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MILITARY JUSTICE AND THE MILITARY JUSTICE ACT OF 1968: HOW FAR HAVE WE COME?

by Wayne L. Friesner

The man who dons the uniform of his country today does not disregard his right to fair treatment under law. The first great step came in 1950. It was then that our servicemen and women were given the Uniform Code of Military Justice—the most sweeping development in military law in all our history. When President Harry Truman signed it into life, he was able to say that 'the democratic ideal of equality is further advanced.' Today we advance again. The Military Justice Act of 1968, which we sign now, will stand proudly next to the 1950 law. It expands the concept of fairness by creating an independent court system within the military, free from command pressures and control. It enlarges the rights of the individual soldier by giving him trained legal defense when he is tried by special court-martial. It makes many other changes to streamline the system, and to safeguard the serviceman. We have always prided ourselves on giving our men and women in uniform excellent medical service, superb training, the best equipment. Now, with this bill, we are going to give him first-class legal service as well.

/s/ LYNDON B. JOHNSON
(Remarks on signing the Military Justice Act of 1968, October 24, 1968.)

With these remarks, President Johnson signed into effect the first major revision of the Uniform Code of Military Justice since its adoption in 1950. In 1953, the United States Supreme Court, in Burns v. Wilson, held that: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." These two pronouncements provide impetus to examine the extent to which the military courts are carrying out their responsibility to protect the individual serviceman from violations of his constitutional rights in an environment which he entered, often involuntarily, and which operates under rules which are foreign to him. This is the issue which is to be explored in this Comment through a survey of the military court system, an examination of United States Supreme Court opinions which have substantially enlarged the substantive and procedural rights of the civilian defendant in criminal prosecutions, and the decisions of the United States Court of Military Appeals which have implemented, limited or expanded the Supreme Court decisions. When appropriate, there will be an examination of the Military Justice Act of 1968, which codified many reform proposals for the military justice system and its

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1 346 U.S. 137 (1953).
2 Id. at 142.
4 Previous attempts to revise the Uniform Code of Military Justice culminated with the introduction in the Senate of the Military Justice Act of 1967 (S. 2009). 113 Cong. Rec. S8838 (daily ed. June 26, 1967). The only previous important revision of the Military Code had occurred in 1961 when Article 15 (the non-judicial punishment provision) was expanded to give the commanding officer the disciplinary powers equivalent to the judicial powers he had as the summary court-martial officer. S. 2009 did not go so far as to abolish completely the summary court-martial. Senator Sam J. Ervin, Jr., the sponsor of the bill, felt that it should be abolished, however, and

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probable impact in the military courts' responsibilities to the servicemen in the armed forces.

I. The Military Justice System

The jurisdiction of the military judicial system is limited by the Supreme Court's holding in O'Callahan v. Parker to crimes that are "service-connected." Punishment for those crimes is meted out principally through one of four modes of judicial machinery. First, a commanding officer is given the power to impose one or more of a large number of punishments referred to commonly as "non-judicial" or "Article 15" punishments. These punishments are primarily disciplinary actions, such as limited correctional custody, forfeiture of a limited amount of pay, reduction of one grade, extra duties, area restrictions, and limited detention. A serviceman is not entitled to counsel at this proceeding, but does have the right, prior to imposition of punishment, to demand trial by court-martial in lieu of non-judicial punishment.

Formal military justice is involved in the other three levels of courts-martial, the first being the summary court-martial. This court consists of one commissioned officer and may generally issue sentences up to one month in confinement or hard labor without confinement for a period up to 45 days.

A second level of courts-martial which involves formal military justice is the intermediate or special court-martial. The jurisdiction of this court is limited to non-capital offenses and it may impose as punishment a maximum sentence of six months in confinement, hard labor without confinement for a period up to three months and a bad conduct discharge. A limitation on the special court's jurisdiction is the requirement that a bad conduct discharge can only be adjudged when a complete record is said that "[t]he summary court is an inferior court in concept, procedure, and in the quality of justice it dispenses." 113 CONG. REC. at S8839. Many provisions of the Military Justice Act of 1967 were substantially adopted by Congress in the Military Justice Act of 1968. S. 2009 was an omnibus bill which contained five separate titles: Title I contained a code of procedure for the consideration and issuance of administrative discharge boards; Title II would have created a separate Navy Judge Advocate General's Corps; Title III would have altered the procedures of the Military Code; Title IV would have transferred the board of review, the intermediate appellate reviewing body, from an administrative board to a formal court; and Title V would consolidate the existing separate Boards for the Correction of Records. For an excellent discussion of S. 2009 and its possible impact, see Haight, The Proposed Military Justice Act of 1967: First Class Legislation for "Second Class" Citizens, 72 DICK. L. REV. 92 (1967).

Titles I and V are the only portions of the omnibus bill that are not presently the law. In recommending the Military Justice Act of 1968 to the Senate, Senator Ervin commented on the absence of the reform of the administrative discharge boards from the bill and indicated, after conferences with Department of Defense representatives, "that it may be possible to obtain some desired reforms in respect to administrative discharge boards next year without opposition." 114 CONG. REC. S12028 (daily ed. Oct. 3, 1968).

The Court in this case did not define in any manner what "service-connected" means.

<ref>Art. 20, UCMJ, 10 U.S.C. § 820 (1964).</ref> Id. at 4469. The Court in this case did not define in any manner what "service-connected" means.
made. The Uniform Code of Military Justice [hereinafter referred to as the Code] also provides that in each special court-martial, the convening authority should "detail trial counsel and defense counsel" as he deems appropriate.

