classes, judicial and non-judicial. Non-judicial punishment is solely a matter of disciplinary action by the unit commander. Judicial punishment is administered by three types of courts: summary, special, and general courts-martial. The offenses over which these courts have jurisdiction progress from the less to the more serious in that order. The convening authority automatically reviews all cases tried by courts-martial. He may approve or disapprove the sentence and findings or any part thereof. If he disapproves, he may either dismiss the case or order a new trial, but in no event may he order a new trial if the verdict was not guilty or increase the sentence unless the sentence prescribed was mandatory. After taking final action the convening authority forwards the records to the office of the Judge Advocate General (Washington, D.C.) for the second automatic review. There all general courts-martial cases other than those which could also have been tried by a special court-martial are reviewed by a board of review. This board consists of not less than three officers or civilians who are members of the bar of either a federal court or the highest court of a state. The same treatment is given to the record of a special court-martial case in which a bad conduct dis-

rights of military personnel than that which is accorded to civilians by the Constitution and laws of the United States. Nevertheless, there is a strong feeling that a review entirely within the military departments is not really an effective safeguard for those rights. Heretofore, if errors in trial procedure were not corrected by military review machinery, there was no direct appeal to a civilian court.[25] The only remedy available to the accused was habeas corpus.[26] The relatively narrow scope of the Great Writ makes it entirely inadequate as an ordinary remedy for such errors, particularly since the only relief obtainable by habeas corpus is release from confinement. There is no final determination thereby of the guilt, innocence, or sanity of the petitioner. The only way in which he can secure the relief afforded by habeas corpus is by showing a jurisdictional defect in the military tribunal. While the grounds for habeas corpus relief for civilians are relatively well settled, unfortunately the same cannot be said for military personnel.[27] It is clear, however, that the rights of military personnel under the Constitution are far less extensive than those of civilians.[28] The new Code has provided a civilian court of review which should eliminate in large part the necessity of resort to habeas corpus with its attendant uncertainties.

IV. A Civilian Court of Military Appeals

Without doubt, the greatest single change in the military law produced by the Code is the creation of a civilian Court of Military Ap-

charge is adjudged. All other special and summary courts-martial records are reviewed by a member of the Judge Advocate General's Corps or a Law Specialist of the Navy. The third review by the Court of Military Appeals is automatic only in certain cases, see text infra. U.C.M.J., arts. 60, 61, 65, 66, 67.

[25] Neither certiorari nor writ of error is available. Civilian courts will not look behind the judgment of a military court, and will examine only its jurisdiction on writ of habeas corpus. This policy is long established and there are no significant indications of any tendency to change it. Smith v. Whitney, 116 U.S. 167, 6 S.Ct. 570 (1886); Johnson v. Sayre, 158 U.S. 109, 15 S.Ct. 773 (1895); Ex Parte Quirin, 317 U.S. 1, 63 S.Ct. 1 (1942); In re Yamashita, 327 U.S. 1, 66 S.Ct. 340 (1946); Hyatt v. Brown, 337 U.S. 103, 70 S.Ct. 495 (1950).

[26] For a detailed treatment of the scope of the writ of habeas corpus as a means of securing review of military trials see, Wurfel, "Military Habeas Corpus," 49 MICH. L. REV. 493, 699 (1951).

[27] Successful military habeas corpus applications seem to be limited to these narrow grounds: (1) The military court was not legally constituted. (2) It did not have jurisdiction over the person tried. (3) It did not have jurisdiction over the offense charged. (4) The sentence was not within the maximum limits prescribed for the offense. Id. at 713.

[28] Civilians frequently and successfully invoke habeas corpus when they have been denied due process of law. Attempts by military prisoners to secure relief on due process grounds have been uniformly rebuffed by the Supreme Court. The normal constitutional concept of due process is not one of the rights of military personnel. Id. at 713-722.

peals. The court consists of three judges appointed from civilian life by the President for a term of fifteen years. The judges are eligible for reappointment and may be removed during their term only for neglect of duty, malfeasance in office, or for mental or physical disability.[29] Thus they are accorded the security of tenure generally considered necessary for the creation of a fearless judiciary.

In addition to its judicial duties, the court is required to meet annually with the Judge Advocate Generals to make a comprehensive survey of the operation of the Code and to report to the Committee on Armed Services in the Senate and the House of Representatives.[30] It is expected that these conferences will operate in a manner similar to the Supreme Court Advisory Committee in making recommendations to Congress for necessary changes in the Code.

