Congressional Proposals for Reform of Military Law

Edward F. Sherman

Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Legislation Commons, and the Military, War, and Peace Commons

Recommended Citation

http://www.repository.law.indiana.edu/facpub/2267

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
The current political and constitutional controversy surrounding military justice has resulted in considerable legislative activity. In the following article, Professor Sherman compares the Bayh, Bennett, Hatfield, Price, and Whalen proposed amendments to the Uniform Code of Military Justice, and offers his assessment of the need for change.

The present American military justice system is twenty years old this year. The Uniform Code of Military Justice (U.C.M.J.) was passed by Congress in 1950 in response to complaints of ex-servicemen and their families concerning the administration of military justice during World War II. The U.C.M.J. removed the worst aspects of the old disciplinary courts martial by introducing a number of civilian court procedures and extending vast new procedural protections to servicemen, but it was a product of compromise. The military had strenuously opposed removing all the special characteristics of the traditional court-martial on the grounds that military discipline would be adversely affected, and these arguments carried the day with Congress. As a result, the U.C.M.J. merely remodeled the old court-martial structure.

The most important feature of the traditional military justice structure retained by the U.C.M.J. was “command control” of the court-martial. Command control refers to the right of an individual commander to convene a court-martial for trial of one of his men, to appoint all the personnel (including counsel and jury) from his officers, and to exert general supervisory power over the entire proceedings from pre-trial investigation to post-sentence review. The court-martial machinery thus was left in the hands of the commander, and it was expected that the court-martial would serve his disciplinary objectives. As the Supreme Court observed in a 1969 decision, “a court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.”

Reformers who had hoped to see military justice become a truly...

---


judicial system providing servicemen fair and impartial trials free from influence by the commander were from the start unhappy with the U.C.M.J. Thus, the chairman of the War Veterans Bar Association committee on military justice, Arthur E. Farmer, testified before the passage of the U.C.M.J.:

The basic reform which the court-martial system requires and without which no real reform is possible—the elimination of command control from the courts—is conspicuously lacking. Under the Uniform Code the commanding general will still appoint the members of the court, the trial counsel and the defense counsel from members of his command, and will review the findings and sentence. We will still have the same old story of a court and counsel, all of whom are dependent upon the appointing and reviewing authority for their efficiency ratings, their promotions, their duties, and their leaves.³

More widespread dissatisfaction with the U.C.M.J. was quick in developing. The first report of the committee required to make an annual assessment of the Code recommended 17 immediate changes.⁴ Remedial bills were proposed throughout the 1950's,⁵ and a sweeping reform bill⁶ was introduced in 1959 with the support of the American Legion which stated that it had become obvious that the U.C.M.J. had not removed the pall of command influence hanging over courts-martial. Reform legislation finally passed as the Military Justice Act of 1968.⁷ It made valuable changes in court-martial procedures, removing some of the most flagrant non-judicial aspects of the U.C.M.J., such as the lack of a right to a lawyer as counsel in special courts-martial and to a judge independent of the commander, but failed to make basic changes in the command structure of the court martial.

The Vietnam War has again brought to public attention the defects in the court-martial system. Under the challenge of wartime conditions—with the usual increase in A.W.O.L. and discipline offenses, as well

⁴Annual Report of the U.S. Court of Military Appeals & the Judge Advocates General of the Armed Forces & the General Counsel of the Department of Transportation Pursuant to the U.C.M.J., 3-11 (June 1, 1952-Dec. 31, 1953).
⁵See, e.g., Comm. on the U.C.M.J., Good Order and Discipline in Army (1960) (report to W. M. Brucker, Secretary of the Army); Report of the Special Committee on Military Justice of the Assoc. of the Bar of the City of New York (March 1, 1961).
CONGRESSIONAL REFORM

as problems peculiar to the Vietnam War such as political dissent, racial violence, and commission of war crimes—the defects in the U.C.M.J. have become ever more apparent. As a result, there is now an active and vocal reform movement in support of amendment of the U.C.M.J. The military, in a not uncharacteristic stance, has taken the position that military justice reform is inappropriate at this time since the changes introduced by the Military Justice Act of 1968 are still being consolidated. But reformers express concern over the continuation of injustices in military justice which cannot be eradicated, they claim, without fundamental changes in the U.C.M.J.