The highest court-martial of the military system is the general court-martial. The jurisdiction of this court extends to all acts punishable by the Code and any punishment not forbidden by the Code including the death penalty. Trial counsel and defense counsel must both be lawyers who have been certified by the Judge Advocate General of the accused's armed service to perform such duties.

The review procedure in the armed forces is unique because of the automatic review afforded in certain cases, and also because of the principle that at each reviewing stage, the sentence can be affirmed, or lowered, but can never be increased. After the court-martial is concluded, the record of each case is sent to the authority who originally convened the court. Every general court-martial record receives an automatic review by the convening authority's staff judge advocate for his legal opinion. This automatic review by a judge advocate officer is also given to any special court-martial that adjudges a bad conduct discharge. After this review, and if the convening authority approves the sentence, the record is forwarded to the Judge Advocate General of the service of which the accused was a member. There, every approved sentence that "affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more" must be reviewed by a statutory three-man board of review.

The highest court in the military system is the Court of Military Appeals, [hereinafter referred to as CMA] which is composed of three civilian judges appointed by the President for a fifteen-year term. This court automatically reviews any sentence affecting a general or flag officer or one that includes a death penalty. Automatic review is given any case

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13 Art. 27(a), UCMJ, 10 U.S.C. § 827(a) (1964). Prior to the Military Justice Act of 1968, "counsel" as used here did not mean a legally qualified lawyer or an officer of the Judge Advocate General Corps. United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963). However, the Code provided that if the trial counsel (prosecutor) was a lawyer, then the defense counsel had to be one also. Art. 27(c), UCMJ, 10 U.S.C. § 827(c) (1964). For the effect of the Military Justice Act of 1968, see notes 127-29 infra, and accompanying text.
16 Art. 27(b), UCMJ, 10 U.S.C. § 827(b) (1964).
17 Art. 62(b), UCMJ, 10 U.S.C. § 862(b) (1964).
18 Art. 60, UCMJ, 10 U.S.C. § 860 (1964). The Military Justice Act of 1968 has extended the right of an accused to petition for a new trial in all cases, not just in those where the sentence was death, dismissal, a dishonorable or bad-conduct discharge or confinement for one year or more. Art. 73, UCMJ, 10 U.S.C. § 873 (as amended 1968).
20 Art. 65(b), UCMJ, 10 U.S.C. § 865(b) (1964).
22 Art. 66(b), UCMJ, 10 U.S.C. § 866(b) (1964).
which a board of review has completed and which the Judge Advocate General orders sent to the court for review.28 In addition, in any other case the accused may petition the court for review.29

II. MILITARY-CIVILIAN CONSTITUTIONAL RIGHTS
AND THE MILITARY JUSTICE ACT OF 1968

When a man enters the armed forces, he loses many freedoms which he would consider "rights" in civilian life. Among these is his freedom to live where he pleases,30 his freedom to tell off his boss or complain about conditions when he pleases,31 his freedom to question instructions given him by a superior,32 and his freedom to choose not to risk his life for his employer.33 The loss of these rights is intrinsic to the military service and because of military exigencies is necessary for the system to work effectively. But when a serviceman is accused of a crime, what constitutional protections can he expect to receive in the military judiciary?

The CMA stated in United States v. Tempia34 that Burns v. Wilson35 was "an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials,"36 and that the constitutional safeguards are applicable to military trials except "as they are made inapplicable either expressly or by necessary implication."37 In Miranda v. Arizona,38 the Supreme Court laid down the requirement that prior to any interrogation by police officials, the accused "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."39 These rights can be waived but if at any time during the interrogation the accused indicates that "he wishes to consult with an attorney before speaking there can be no further questioning."40 In Tempia the CMA held that the rules enunciated in Miranda "are to govern all criminal interrogations by Federal or State authorities, military or civilian, if resulting statements are to be used in trials commencing on and after June 13, 1966."41 Since Tempia,
the CMA has resolved many of the procedural problems raised by *Miranda* and has applied the requirements of *Miranda-Tempia* to actual fact situations.\(^{48}\)

**Rights of the Fourth and Fifth Amendments.** The protections afforded an accused by the fourth and fifth amendments overlap in many contexts. Thus, for instance, the taking of blood from an unconscious person has been attacked as an unreasonable search and seizure of his person in violation of the fourth amendment and also as being in violation of the self-incrimination clause of the fifth amendment.\(^{49}\) This overlap warrants treatment of the rights guaranteed by these amendments in one section.

The fourth amendment’s protection against unreasonable searches and seizures does not have an exact statutory counterpart in the Code,\(^{50}\) but the issue is covered in the Manual for Courts-Martial [hereinafter referred to as the Manual]. Prior to 1969, the Manual provided examples of five types of searches considered legal: (1) those conducted under the authority of a lawful search warrant; (2) a search of the person, the clothes he is wearing and the property in his immediate possession or control incident to a lawful arrest; (3) a search to prevent the removal or disposal of criminal goods; (4) a search made with the consent of the owner of the property; and (5) a search authorized by a commanding officer.\(^{51}\) Until the CMA’s decision in *United States v. Brown*\(^{60}\) in 1959, probable cause to search was required in the first four examples, while the fifth, the com-


\(^{49}\) See, e.g., *United States v. Burns*, 17 U.S.C.M.A. 39, 37 C.M.R. 303 (1967) (warning of art. 31 rights and that the accused was entitled to “consult with legal counsel if you so desire” held insufficient in the absence of a warning as to the right to appointed counsel); *United States v. McCauley*, 17 U.S.C.M.A. 81, 37 C.M.R. 345 (1967) (failure to warn accused of his right to the presence of an attorney, either retained or appointed, rendered statements made inadmissible); *United States v. Bollons*, 17 U.S.C.M.A. 253, 38 C.M.R. 51 (1967) (when accused states that “I don’t want to say anything to incriminate myself,” the questioning must cease); *United States v. Solomon*, 17 U.S.C.M.A. 262, 38 C.M.R. 60 (1967) (after a request for counsel, the questioning must cease).