Review by the Court of Military Appeals is not automatic except in cases in which the sentence affects a general or flag officer, or extends to death, or in which the Judge Advocate General has ordered the case forwarded to the court for review. In all other cases reviewed by a board of review,[31] however, the court may, upon a petition of the accused showing good cause, grant review.[32] In all cases reviewed by the court, it may reverse for errors of law materially prejudicial to the substantial rights of the accused.[33] One of the first indications of how effectively we may expect that power to be exercised is the recent decision of the Court of Military Appeals in *United States v. Clay*.[34]

V. United States v. Clay

This case is one of the early decisions handed down by the new Court of Military Appeals. The accused was tried by a special court-martial on two charges, one for an alleged disorder and the other for improperly wearing the uniform. He pleaded guilty to the charge of improperly wearing the uniform and not guilty to the charge of disorder. The trial procedure was governed by the new Code.[35] The president

[29] U.C.M.J., art. 67(a)(3).

[30] Id., art. 67(g).

[31] See note 24 supra.

[32] U.C.M.J., art. 67(b)(3).

[33] Id., arts. 59(a), 67(d). Appeals to the Court of Military Appeals are limited to questions of law. Since the convening authority and the board of review have the power to review both facts and law, and since military men are more apt to be familiar with the fact situations involved, it was felt that to give the court the power to review facts would place an unnecessary burden upon it.

[34] — U.S.C.M.A. —, No. 49, Nov. 27, 1951.

[35] The offenses were committed prior to the effective date of the Uniform Code of Military Justice (May 31, 1951), but since the hearing was not held until after that date,

neglected to charge the court on the elements of the offense, the presumption of innocence, and the burden of proof, as provided by the Code[36] and the Manual for Courts-Martial.[37] The court found the accused guilty on both charges. The convening authority concluded that the error was not prejudicial and the board of review affirmed on the ground that the evidence was of such quality and quantity that the burden of proof was overcome, establishing beyond a reasonable doubt the guilt of the accused.[38] On certification of the question by the Judge Advocate General of the Navy,[39] the United States Court of Military Appeals reversed. The power of the court to reverse is limited to errors of law which materially prejudice the substantial rights of the accused. In the *Clay* case the court declares that the source of these rights is Congress and not the Constitution. The court, therefore, need not determine the constitutional basis of the rights or their jurisdictional or non-jurisdictional character, questions which have plagued other civilian courts taking jurisdiction on habeas corpus. The court instead looks to the Code to find that Congress has declared that there are certain fundamental or substantial rights inherent in the trial of military offenses which must be accorded the accused before it can be said that he has been fairly convicted. Since the court feels that it was the intent of Congress to place military justice on the same plane as civilian justice, it proposes to enforce those rights with the same vigor with which the other federal courts enforce the rights of civilians under the

the trial procedure was governed by the new Code. Executive Order 10214, 16 Fed. Reg. 1303 (1951).

[36] U.C.M.J., art. 51(c).

[37] MANUAL FOR COURTS-MARTIAL, United States, 1951, ¶73(b). The *Manual for Courts-Martial*, sometimes hereinafter referred to briefly as the Manual, was published by the President by Executive Order 10214, 16 Fed. Reg. 1303 (1951), pursuant to the Code which provides, "The procedure, including modes of proof, in cases before courts-martial . . . and other military tribunals may be prescribed by the President by regulations. . . ." U.C.M.J., art. 36.

[38] The test to be used in determining whether error is substantial or not is that it is substantial "unless the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious men would have made the same finding had the error not been committed." MANUAL FOR COURTS-MARTIAL, United States, 1951, ¶87(c).

[39] U.C.M.J., art. 67(b)(2), permits the Judge Advocate General of any of the Services to certify questions to the court for review. This appeal was not taken by the accused under art. 67(b)(3) of the Code. Presumably the Judge Advocate General of the Navy brought the appeal because he wished to obtain a clarification of the questions raised by the Court of Military Appeals decision in United States v. Lucas, — U.S.C.M.A. —, No. 7, Nov. 8, 1951. In that case the court had held that a failure to charge the court with the elements of the offense, the presumption of innocence, and the burden of proof where a plea of guilty has been entered [as provided by the Manual, ¶73(c)] was an error of law, but not such an error as would be materially prejudicial to the substantial rights of the accused.