Five major bills for military justice reform are now pending in Congress. Senator Birch Bayh (D. Ind.), Senator Mark Hatfield (R. Ore.), and Congressman Charles Bennett (R. Fla.) have introduced sweeping bills which would make fundamental changes in the structure of the court-martial system. Congressman Charles W. Whalen, Jr. (D. Ohio) and Congressman Charles M. Price (D. Ill.) have introduced identical bills containing more limited reforms aimed only at commanders' control over court-martial appointments and machinery. Senator Sam J. Ervin, Jr. (D. N.C.) introduced a bill in 1969 to extend new protections in administrative discharge proceedings. None of these reform bills would completely alter the structure of the military justice system. Each would retain the hierarchy of courts-martial to be invoked according to the seriousness of the offense; the Bayh, Bennett, and Hatfield bills would abolish "summary courts martial" (the lowest level of court-martial, a one-officer disciplinary proceeding), but would retain

---

10 S. 4168-4178, 91st Cong., 2d Sess. (1970). Senator Hatfield's office has stated that these bills will be reintroduced in the 92d Cong., 1st Sess. with minor changes and some additions, including provisions restricting administrative discharges, permitting judges to suspend sentence, granting credit for pretrial confinement against sentence, and providing for law clerks for judges of the Court of Military Appeals and the Courts of Military Review.
11 H.R. 579, 92d Cong., 1st Sess. (1971). This bill is essentially identical to the Bayh bill which was first introduced as S. 4191, 91st Cong., 2d Sess. (1970). Although it follows the basic court-martial structural proposals made by the Bayh bill, it contains distinctively different provisions concerning court martial jurisdiction.
13 S. 1266, 91st Cong., 1st Sess. (1969). Senator Ervin's office has stated that this bill will be reintroduced in the 92d Cong., 1st Sess.
the "general courts-martial" and "special courts-martial." However, the bills would make substantial changes in the administrative structure of these courts-martial. Let us look at the major areas of controversy in the military justice system and the changes which the reform bills would make:

Crimes and Punishments. Under the original U.C.M.J., military justice was viewed as a total criminal law system with jurisdiction to try servicemen for all crimes committed at any time or place, consistent with the popular military adage that "a serviceman is on duty 24 hours a day." The U.C.M.J. also claimed court-martial jurisdiction over certain civilians, such as persons accompanying armed forces in the field during wartime or outside the United States. In 1955, however, the Supreme Court began chipping away at court martial jurisdiction over civilians, ruling that there was no jurisdiction over discharged servicemen, civilian dependents overseas in peacetime, or civilian employees of the military overseas. Then, in June, 1969, in *O'Callahan v. Parker*, the Supreme Court found that there is no court-martial jurisdiction over an attempted rape committed by a serviceman while off-post and in civilian clothes. The Court held that courts-martial lack jurisdiction over offenses committed by servicemen where these offenses are not "service-connected."

The *O'Callahan* decision has left court martial jurisdiction in an uncertain state because of the vagueness of the "service-connected" standard. The Court of Military Appeals has given the term a broad construction, holding that offenses are "service-connected" when committed on-post, and when committed off-post if they involve drugs, if they

---


are perpetrated against other servicemen,\textsuperscript{20} or if military rank was used in committing the crime.\textsuperscript{21} The Supreme Court recently upheld court-martial jurisdiction over a kidnapping and rape committed by a serviceman on-post,\textsuperscript{22} but the Court of Military Appeals' approval of court-martial jurisdiction over various off-post offenses is still in doubt and will require further litigation in the federal courts.

The reason given by the Supreme Court for taking a narrow view of court-martial jurisdiction is that a court martial does not provide many of the constitutional rights available in civilian trials, such as the rights to indictment by grand jury, to a jury of one's peers, and to a trial process free from command control. These considerations have also led to proposals that court-martial jurisdiction be limited by Congress to those cases where, for reasons of practicality and military necessity, trial in a civilian court is not possible. Thus, the 1959 American Legion bill proposed removing court-martial jurisdiction over all civilian-type crimes,\textsuperscript{23} and two of the bills now pending in Congress would limit court-martial jurisdiction much further than the post-\textit{O'Callahan} military court cases have done.

The Hatfield bill would leave court-martial jurisdiction over only 18 typically military offenses (such as A.W.O.L., missing movement, and insubordination); it would transfer to the federal courts jurisdiction over the other 37 offenses listed in the U.C.M.J., including both serious military offenses (like mutiny and aiding the enemy) and civilian-type offenses (like murder and larceny).\textsuperscript{24} The Bennett bill would limit court-martial jurisdiction of "upper courts" (similar to the present general court-martial) to ten serious military offenses (such as desertion and mutiny) and to nine other serious civilian-type crimes (like murder and rape) if committed outside the territorial limits of the United States.\textsuperscript{25} It would limit jurisdiction of "lower courts" (simi-


\textsuperscript{22}Relford v. Commandant, 397 U.S. 934 (1971).


\textsuperscript{24}S. 4178, 91st Cong., 2d Sess. § 821 ((1970).