\(^{50}\) *Schmerber v. California*, 384 U.S. 717 (1966).

\(^{51}\) Art. 7(b), UCMJ, 10 U.S.C. § 807(b) (1964), requires that: “Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.” (Emphasis added.) See Cobbs & Warren, *Military Searches and Seizures*, 1 Mil. L. Rev. 1 (1958).

\(^{60}\) *United States v. Swift*, 17 U.S.C.M.A. 227, 38 C.M.R. 25 (1967), held that probable cause to search was required in the first four examples, while the fifth, the self-incrimination clause of the fifth amendment, warrants treatment of the rights guaranteed by these amendments in one section.

\(^{61}\) Because of the enactment of the Military Justice Act of 1968, the Manual will be revised again effective Aug. 1, 1969, the same date that the Act will become effective.
manding officer's search of government owned or controlled property, did not require probable cause. However, in *Brown*, the CMA extended the probable cause requirement to include commanding officers' searches. The court recognized the wide discretion given to commanders to authorize a search, but held that in this instance "reasonable or probable cause was clearly lacking for both the apprehension and the search and, although the military permits certain deviation from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same. Unreasonable searches and seizures will not be tolerated." The officer who conducted the search acted on "mere suspicion" and "[t]he search was general and exploratory in nature and wholly lacking in reasonable cause." By this holding, the court in effect raised the military procedure to that in the civilian system.

Congress in the Military Justice Act of 1968 did nothing to add to or detract from the status of military law on the search and seizure or probable cause requirements of the fourth amendment. However, the drafters of the new Manual now present a very modern and definitive statement as to what is a "lawful search" and what is "probable cause." The Manual, in effectively adopting much prior federal and military law, is not expected to effect a change in military law, but rather consolidates the law in a more accessible manner so that the requirements of the fourth amendment will be more fully met.

The fifth amendment gives to a civilian the right of a grand jury indictment or presentment before he can be held to answer for a capital or otherwise infamous crime. Cases that arise in the armed forces are expressly excepted from the operation of this part of the amendment.

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67 *Id.* at 488, 28 C.M.R. at 54.
68 *Id.* at 489, 28 C.M.R. at 55.
70 MCM 1969, para. 152.
71 The examples given in the old Manual were retained, though more were added to the "search incident to a lawful arrest" example and the probable cause requirement of *United States v. Brown* was set forth explicitly for all searches. In addition, two more lawful searches were added; a search incident to a lawful hot pursuit of a person, and a search of open fields or woodlands with or without the consent of the owner or tenant.
72 The Manual specifically provides that:

Probable cause for ordering a search exists when there is reason to believe that items of the kind indicated above as being properly the subject of a search are located in the place or on the person to be searched. Such a reasonable belief may be based on information which the authority requesting permission to search has received from another if the authority ordering the search has been apprised of some of the underlying circumstances from which the informant concluded that the items in question were where he claimed they were and some of the underlying circumstances from which the authority requesting permission to search concluded that the informant, whose identity need not be disclosed, was credible or his information reliable.

MCM 1969, para. 152.
73 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service or in time of war or public danger. . . ." U.S. Const. amend. V. The words "when in actual service in time of war or public danger," refer only to the "Militia." All persons in the military or naval service of the United States, are subject to the military law. Johnson v. Sayre, 158 U.S. 109 (1895); *Ex parte Mason*, 101 U.S. 696 (1882). See also *Lee v. Madigan*, 358 U.S. 228 (1959); *Ex parte Quirin*, 317 U.S. 1 (1942); Kahn v. Anderson, 255 U.S. 1 (1921). But see *O'Callahan v. Parker*, 37 U.S.L.W. 4464 (U.S. June 2, 1969).
Although the Constitution does not require that grand jury action be available prior to military prosecution, Articles 32 and 34 of the Code require that "[n]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." This is essentially the function of the civilian grand jury. However, the Article 32 investigation, as opposed to the grand jury procedure or the preliminary hearing under the federal rules, affords the military accused much greater guarantees of procedural and substantive due process.

Initially the military accused must be advised of the charges against him and his right to be represented by counsel, either retained or appointed at the hearing. He is also given the right to cross-examine witnesses against him and to present any evidence on his own behalf either in defense or mitigation. The investigating officer is required to make available all witnesses requested by the accused and to prepare a statement (a copy of which is to be given to the accused) of the substance of all testimony taken on both sides to accompany his recommendation as to the charges. This military procedure of requiring an investigation into the truth of the matters in the charge prior to a court-martial gives the accused greater protections and rights than a civilian receives from the grand jury procedure, where few if any protections are available against unwarranted or arbitrary action, or the federal preliminary hearings where substantial discovery rights are doubtfully available.

The fifth amendment's right against self-incrimination, made applicable to the states by the 1964 decision in Malloy v. Hogan, has been protected in the military by the Code since it was adopted in 1950. It provides in Article 31 that:

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

As may be seen by comparing this section with the requirements of Mi-
randa, the military, prior to Malloy and Miranda, afforded self-incrimination protection superior to and as effective as any such protection provided by the states. The Miranda requirement missing in Article 31 is that relating to the individual's right to consult with counsel, either retained or appointed. However, the CMA has previously held that when an accused requests counsel after having been given his Article 31 warnings, a refusal by the interrogator to afford him the opportunity to consult with counsel is reversible error. When the CMA adopted Miranda in Tempia, this statutory deficiency was corrected by judicial interpretation so that currently the military complies with at least all of the requirements of the Supreme Court as to self-incrimination.