Constitution and laws of the United States. Perhaps the most interesting aspect of the *Clay* case is the court's concept of the effect of the standards set up by the Code and the court's own function in enforcing those standards. The standards vary in importance. The more important of them form a pattern which the court chose to label "military due process." "Military due process" is a framework of the minimum rights afforded to military personnel. A failure to accord an accused one of these rights would be grounds for reversal. It is the court's function to determine the prejudicial effect of a denial of any right under the Code. It does so by examining previously adjudicated federal court cases. If the denial of a right to a civilian, comparable to a right established by the Code, is of sufficient importance to justify a civilian court in holding that there was a lack of due process, then a denial of the comparable right to the accused in a military trial would constitute a lack of "military due process." Having determined that a failure to charge a jury with the elements of the offense was considered in a civilian court to be a denial of due process,[40] the court held that the failure to do so by the president of the special court-martial was reversible error. Prior to the Code, the protection afforded by the concept of due process of law was limited to civilians. The effect of this decision, however, seems to be to transplant to the military law all of the rights afforded by that concept which have a military counterpart in the new Code.[41]

In addition to the creation of the concept of a statutory "military due process," the court has made other improvements in the protection given to the right to a fair military trial. Consistent with its interpretation of Congress's intent to place military and civilian justice on the same plane, the court has in subsequent decisions continued its policy of applying civilian principles of procedure wherever possible. In

[40] Citing Watts v. Indiana, 338 U.S. 49 at 54, 55, 69 S.Ct. 1357 (1949); United States v. Levy, (3d Cir. 1946) 153 F. (2d) 995 at 998; Williams v. United States, (D.C. Cir. 1942) 131 F. (2d) 21 at 22; Screws v. United States, 325 U.S. 91 at 107, 65 S.Ct. 1031 (1945).

[41] The court suggested the following as a few of the rights which make up the pattern of military due process: "To be informed of the charges against him; to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review." United States v. Clay, — U.S.C.M.A. —, No. 49, Nov. 27, 1951.

United States v. Williams[42] it gave further protection to the right to have the military court properly instructed by the law officer by holding that if the instructions were substantially prejudicial, a failure of the defense counsel to make a timely objection did not constitute a waiver of that right.[43] In other cases the court has held that while its power to review is limited to questions of law, it may, like other appellate courts, weigh evidence for the purpose of determining its sufficiency as a matter of law.[44] The new Court of Military Appeals is proving to be not only a court of last resort for the accused in a military trial,[45] but a tribunal in which he may expect the military law to be applied as nearly as possible in accord with the principles of civilian criminal procedure which are traditional in the Anglo-American legal system.

VI. Conclusions

Granting that the reluctance to diminish disciplinary control over courts-martial has prevented the correction of some of the greatest infirmities in the military law, what has been accomplished is not to be slighted. The right to a fair military trial has received effective new machinery for its protection. Our law is founded more upon hindsight than upon foresight. In both civilian and military law we have been content to reform for the present and not the future. The best that can be hoped is that we will not lag too far behind the times. It is perhaps unfortunate that the impetus of World War I did not produce even greater changes in the military law, but with the aid of the annual report on the operation of the Code to keep the needs of the military law before Congress, it is to be hoped that when further reform is essential it will be forthcoming.

John F. Spindler

[42] — U.S.C.M.A. —, No. 133, Feb. 21, 1952.

[43] The court considered the relationship of rules 30 and 52 of the Federal Rules of Criminal Procedure and the effect of Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031 (1945), to reach the conclusion that the failure of the defense counsel to object was not a waiver, even though the Manual states in ¶67(a) that "failure to assert any such defense or objection . . . before the conclusion of the hearing . . . constitutes a waiver." See also United States v. Rhoden, — U.S.C.M.A. —, No. 153, Feb. 26, 1952.

[44] E.g., United States v. Shull, — U.S.C.M.A. —, No. 45, Feb. 18, 1952.

[45] If a petition for review of an accused were denied or his conviction affirmed by the Court of Military Appeals, habeas corpus would still lie for any jurisdictional defects which he might allege, but presumably he would have to exhaust his military remedy first by making such an application to the Court of Military Appeals.