\textsuperscript{25}H.R. 579, 92d Cong., 1st Sess. § 818 (1971).
lar to the present special court-martial) to 19 less serious military offenses (like A.W.O.L.) and 20 less serious military and civilian-type crimes (like destruction of government property and larceny) if committed outside the territorial limits of the United States.\textsuperscript{26} The Bayh bill calls for a special committee to study the desirability of transferring to the federal courts jurisdiction over certain cases involving desertion and A.W.O.L.\textsuperscript{27}

A decision as to how much to limit court-martial jurisdiction is not easily made. On the one hand, cogent arguments can be made that servicemen should not be relegated to an inferior form of criminal due process in a court-martial unless trial by a civilian court is impossible or inadequate under the circumstances. The experience of the West German Army, which has not had a court-martial system since the end of World War II, indicates that servicemen can be tried in civilian courts without affecting military efficiency.\textsuperscript{28} However, the German army is small and does not have substantial forces abroad, and special arrangements would have to be made for trial of American servicemen who commit crimes outside the United States. It can also be argued in support of a broader court-martial jurisdiction that trial of servicemen by local civilian juries can be unfair. Many of our military installations are located in small communities and trial by local juries which distrust tenant servicemen or are subject to parochial prejudices and attitudes may not be desirable for servicemen who are not in the locality by choice.

It appears that the broad scope of court-martial jurisdiction has little to do with military necessity or administrative convenience and that many offenses committed by servicemen could be tried in civilian courts with the advantageous effect of according servicemen the same due process rights which civilians enjoy. Further consideration as to what offenses should no longer remain under exclusive military court jurisdiction is a necessary step in the reform of military justice.

The U.C.M.J. contains a number of traditional military offenses which, under today's standards, are either unduly vague or constitute a direct infringement upon servicemen's free speech rights. Article 88,\textsuperscript{29}

 forbidding officers from uttering "contemptuous words against the Presi-

\textsuperscript{26} H.R. 579, 92d Cong., 1st Sess. § 819 (1971).
\textsuperscript{27} S. 1127, 92d Cong., 1st Sess. § 1259 (1971).
\textsuperscript{29} 10 U.S.C. § 888 (1964).
dent” and other named public officials, and Article 89, forbidding “disrespect” towards a superior commissioned officer, are examples of particularly authoritarian limitations which are of questionable usefulness in today’s military. Article 88 is rarely used, being invoked for the first time since 1951 in the 1965 court-martial of Lt. Henry Howe for carrying a sign critical of the President in an off-post peace rally while in civilian clothes. Article 89 is so vague in its terms that it, too, can be a source of discriminatory prosecution. Both offenses are so broad in scope, not being limited to situations involving “fighting words” or a clear and present danger of a breach of discipline, that they constitute a direct infringement upon servicemen’s free speech rights which would be unconstitutional in civilian life. Since they are subject to abuse and since there are other military offenses (such as disobedience) which provide the military with considerable legal authority to maintain order and discipline, a case can be made for abolishing these offenses. The contrary argument is that military discipline can be undercut by expressions of contemptuous words about public officials by officers and by acts of disrespect which do not amount to disobedience, and so Articles 88 and 89 are necessary tools for preserving military discipline. The Hatfield bill would abolish Articles 88 and 89, while the Bennett bill would shift jurisdiction over Article 88 to the federal courts unless committed outside the territorial limits of the United States.

Even more questionable in a modern criminal code are the “general articles” of the U.C.M.J., Article 133 which forbids “conduct unbecoming an officer and a gentleman” and Article 134 which forbids “disorders and neglects to the prejudice of good order and discipline” and “conduct of a nature to bring discredit upon the armed forces.” It would be unconstitutional to try a civilian for offenses such as these; they are so vague that it is questionable whether they provide adequate notice of what is criminal and so broad that a commander and court-

---

martial members may interpret the crime according to their own feelings. Although the Manual for Courts-Martial contains a number of precise specifications for charging a serviceman under Article 133 (from cheating on an examination to failure to pay a debt) and Article 134 (58 specifications from abusing a public animal to wrongful cohabitation), many of these specifications are themselves vague and overbroad infringements on constitutional rights (such as making "disloyal statements"); moreover, the Manual states that these are only examples of the type of acts a commander can treat as criminal under the general articles.

Few people would argue that a commander should not have the disciplinary power to enforce unwritten military standards of conduct, and it would certainly be difficult to draft criminal offenses with particularity for every type of conduct which adversely affects discipline and good order in the military. However, a court-martial under the general articles involves not merely discipline, but a criminal prosecution. It is one thing for a commander to be able to discipline his men for failure to comply with vague and unwritten standards of conduct—using such minor punishments as restriction to quarters, denial of passes and other privileges, additional duties, even demotion, forfeiture of pay, and short-term confinement. It is quite another thing to permit, as the general articles do, the trial of servicemen for violation of vague standards in a general court martial with maximum sentences of up to 20 years confinement.

General Samuel T. Ansell, the acting Judge Advocate General of the Army in World War I and an ardent advocate of military justice reform, was greatly disturbed by the vagueness and overbreadth of the general articles. He felt these articles were necessary because of the difficulty of drafting rules for every-day conduct with greater specificity, but he accepted the proposal that they carry a maximum sentence of six months. The Hatfield bill adopts that position, limiting charges under Articles 133 and 134 to Article 15 non-judicial punishment proceedings in which the maximum punishment is correctional custody.