Differences do exist between what is required in civilian courts as protection against self-incrimination and what is required in the military judiciary. Shortly after Miranda, the Supreme Court held in Schmerber v. California that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." This holding was based on facts indicating that the accused had objected to the withdrawal of the blood by a medical doctor at the direction of a police officer. Prior to Schmerber, the CMA in United States v. Musguire had held that an order to submit to a "blood alcohol test" was not a legal order because the word "statement" in Article 31 "includes both verbal utterances and actions," and consequently this order, if carried forward by action on the accused's part, would be a self-incriminating statement within the meaning of Article 31. The court further held that "Article 31 is wider in scope than the fifth amendment." The court held as inapplicable the Supreme Court's holding in Breithaupt v. Abram that the admission into evidence of a blood sample taken from an unconscious accused did not deprive him of his constitutional rights insofar as they applied to state criminal prosecutions because Musguire was not a "state" case. In United States v. Miller, the CMA held that results of a blood test taken from the unconscious accused would be admissible if there was "no 'nexus' between the doctor and enforcement agents or accused's
superiors who may be interested in those results for the purpose of possible prosecution.\footnote{32} Thus, the right against self-incrimination is violated in the military when the results of blood tests are used unless there is a showing that the tests were taken solely for medical diagnostic purposes, while in the civilian area the results of such tests are admissible.\footnote{34}

In \textit{Gilbert v. California},\footnote{34} the Supreme Court followed the \textit{Schmerber} rule and held that the admission of handwriting exemplars over the objection of the accused did not violate the self-incrimination clause because "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection . . . . No claim is made that the content of the exemplars was testimonial or communicative matter."\footnote{37} Prior to \textit{Gilbert}, the CMA in \textit{United States v. Minnifield}\footnote{77} had held, in accord with the reasoning of \textit{Musgrave}, that "an accused's handwriting exemplar is equated to a 'statement' as that term is found in Article 31. It follows, therefore, that in order to be admissible, it must be shown that the provisions of Article 31 have been fully complied with."\footnote{81} After \textit{Gilbert} an attack was made in \textit{United States v. White}\footnote{83} that \textit{Gilbert} overruled \textit{Minnifield}. The CMA, however, reaffirmed \textit{Minnifield}, pointing out the distinction of \textit{Musgrave} that Article 31 is broader than the fifth amendment and that this is a statutory right and not a constitutional right. "Consequently," the court concluded, "we adhere to \textit{Minnifield}, and reaffirm the rule that an accused must be apprised of his rights under Article 31, before he can be asked for samples of his handwriting."\footnote{88} This statutory right does not apply when evidence, later used in a court-martial, is obtained by a civilian investigator acting independently of the military authorities.\footnote{81} However, the Article 31 requirements would extend to the civilian investigator when (1) the scope and character of the cooperative efforts demonstrate that the two investigations merged into an indivisible entity, or (2) when the civilian investigator acts in furtherance of the military investigation or in any sense as an instrument of the military.\footnote{85}

The double jeopardy clause of the fifth amendment has an equivalent provision in the Code. However, Article 44 provides that "[n]o person may, without his consent, be tried a second time for the same offense."\footnote{84} In \textit{United States v. Waldron},\footnote{85} the CMA cited the fifth amendment and Article 44 as synonymously standing for a prohibition against placing the accused in double jeopardy and held that "if an accused is brought to trial before a court-martial and the proceedings are terminated after

\begin{itemize}
  \item 388 U.S. 263 (1967).
  \item \textit{Id.} at 321, 31 C.M.R. at 293.
  \item \textit{Id.} at 266.
  \item \textit{Id.} at 216, 38 C.M.R. at 14.
  \item \textit{Id.} at 321, 31 C.M.R. at 293.
  \item \textit{Id.} at 216, 38 C.M.R. at 14.
\end{itemize}
jeopardy attaches, but without legal justification, the accused is protected against another trial for the same offenses. Thus, the court adopted the constitutional protections of the fifth amendment by the statutory protections afforded under Article 44.

The interplay of the fourth and fifth amendments and their role in the military is further illustrated by United States v. Whisenbant. In that case, the CMA reversed a prior decision, relying on the Supreme Court's rejection in Warden v. Hayden of the "mere evidence rule" under the fourth amendment's search and seizure provision. The CMA further relied on the Schmerber test and said that the evidence (items of clothing) "[was] neither 'testimonial' nor 'communicative' in nature; hence their introduction did not compel the accused to become a witness against himself in violation of the fifth amendment."

Rights of the Sixth Amendment. Article 10 of the Code requires that when an accused is placed in arrest or confinement, "immediate steps" shall be taken to try him or to dismiss the charges and release him. Article 33 requires that if a person is held for trial by general court-martial, charges shall be forwarded to the officer exercising general court-martial jurisdiction within eight days after the accused is ordered into arrest or confinement. These two articles provide for the serviceman the military equivalent of a right to a speedy trial under the first clause of the sixth amendment. While the CMA has said that trials by court-martial are not governed per se by the sixth amendment, the case law that has developed in the military has been to the effect that these two articles provide at least the equivalent of the constitutional requirement, as well as the requirement of the Federal Rules of Criminal Procedure that there be no "unnecessary delay."

In United States v. Jacoby, the CMA overruled previous decisions of the court and held that the sixth amendment right of confrontation required that Article 49 of the Code be read to require "that the accused be afforded the opportunity (although he may choose knowingly to waive it thereafter) to be present with his counsel at the taking of written depo-
The reliance by the CMA on Burns v. Wilson in reaching this seems to have brought the military accused within the sixth amendment’s guarantee of the right to personally confront the witnesses against him.

Criticism of the military in the area of sixth amendment rights is aimed primarily at the “impartial jury” requirement of that amendment and specifically at Article 25 of the Code. This article provides in effect that when an enlisted man is to be tried by either a special or general court-martial and he requests in writing that enlisted members serve on the court, at least one-third of the members must be enlisted men. Two issues are critically posed: (1) why should not the enlisted man be entitled to a jury completely of his peers, i.e., all enlisted men; and (2) there is no control over the discretion of the convening authority who appoints members of the court. If an enlisted man requests the “enlisted-man court,” what is to prevent the convening authority from appointing career noncommissioned officers who will invariably vote with officers of the court, thus having the effect, in many instances, of making the court far from “impartial.” Another general point of difference between the civilian jury system and the military system is that in the military, the number of members of the court can vary from not less than three to any number not less than five, while the normal civilian criminal jury consists of twelve members. Also in the military, it takes only two-thirds of the members present to convict an accused. However, unanimity is required if the crime is capital and a three-fourths vote is required if the sentence is life imprisonment or confinement for a period in excess of ten years. The Manual further provides that “[a] finding of not guilty results as to any specification or charge if no other valid finding is reached thereon . . . . This has led many to erroneously conclude that there can be no “hung jury” in the military. The new Manual has recognized the need for a procedure to resolve the problem of a “hung jury” by providing for a reballoting procedure similar to that required by the CMA in

2. 146 U.S. 137 (1913). See notes 31-34 supra, and accompanying text.
3. The CMA also relied on two other Supreme Court cases: Motes v. United States, 178 U.S. 438 (1900) and Mattox v. United States, 156 U.S. 237 (1895). See also Donahue, Former Testimony, 31 MIL. L. REV. 1 (1966). See MCM 1969, para. 146b, for a discussion of former testimony and the right of confrontation.
5. The issue of control by the convening authority over the military judicial proceeding, the so-called “command influence,” is treated at notes 168-82 infra, and accompanying text.
11. MCM 1969, para. 74d(3).
14. MCM 1969, para. 74d(3) provides in part:

If a reballot is proposed by any member as to a finding of guilty of an offense for which the death penalty is mandatory by law, an additional ballot shall be taken immediately. Otherwise, the question shall be determined on secret written ballot, and a reballot shall be taken on an initial not guilty finding when a majority of the members vote in favor thereof or on a prior guilty finding if more than one-third of
United States v. Nash\textsuperscript{112} prior to the revision of the Manual. A final difference in the military is that unlike most civilian juries, the court itself sentences the accused upon a finding of his guilt.\textsuperscript{119}

In United States v. Jackson,\textsuperscript{114} the Supreme Court held the section of the Federal Kidnapping Act\textsuperscript{118} which provided that only in the event a defendant requested a jury trial could the death penalty be imposed to be an unconstitutional burden on the defendant's free exercise of the sixth amendment guarantee of a jury trial. Congress in the Military Justice Act of 1968 attempted to remedy a similar situation by providing in Article 18 that where the death penalty may be adjudged, the accused cannot request to be tried by a military judge sitting alone.\textsuperscript{116} This provision leaves the accused with no choice ("choice" being the constitutional objection the Supreme Court found in the Jackson case) to make; he must be tried by a military judge and a general court of not less than five members.\textsuperscript{117}

After the CMA holding in Tempia\textsuperscript{118} that prior to any interrogation, a suspect must be advised of his right to counsel,\textsuperscript{119} the issue of whether a serviceman is constitutionally entitled under the sixth amendment to the services of an attorney during his special court-martial is raised. Accordingly, as one author pointed out, "after Tempia . . . a serviceman is entitled to an appointed lawyer during interrogation but not in his special court-martial trial."\textsuperscript{120}

The issue of whether or not a serviceman has a constitutional right to the services of a qualified counsel has never been definitively answered by the Supreme Court.\textsuperscript{121} However, the issue has been considered by various lower courts, both military and federal. In United States v. Culp,\textsuperscript{122} the CMA in effect held that the failure to provide an accused legally qualified counsel at a trial by special court-martial is not incompatible with the requirements of the sixth amendment.\textsuperscript{123} In In re Stapely,\textsuperscript{124} a federal dis-
strict court held that "in proceedings before special courts-martial where substantial criminal charges are to be tried . . . the availability of counsel is a constitutional requirement."225 The holding of Culp was adopted by the Tenth Circuit when it affirmed a district court's holding226 in Kennedy v. Commandant.227 Thus, prior to the determination by the Tenth Circuit in Kennedy that the sixth amendment did not guarantee a serviceman the right to the services of a legally qualified counsel, district courts in the same circuit had differed diametrically on the issue.

Congress has taken from the Supreme Court the necessity of deciding the constitutional and practical issues raised by the use of non-lawyer counsel in the special courts-martial. One of the most important provisions of the Military Justice Act of 1968 is Article 27 which gives to the accused the right to representation by legally qualified counsel at a special court-martial228 unless such counsel "cannot be obtained on account of physical conditions or military exigencies."229 In one sense, this amendment brings the military in line with the Federal Rules of Criminal Procedure because it requires the assignment of counsel to defendants that are unable to afford one.230 However, the Act goes further in that indigency of the serviceman is not a prerequisite to the "right" to receive, free of charge, the services of a qualified attorney. This provision does not in any way limit the right of the military accused to obtain civilian counsel of his own choice, at his own expense.