---

40 Id. app. 6c, art 134, at A6-20-26.
42 See S. 64, 66th Cong., 1st Sess. art. 96 (1919).
for seven days (30 days if imposed by a field grade officer), plus restrictions, extra duties, partial forfeiture or detention of pay, and demotion.\textsuperscript{43} The Bennett bill would shift jurisdiction over Articles 133 and 134 to federal courts except when committed outside the territorial limits of the United States.\textsuperscript{44}

The Bayh, Bennett, and Hatfield bills also attempt to remedy an injustice whereby servicemen can be tried and punished for the same offense in both a court-martial and a state court (although not a federal court). The Bayh and Bennett\textsuperscript{45} bills forbid retrial for the same offense, and the Hatfield bill\textsuperscript{46} provides that where there is disagreement between civil and military authorities as to jurisdiction to try a serviceman, he may elect the court in which he wants to be tried.

\textit{Court-martial sentences}—Under the U.C.M.J., court-martial members not only determine guilt or innocence, but also the sentence.\textsuperscript{47} This differs from federal courts and most state courts where the judge, not the jury, sentences a convicted defendant.\textsuperscript{48} One trouble with letting the court members sentence is that they frequently do not have the experience to insure that the sentence is consistent with sentences given in other cases. Also, court members may lack the objectivity expected of a judge, giving unduly harsh sentences where a case has offended them. For example, the first three men court-martialed for participating in a brief sit-down strike at the Presidio stockade in 1968 received sentences of 14, 15, and 16 years which were later drastically reduced by the Judge Advocate General after intense public criticism.\textsuperscript{49}

The Bayh and Bennett bills would give sentencing power to military judges.\textsuperscript{50} The Hatfield bill\textsuperscript{51} would prevent suspension, as has been done in Vietnam for some offenses,\textsuperscript{52} of the Table of Maximum Punish-

\textsuperscript{43} S. 4178, 91st Cong., 2d Sess. (1970).
\textsuperscript{44} H.R. 579, 92d Cong., 1st Sess. \textsection 819 (1971).
\textsuperscript{45} S. 1127, 92d Cong., 1st Sess. \textsection 844 (1971); H.R. 579, 92d Cong., 1st Sess. \textsection 844 (1971).
\textsuperscript{46} S. 4171, 91st Cong., 2d Sess. \textsection 803 (1970).
\textsuperscript{47} 10 U.S.C. \textsection\textsection 851-852 (1964).
\textsuperscript{48} FED. R. CRIM. P. 32; See also Model Penal Code \textsection 6.
\textsuperscript{50} S. 1127, 92d Cong., 1st Sess. \textsection 826 (1971); H.R. 579, 92d Cong., 1st Sess. \textsection 826 (1971).
\textsuperscript{51} S. 4178, 91st Cong., 2d Sess. \textsection 856 (1970).
\textsuperscript{52} E.g., on December 3, 1966, the President increased the authorized maximum punishment for misbehavior of sentinels in combat zones, namely Vietnam. Exec. Order No. 11317, 3 C.F.R. 170 (1966). The table was suspended for certain offenses in the Korean War, Exec. Order No. 10247, 3 C.F.R. 754 (1953), and in World War II, MCM 1951, para. 127c, at 271 n. 1. See also Note, 82 Harv. L. Rev. 483 (1968).
ments, which is the only limitation on maximum sentences which a
general court-martial can give. The Bayh and Bennett bills also call
for a study by a special committee to identify and recommend corrective action for inequities in the maximum punishments prescribed by
the Table, to recommend sub-categories of offenses based upon differences in the degree of seriousness of the offenses, and to consider the advisability of legislation limiting the authority of the President to suspend the Table for particular offenses.53

Rights of Servicemen Incident to Search and Arrest—The U.C.M.J. extended to servicemen broad rights against self-incrimination,54 and the Court of Military Appeals has generally followed the decisions of the Warren court concerning arrest and search and seizure.55 Military court requirements for probable cause prior to the issuance of arrest and search warrants are comparable to civilian court requirements.56 However, military warrants are issued by commanders (often the same commander who has ordered or approved the arrest or search) rather than by independent magistrates as in civilian courts. A request for issuance of a warrant need not be supported by sworn affidavits as in civilian courts; thus, there is no written record for determining later the sufficiency of the showing of probable cause. The Bayh and Bennett bills take the power to issue search warrants from commanders and put it in military judges; they also provide that no search and seizure shall be ordered by a military judge "except in writing upon probable cause supported by written affidavits and particularly describing the person or place to be searched or the person or thing to be seized."57 There appears to be little to be said in favor of continuing to permit commanders who are neither lawyers nor impartial magistrates to issue search warrants. The increased work load on military judges should not be substantial and would seem to be outweighed by the added protection provided accused servicemen.

None of the bills have addressed themselves to another aspect of

military search and seizure which compares unfavorably with civilian practice—the fact that commanders have the power to conduct administrative searches (such as routine inspections and "shakedowns" which require all men to display their belongings) which are not considered searches subject to the protections of the Fourth Amendment and therefore do not require warrants or probable cause. It has been suggested that items discovered in such administrative searches be subject to confiscation or to use as the basis for disciplinary action, but not be admissible as evidence in a court martial. It has also been suggested that servicemen be permitted to have one area—such as a personal locker—which is not subject to unannounced administrative inspections unless a search warrant has been issued or the usual civilian requirements for a warrantless search are met. Such provisions would extend a modicum of privacy to the serviceman but are strenuously opposed by the military as permitting a haven for contraband and unauthorized possession of property.

Pre-Trial Investigation and Indictment—Servicemen are specifically excluded by the Fifth Amendment from the right to indictment by a Grand Jury, and there is no provision under military law for a preliminary hearing to determine probable cause for prosecution. However, Article 32 of the U.C.M.J. provides for a mandatory pre-trial investigation before charges can be referred to a general court-martial (but not a special court-martial). The accused is entitled to present evidence and cross-examine witnesses, as is permitted in civilian preliminary hearings but not in the usual Grand Jury proceeding. The commander, as convening authority, chooses one of his officers, often a non-lawyer, to serve as investigating officer. The investigating officer's findings and recommendations are not binding, however, and the commander may refer the charges to a court-martial over a contrary recommendation. This contrasts with civilian procedure under which a person cannot be tried if the magistrate at the preliminary hearing finds no probable cause or if the Grand Jury refuses to indict.

The Bayh and Bennett bills do away with the Article 32 pre-trial investigation and essentially adopt the federal pretrial procedure minus the Grand Jury. A serviceman would be entitled to an initial appear-

---

88 See Sherman, note 55 supra, at 67-68.
90 MCM 1969, para. 34, at 7-9.
ance before a military judge within 24 hours after arrest or preferral of charges. He would be informed at that time of the charges against him and of his right to a civilian lawyer of his choice or an appointed military lawyer. Within a reasonable time, the military judge would hold a preliminary hearing unless it were waived by the accused. The accused could cross-examine witnesses, discover the evidence against him, and introduce evidence in his own behalf. If the judge determined from the evidence that there was probable cause that an offense had been committed by the accused, he would forward the charges together with a summary record of the preliminary examination to the Prosecution Division of the Regional Command (to be discussed in a later section). The Prosecution Division would refer the charges to a court-martial if it determined that there were sufficient evidence to convict. Thus the commander would be removed entirely from the pre-trial hearing process, and the accused would be provided a full preliminary hearing before a judge whose determination as to probable cause could not be overruled by the commander.

In contrast, the Hatfield bill retains the Article 32 pre-trial investigation structure with some changes.62 The Judicial Circuit Officer (to be discussed in a later section) rather than the commander would appoint the investigating officer who must be from another command. If the investigating officer recommended that the charges not be referred to a court-martial, the Judicial Circuit Officer could over-rule him only by making a written report on each issue of fact and law, giving reasons for his determination that there is legally sufficient evidence to support the charges. If either the investigating officer or the Judicial Circuit Officer recommended against court-martial, the commander could appeal to the Judge Advocate General for a final determination as to whether to court-martial. Thus the commander’s desire to court-martial one of his men could not be entirely frustrated by a contrary recommendation by the investigating officer or the Judicial Circuit Officer, but the commander would have to win his case before the Judge Advocate General to overrule them. This is more of a compromise toward command control than the Bayh and Bennett bills, but it does place some restraint on the absolute authority of commanders to have someone court-martialled.

Pre-Trial Release—The constitutional right to pre-trial bail does not apply in the military. However, a serviceman is entitled to pre-trial release from confinement as provided by the Manual for Courts-Martial,

unless it is deemed necessary "to insure the presence of the accused at
the trial or because of the seriousness of the offense charged." The
military courts have interpreted this provision as giving the com-
mander broad discretion in granting pre-trial release and will over-rule
his determination not to permit release only for gross abuse of discre-
tion. As a result, servicemen are frequently incarcerated prior to trial
when charged with possession of marijuana, A.W.O.L., and political
or dissent activities. The breadth of this discretion has resulted in
charges of unfairness in the administration of pre-trial release. For ex-
ample, a private charged in a special court martial with making "disloyal
statements" filed an unsuccessful petition for release claiming discrimi-
nation because Lt. William Calley, charged with 102 murders in a
general court martial, was granted pre-trial release.

A broader right to pre-trial release, or at least a right to have some-
one other than the commander make the decision as to release, would
not seem to present a threat to military discipline. It would avoid need-
less incarceration, with its attendant aggravation of personality and
psychiatric disorders, and permit productive assignment of the accused
by the military prior to trial and greater assistance by the accused in his
own defense. The Bayh and Bennett bills would give military judges
the power to grant pre-trial release both at the time of the initial appear-
ance and after the preliminary examination; bail would be granted
in accordance with regulations prescribed by the Secretary of the armed
force. The Bayh, Bennett, and Hatfield bills limit the military judge's
discretion to deny bail to cases where confinement is necessary to
insure presence at trial. The Bayh and Bennett bills would also give
servicemen credit against their sentences for time spent in pre-trial
confinement.