The impact of the requirement of lawyers at special courts-martial will be affected by another important provision of the Military Justice Act. Prior to the new Act, if a serviceman refused Article 15 punishment231 and elected to be tried by court-martial, he could not refuse a summary court-martial. In all other instances, an accused could refuse to be tried by the one officer summary court-martial and subsequently be tried by a special

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225 246 F. Supp. at 321.
229 The bill as passed by the House of Representatives would only have required the use of legally qualified counsel in those instances where a bad-conduct discharge could be adjudged. 14 CONG. REC. H4466 (daily ed. June 3, 1968). However, as passed, this one section of the Act will have a tremendous impact on the Army alone. First, based on 1963 figures, out of 43,769 special courts-martial, 95% ended in convictions. 1968 UNITED STATES COURT OF MIL. APPEALS ANNUAL REP. 23. Presumably, if adequate counsel is provided, there will be fewer guilty pleas and possibly the conviction ratio will decrease. Secondly, since lawyers must now be furnished accused who are tried by special court-martial (unless unobtainable on account of physical conditions or military exigencies), the number of lawyers in the Army Judge Advocate General Corps will have to be substantially increased. Finally, if the constitutional rights of servicemen were jeopardized by their representation by non-legal counsel, the protection of such rights will be substantially improved by the guarantee of the right to legally qualified representation.
230 Art. 27(c)(1), UCMJ, 10 U.S.C. § 827(c)(1) (as amended 1968). (c) In the case of a special court-martial
(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) 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 counsel with such qualifications could not be obtained; . . .
231 See notes 7-8 supra, and accompanying text.
court. Article 20 of the new Act, however, omits any reference to the individual who has refused Article 15 punishment. This means that any individual can now receive a special court-martial with the attendant right to counsel. This provision is in line with congressional action to eliminate the practical usage of the summary court-martial by the convening authority, "thus assuring that no serviceman may be forced to stand trial against his will in a court where the same man is judge and jury, prosecutor, and defense counsel."  

The special court itself has been changed dramatically under the new Act to conform more closely with the federal judiciary. Article 16 now provides that a special court-martial can also consist of (1) a military judge and not less than three members, or (2) only a military judge if before the court is assembled and after the accused knows the identity of the judge and after consultation with his attorney, he requests in writing a court composed of only a military judge and the judge approves. If the latter provision is used extensively, it will not only substantially speed up the court-martial procedure, but will also free many "line" officers who would otherwise be detailed to courts-martial away from their other duties. This provision will also raise the stature of the special court-martial proceeding substantially to that of the federal bench because the military judge must be a member of the bar of a federal court or of the highest court of a state and must be certified as a military judge by the Judge Advocate General. Thus, every accused before a special court-martial will be represented by a lawyer and has the option to be tried before a trained judge.  

**Rights of the Eighth Amendment.** Two provisions of the eighth amendment bear comment as to their applicability in the military judicial system. The constitutional provision against the infliction of cruel and unusual punishments is carried forward statutorily by Article 55 of the Code. This article provides that "[p]unishment by flogging, or by branding, marking, or tattooing the body, or any other cruel or unusual punishment -
ment, may not be adjudged by a court-martial or inflicted by any person subject to this chapter."

The excessive bail prohibition has no exact counterpart in the Code. The practical problem presented by bail not being available was that prior to the 1968 amendment it would not be uncommon for a convicted serviceman to serve his entire sentence by the time his appeal was completed with no real recourse available to him if his sentence was eventually reversed. It has been stated on numerous occasions by the CMA that the constitutional guarantee of bail has not been extended to military personnel pending appeal from a court-martial conviction. In *Levy v. Resor*, the CMA held "immediate release of the person from any restraint" in paragraph 21(d) of the Manual reposed discretionary authority in the commanding officer to release a convicted prisoner on his own recognizance pending appeal, not just for release of persons acquitted.

Congress has amended the Code to provide for limited "bail" along the lines set forth in the *Levy* case. In Article 57, Congress provided that "[o]n application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority . . . may in his sole discretion defer service of the sentence . . . . The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it . . . ." If this statutory grant of discretion is exercised liberally by convening authorities, it will provide the military serviceman convicted of a crime and sentenced, a "bail" provision pending appeal without any bond or monetary equivalent present or required, a right not available in the civilian judiciary.

### III. PROCEDURAL CHANGES OF THE MILITARY JUSTICE ACT OF 1968

In keeping with its objective of "streamlining" the court-martial procedures to conform with procedures in United States District Courts, Congress elevated the position of the law officer of a court-martial to that of a military judge. Many of the military judge's new duties have analogies in the Federal Rules of Criminal Procedure and many are radical departures from past practices. Permeating all of these changes is an attempt by Congress to remove the military judiciary from under any control of the authority who is responsible for convening the court-martial.

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140 MCM 1969, para. 21(d) provides that:
Upon notification from a trial counsel of the result of a trial . . . . a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. This action, depending on the circumstances, may involve the immediate release of the person from any restraint, or the imposition of any necessary restraint pending final action on the case.
141 This provision was not included by the House in their original bill, but was added by the Senate.
142 Art. 57(d), UCMJ, 10 U.S.C. § 857(d) (as amended 1968).
143 See Fed. R. Crim. P. 46(a), (c), (d).
144 S. REP. NO. 1601, 90th Cong., 2d Sess. at 3 (1968).
The innovations of Article 26 contain some of the most radical changes in the Code. The military judge must, as in the past, be qualified and certified by the Judge Advocate General of the armed force of which he is a member. However, although the convening authority will detail the specific judge to the court-martial, that judge will be designated by, assigned by and will be directly responsible to the Judge Advocate General.