63 MCM 1969, para. 19c, at 5-3.
release cases, United States v. Daniels, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970); Dale
399 (1967)
66 S. 1127, 92d Cong., 1st Sess. § 832 (1971); H.R. 579, 92d Cong., 1st Sess. § 832
(1971).
67 S. 1127, 92nd Cong., 1st Sess. § 832 (1971); H.R. 579, 92nd Cong., 1st Sess. § 832
(1971); S. 4172, 91st Cong., 2nd Sess. § 810 (1970). The Bayh and Bennett bills also
permit an appeal from a denial of bail to the Court of Military Review. H.R. 7442, 92d
Cong., 1st Sess. (1971), introduced by Cong. Teague, would amend Art. 57, U.C.M.J.,
to give servicemen benefits of the Bail Reform Act of 1966, 18 U.S.C. § 3141 et seq.
also permit pretrial confinement to be deducted from a serviceman's sentence.
Preparation for Trial—The military has liberal rules for obtaining evidence and witnesses.\(^6^9\) However, as in so many aspects of the court-martial system, the command plays a key role in the discovery process. If the defense counsel wants to obtain discovery of particular items or to subpoena certain witnesses for trial, he must go to the trial counsel (prosecutor). In the case of a witness, he must submit a written statement of expected testimony and reasons why the personal appearance of the witness is necessary, thus having to reveal his evidence and strategy in advance.\(^7^0\) If the trial counsel refuses to make the discovery or to subpoena the witness, the matter is referred to the commander convening authority for decision. This differs from civilian court procedure in which the judge rules on requests for discovery and subpoena of witnesses.\(^7^1\)

The Bayh, Bennett,\(^7^2\) and Hatfield\(^7^3\) bills provide that requests for discovery and subpoena of witnesses shall be submitted to the military judge. The Bayh and Bennett bills establish the same standards as in federal criminal courts for such determinations and provide that a refusal by a military judge is subject to interlocutory appeal to the Court of Military Review.

Commanders' Role in the Court Martial—The most significant difference between a civilian criminal trial and a court martial is that the commander convening authority carries out many functions which are exercised by independent officials in a civilian trial. In a civilian court, the district attorney decides whether to prosecute; the judge determines whether there is sufficient evidence to go to a Grand Jury; the Grand Jury decides whether to indict; the defense counsel is an independent lawyer hired by or appointed for the defendant; the jury is made up of twelve citizens chosen at random from the community; and the appeals courts are separate and independent tribunals.

In contrast, under the court-martial system, the commander who decides to court-martial one of his men plays some part in each of these functions. He decides whether to bring court martial charges; he appoints the investigating officer whose recommendation he can overrule; he can handpick the jury, prosecutor and defense counsel from his officers; and, when the trial is over, he can reverse the conviction or

\(^{69}\) See Sherman, note 55 supra, at 73-6.

\(^{70}\) MCM 1969, para. 115, at 23-1-4.

\(^{71}\) Fed. R. Crim. P. 15, 16, 17.

\(^{72}\) S. 1127, 92d Cong., 1st Sess., § 846(a) (1971); H.R. 579, 92d Cong., 1st Sess., § 846(a) (1971).

reduce the penalty. He may also carry out certain administrative functions in the court martial: plea bargaining with the accused, granting immunity to witnesses in return for testimony favorable to the prosecution, and overseeing, personally or through subordinates such as his Staff Judge Advocate, the conduct of the trial. He even has the power to order a charge reinstated where it has been dismissed by a military judge on such grounds as failure to provide a speedy trial or legal insufficiency of the charge.

"Command control" is the most criticized aspect of military justice. Charges of command influence have been raised in most of the controversial court martial cases of the last five years—the trial of Captain Levy, the filing of charges against members of the Pueblo crew, the Presidio "mutiny" cases, the "Green Beret" murder case, the court-martial of numerous anti-war dissenters, and the My Lai prosecutions. In most of these cases there was intense command interest in prosecution and considerable involvement of the command in the proceedings. Following the Presidio mutiny trials, which were referred to trial by the commanding general over the contrary recommendation of an investigating officer, one of the defense counsel, Captain Brendan V. Sullivan, observed: "I know now that you should always get a civilian lawyer. We were under such tremendous pressure not to challenge the structure of the court, not to challenge the pretrial advice, not to challenge the system."