This article specifically provides that "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." By this enactment, Congress intended to "enact into law the general principles of the 'independent field judiciary' system already adopted administratively by some of the armed services, while leaving to the services a desirable degree of flexibility for implementing improvements in detail which may be indicated by additional experience."

To warrant his new stature, the military judge has been given many new duties. Primarily, by acting alone at the request of the accused, the military judge can be the general court-martial (as long as the death penalty is not to be adjudged) and the special court-martial. When the court-martial is composed of a military judge acting alone, he "shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence." When he is acting as the judge with other members of the court, he "shall rule upon all questions of law and all interlocutory questions arising during the proceedings." Other technical amendments were made enlarging the judicial power of the military judge. He will now decide whether a continuance is to be granted and will also pass upon challenges for cause.

Under Article 39, the military judge is given the power to call the court into session without the presence of the members for the purpose of disposing of interlocutory motions which raise defenses and objections, ruling upon other matters under the Code that may be legally ruled upon by the military judge, holding the arraignment and receiving the pleas of the accused if permitted by regulations, and performing other procedural functions which do not require the presence of the other members of the court. It is specifically provided that "[t]hese proceedings shall be con-

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*Art. 26(b), UCMJ, 10 U.S.C. § 826(b) (as amended 1968).
*Art. 26(a), UCMJ, 10 U.S.C. § 826(a) (as amended 1968).
*Art. 26(c), UCMJ, 10 U.S.C. § 926(c) (as amended 1968).
*Id.
*See notes 113-16 supra, and accompanying text.
*Art. 16(2)(C), UCMJ, 10 U.S.C. § 816(2)(C) (as amended 1968).
*Art. 51(d), UCMJ, 10 U.S.C. § 851(d) (as amended 1968).
*Art. 51(b), UCMJ, 10 U.S.C. § 851(b) (as amended 1968). See also United States v. Bridges, 12 U.S.C.M.A. 96, 30 C.M.R. 96 (1961). Prior to the 1968 amendments, the law officer of a general court and the president of the special court ruled on these motions.
ducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record." 157

Although the 1968 amendment to the Code conforms the military criminal procedure with Rules 12 and 17.1 of the Federal Rules of Criminal Procedure, 158 its importance goes much further. The practical effect upon the military will be great. In a typical instance, when the issue arose as to the admissibility of a confession, the members of the court had to be excluded from the court room, though they were required to stay in attendance. This meant that while sometimes lengthy arguments were taking place, officers and enlisted men that had been taken from other duties were doing nothing except waiting for a decision to be made. Under the new procedure, this issue would be resolved prior to the assembling of the court. If the objection were sustained, the issue would be resolved. If the objection were overruled and the judge decided to admit the confession, the issue of voluntariness would be litigated before the full court.

One practice authorized under the old Code 159 was that of the law officer (the former military judge) assisting the court members in closed session to put their findings into proper form. As the CMA noted in United States v. Manual, 160 "the practice is fraught with danger. Comments by the law officer may go beyond those very narrow limits of assistance with legal form to become part of the court-martial's deliberation." Congress has removed this danger by establishing more of a judge-jury relationship. Now, the military judge "may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel . . . ." 159

Another example of the new "streamlined" Code is Article 29, which now provides that if new members are added to a special or general court-martial after the trial has commenced due to the absence or excusal of a member, the trial will proceed after a reading of the recorded evidence has been made to the court in the presence of the judge, the accused and counsel for both sides. If in a special court-martial, no verbatim record has been maintained, the trial will proceed as though no evidence had been introduced. 161 If a military judge sitting alone is unable to continue, a new judge must be selected pursuant to Article 16(1)(B) or (2)(C) and the trial started anew unless a verbatim record has been kept. 162

Article 45 has been amended to provide that if the regulations so provide, an accused may plead guilty to any charge or specification other than one for which the death penalty may be imposed. Upon such plea and acceptance by the court, a finding of guilty of the charge or specifi-

157 Arts. 39 (a), UCMJ, 10 U.S.C. § 839 (a) (as amended 1968).
161 Id. at 360, 36 C.M.R. at 516.
162 Arts. 26(b), 39(b), UCMJ, 10 U.S.C. §§ 826(b), 839(b) (as amended 1968).
163 Arts. 29(b), (c), UCMJ, 10 U.S.C. §§ 829(b), (c) (as amended 1968).
164 Art. 29(d), UCMJ, 10 U.S.C. § 829(d) (as amended 1968).
cation may be entered without the formalities of a vote. This amendment will conform the military to the civilian practice and eliminate the time-consuming military procedure of requiring the court to assemble and vote on the guilty plea.

By amending Article 66 and redesignating the old boards of review as "Courts of Military Review," Congress has established a stronger intermediate, independent appellate body within each service to review its court-martial cases. Each Judge Advocate General is now authorized to establish a Court of Military Review of one or more panels to be composed of not less than three appellate military judges. A chief judge is also designated for the court. Article 66 was further amended to prohibit a member of a court of military review from in any way preparing or participating in the submission of a fitness or efficiency report of any other member.

Article 69 has been amended by adding a new provision to authorize the Judge Advocate General when reviewing the records of trials by courts-martial to either vacate or modify the findings or sentence, or both, of any courts-martial case which has been finally reviewed, but which has not been reviewed by a Court of Military Review, because of newly discovered evidence, fraud of the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.