The U.C.M.J. forbids improper command influence of a court martial. Article 37 prohibits the convening authority from censuring, rep-

---

74 Pre-trial agreements are not provided for in the U.C.M.J., but have been used since their initiation by the Acting Judge Advocate General of the Army in 1953 and have been upheld by the military courts. United States v. Villa, 19 U.S.C.M.A. 564, 42 C.M.R. 166 (1970); United States v. Callahan, 22 C.M.R. 443, 447 (A.B.R. 1956). Some limitations have been placed on their use, United States v. Veteto, 18 U.S.C.M.A. 64, 39 C.M.R. 64 (1968); United States v. Brady, 17 U.S.C.M.A. 614, 38 C.M.R. 412 (1968); United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968). There are guilty pleas in two-thirds of all Army general courts-martial and three-fourths of these are negotiated pleas. 1 The Advocate, April 1969, at 1.


76 The convening authority has general supervisory control over all the administrative aspects of the trial and personnel involved in the trial. He can excuse court members both before, and, in certain situations, after the trial has begun. United States v. Allen, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1953); United States v. Geraghty, 40 C.M.R. 499 (A.C.M.R. 1969).


78 F. Gardner, The Unlawful Concert, note 49 supra, at 143.
rimanding, or admonishing any court member, law officer, or counsel concerning the findings or sentence and from attempting to coerce or, by any unlawful means, influence the action of a court-martial or any member.\textsuperscript{79} Violation of this article is a crime, but it was obvious from the start that Article 37 was unlikely to prevent command influence. First, there is no clear line between proper and improper command influence; secondly, the commander’s power to appoint the court and supervise the court martial permits him ample opportunity to influence the outcome of trials by quite legal means. Thus, when the U.C.M.J. was introduced, Arthur Farmer testified:

The provisions of Article 37 which prohibit the censure of the court and counsel and any attempt to coerce the court’s actions, will be valueless in a situation where the commanding general desires to circumvent them. It is naive to suppose that it will be necessary for the commanding general to use such direct means of influencing the court that they could form the basis for prosecution under Article 37.\textsuperscript{80}

This prediction has proved accurate. Although, as the Court of Military Appeals has observed, “in the nature of things, command control is scarcely ever apparent on the face of the record,” \textsuperscript{81} there have been an increasing number of documented cases of improper command influence on courts-martial.\textsuperscript{82} There has never been a prosecution of a commander under Article 37 for exercising improper command in-

\textsuperscript{80} Statement of Arthur E. Farmer, note 3 supra, at 2.
fluence. One of the rare instances in which command influence has been publicized occurred at Ft. Leonard Wood, Missouri, in 1967 when ninety-three court-martial convictions were reversed by the Court of Military Appeals because of charges of improper command influence.\(^{83}\) There was evidence that the commanding general, Major General Thomas Lipscomb, had publicized his view that court-martial sentences were too lenient, had expressed his displeasure about certain verdicts and sentences to court members and counsel, and that he personally had directed certain administrative functions to insure that the verdicts would be consonant with his disciplinary policies. A military investigation found that he had acted unwisely but not illegally, and no action was taken against him.\(^{84}\)

The military contends that the number of cases of improper command influence is small, as indicated by the small number of cases in which the issue has been raised. They argue further that despite the risk of improper command influence, commanders must be left in control of court martial machinery or discipline will suffer. A commander is charged with insuring discipline and order within his unit, and he can be held personally responsible by his superiors for any shortcomings of his unit. Great importance is placed upon this personal liability of commanders in the military. The commander is given broad powers for disciplining and “shaping up” his men, and his failure to use these powers would be considered dereliction of duty. Removal of the commander’s individual control over certain phases of the court-martial is viewed as undercutting his position and lessening his ability to enforce discipline. Members of the military are used to playing different, sometimes inconsistent, roles (“wearing a number of hats,” as the military expression goes), and the military claims there is no conflict of interest where a commander controls both the enforcement of discipline (including the decision to court-martial his men) and the administration of the criminal trial.

The problem with this position is that a commander, no matter how fair and conscientious, can become personally involved in disciplinary matters, and this involvement may affect his view of how the case should be handled. A commander is in a position to exert considerable influence on the outcome of a trial by merely using his legal powers. Charged with the responsibility for maintaining good order and discipline among his troops, it may be difficult for a commander to achieve


the degree of detachment required of administrators in a civilian criminal law system.

There is also something unrealistic about the notion that a commander must possess all effective powers over the appointment and supervision of a court-martial to secure his authority over his men. Today, with instant communications and easy mobility, there is no reason to believe that a particular commander’s effectiveness would be destroyed if he relied upon other agencies or commands to perform court-martial functions. The nature of discipline has changed dramatically since World War II as technology has transformed the military into a highly trained and bureaucratic society. The traditional military view of the commander as an all powerful pater familias is something of an anachronism and, even among combat troops, the specialization of jobs has removed much of the need for absolute powers vested in individual commanders. Our civilian paramilitary, such as police and firemen, demonstrate that men can perform essential and life-endangering activities effectively within a relationship where the superior lacks absolute disciplinary powers over his subordinates. There is, of course, no way to know how millions of servicemen would react to removal of command control of courts-martial, but the steady development away from absolute power in individual commanders in recent years seems to indicate that there would be little effect upon military discipline. Individual commanders would still possess substantial disciplinary powers under their informal command prerogatives and Article 15 non-judicial punishment powers, and the morale of servicemen would probably be raised by removing the suspicion that the court-martial is simply an extension of the commander’s disciplinary powers.