Perhaps the most vexatious and often criticized aspect of military justice has been the real or imagined influence of the commanding officer or convening authority over the judicial process. Under the Code before it was amended, this "influence" primarily took place in the convening authority's broad discretion as to what cases he would deem worthy of convening (a criticism which can be equally aimed at district attorneys), and to "detail" members of the courts-martial, the law officer, and the trial and defense counsel. In a case involving influence over court action the commander's chief legal advisor, the staff judge advocate, had delivered lectures on the responsibilities and duties of court members to an entire command (which included five of seven members of the accused's court). The CMA held that references to inconsistent prior sentences were not prejudicial to the accused and did not deprive him of a fair trial. The dissent felt that the lectures were "intended to, and did, influence its

105 Art. 45 (b), UCMJ, 10 U.S.C. § 845(b) (as amended 1968).
106 Art. 66(a), UCMJ, 10 U.S.C. § 866(a) (as amended 1968).
107 Art. 66(g), UCMJ, 10 U.S.C. § 866(g) (as amended 1968).
113 Art. 34(a), UCMJ, 10 U.S.C. § 834(a) (1964) provides that before the convening authority can direct the trial of any charge by general court-martial, he must first refer it to his staff judge advocate for consideration and advice.
hearers to adjudge harsher sentences . . . . 172 In another instance of influence by the staff judge advocate, it was found on appeal that the staff judge advocate had rendered poor efficiency reports on defense counsel because of the zeal with which they had defended their clients. 176 To an officer who depends on good efficiency reports for promotion to higher grades, this type of influence and pressure could have a very real and detrimental effect on the rights of the accused.

The Code attempts to deal with command influence in the form of limitations on the commander's control. Article 22 (b) provides that if the commanding officer is an "accuser" 177 he will be disqualified from convening a general court-martial and it will have to be convened by a superior competent authority. 178 Articles 37 and 98 in combination make it a court-martial offense for a convening authority or commanding officer to "censure, reprimand or admonish the court or any member, law officer, or counsel thereof, with respect to the finding or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings." 177

The Military Justice Act of 1968 provides reform in this area of command influence, although it has been criticized as presenting only additional limitations on the commander's control rather than taking away some of this control. 180 First, and most important, the establishment of a military judge corps independent of direct command influence has been accomplished. As discussed previously, 81 Article 26 now provides for the Judge Advocate General to designate military judges for detail by the convening authority. In addition, with the accused being entitled in both the special and general courts-martial to elect to be tried by a single military judge, 182 the convening authorities' control over the court members will be minimized. If the military judge is removed from direct influence by the convening authority, when he has appointed members on the court with him, he will still be able to maintain an atmosphere of independence.

The impact of the amendment to Article 27 requiring qualified lawyers as counsel in special courts-martial will probably mean a decrease in attempts by convening authorities to influence court members, or else will destroy the "myth" that there is widespread command influence to be prohibited. Trained lawyers should be more able to recognize and object

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177 "[A] person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person in the prosecution of the accused." Art. 1(9), UCMJ, 10 U.S.C. § 801(9) (1964).
178 See also Arts. 23(b), 24(b), UCMJ, 10 U.S.C. §§ 823(b), 824(b) (1964) for the same provisions as to limitations on commanders' authority to convene special courts-martial and summary courts-martial respectively.
181 See notes 143-57 supra, and accompanying text.
to adverse influence as well as prepare a better record for appeal setting forth alleged objections.

The lawyers are now better protected from influence by their superiors by an extensive amendment to Article 37. Article 37(a) was amended to provide that general instructional or informational courses in military justice solely for explaining the substantive and procedural aspects of courts-martial are permissible. A new section was added to Article 37 which requires that in preparing efficiency reports, a commander or superior may not 

"(1) consider or evaluate the performance of duty of any such member as a member 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."

This gives needed protection to both non-lawyer members of the court as well as the trial lawyers.

IV. CONCLUSION

In enacting the Military Justice Act of 1968, Congress has extensively modernized a system of military justice that had not undergone substantial statutory revision for almost three decades. The revisions enacted were not easily accomplished, but were the work of various congressmen. Moreover, they are the result of compromise on the parts of the military departments and the civilian revisors. It is a realistic compromise between the civilian federal rules and a strict disciplinarian system of the pre-World War I and II days, recognizing the modern and judicially streamlined quality of the former while keeping in mind that the military exigencies of the latter often demand different rules and standards.

In addition, the quality of military justice has undergone and is undergoing revision through the decisions of the CMA. With the adoption of the requirements of Miranda by the Tempia court, the CMA brought the military up to a plane with the Supreme Court's requirements as to what is required at a minimum by the Constitution. The examination in Part II of this Comment has given a summary of the constitutional rights emanating from the Supreme Court and their analogous protection in the military. A comparison of these cases leads to a possible conclusion that the CMA will consider the Code to be controlling when it gives the accused greater protection than the constitutional guarantee, and that it will consider the Constitution as governing when the Code provides less protection.

Have the pronouncements of the CMA and the enactment of the Military Justice Act of 1968 given the serviceman the "first-class legal service" that President Johnson alluded to when he signed the Act into law? If the military commanders and convening authorities comply with the law in the spirit that it was meant to be complied with, further legislation should not be required in the immediate future. The military services should be given the opportunity to "live" with the law and try to correct

183 Art. 37(b), UCMJ, 10 U.S.C. § 837(b) (as amended 1968).
any deficiencies that arose under the old Code and that were corrected by the Military Justice Act of 1968.

Time and experience will have to be the judge as to the "first-class" quality of the military justice, but the military, through the CMA, and Congress through the Military Justice Act of 1968, have gone a long way toward guaranteeing just that.