The Bayh, Bennett, Hatfield, and Whalen-Price bills would each establish an independent court-martial command to exercise most of the appointive and administrative functions presently performed by the commander or his subordinates. The bills would divide the areas in which American troops are stationed into “Regional Commands” (the term used in the Bayh and Bennett bills) or “Judicial Circuits” (the term used in the Hatfield and Whalen-Price bills), each headed by a Regional Commander or Judicial Circuit Officer under the command of

---


86 S. 1127, 92d Cong., 1st Sess. § 806(a) (1971); H.R. 579, 92d Cong., 1st Sess. § 806(a) (1971).


the Judge Advocate General. All of the bills would create separate divisions within each circuit for military judges and defense counsel. In addition, the Bayh, Bennett, and Hatfield bills include a division for trial counsel (prosecutors); the Bayh, Bennett, and Whalen-Price bills have a division for administrative functions (such as court reporters); and the Hatfield bill has a division for trial review. Under this arrangement, a commander desiring to court-martial one of his men would be required to forward the charges to the Judicial Circuit Officer who would administer the selection of the court members and direct the various divisions (military judge, defense counsel, trial counsel, and administrative) to perform in the court martial. (The Whalen-Price bill would not remove the commander's power to appoint the court members in a special court-martial).

The Military Justice Act of 1968 removed military judges from the command of individual convening authorities, and the services have adapted to the circuit concept in the assignment of military judges. These bills would extend that concept to all the functions of the court martial, removing from the commander all tasks except the initiating and forwarding of charges.

The establishment of an independent chain of command for the administration of courts martial would remove the risk that a commander could influence the outcome of courts-martial through his appointive and administrative functions; but, it would not eliminate the threat of institutional influence. Although the court martial personnel (counsel, judges, and administrators) would not be subject to the command of the convening authority, they would remain vulnerable to various command pressures arising out of their own Judge Advocate General chain-of-command and out of the military itself. The new military judge system has been criticized on the grounds that some military judges, desirous of maintaining the upward thrust of their military careers or deeply imbued with the command philosophy, have been extremely sensitive to the wishes of the commanding generals at the installations where they sit.

It appears that the only way to protect completely against command or institutional influence is to abolish the court-martial system, as the West German military has done or, as Great Britain has done, civilian-
ize the military legal corps so that legal officers will no longer be subject to the pressure of promotion and career. This position has been taken by a number of contemporary critics of the military justice system. However, command and institutional influence could be lessened, even while retaining the military-dominated court-martial system. This could be accomplished by giving military judges tenure during which they could not be reassigned, by introducing civilian lawyers into military judge and counsel positions, and by encouraging an independent military legal corps through the incentives of higher pay and demilitarized rules (such as abolishing the wearing of uniforms) for military lawyers. The compromise offered in the current bills does not completely satisfy either the military or the critics of military justice, but it does attack the most serious abuses of command influence and appears to offer the most politically feasible reform for military justice in the foreseeable future.

Selection of Court Martial Members—The right to trial by a jury of peers chosen at random does not apply in courts-martial. Servicemen are tried by courts chosen by the commander-convening authority or his subordinates from among the officers in the command. An enlisted man can request that one-third of the court be enlisted men, but this right has been exercised rarely because commanders invariably appoint high-ranking noncommissioned officers who are considered more disciplinarian than officers.

The philosophy behind the civilian right to trial by a jury of peers chosen at random is that there is a better chance for a fair trial if the jury represents different classes, occupations, and perspectives within society. The all-officer jury, on the other hand, is composed of a small, select class who, by the nature of their positions, generally reflect the attitudes of the command. This is not to say that officers do not serve honestly and conscientiously on courts-martial; but it is to be expected that an all-officer jury, like a jury of bank presidents or union officers, will not reflect the wide spectrum of attitudes and biases which is basic to the American idea of trial by jury.

Court with direct review over courts-martial, and the Criminal Appeals Act 1966, c. 31 further enlarged the scope of appellate review of courts-martial.


92 See Morgan, The Background of the Uniform Code of Military Justice, 28 Mil. L. Rev. 1, 25 (1965). Enlisted personnel were requested in only 2.6% of Army courts martial in 1968 according to unpublished statistics provided by the office of the Judge Advocate General of the Army.
The all-officer court martial may have been justified in the day when military units were often isolated and, in general, only officers were educated. But today, when most enlisted men have at least a high school education and logistical contact between units is not a problem, there is little reason to limit court-martial duty to the officers in the command. The military has expressed the very real concern that enlisted men sitting on courts-martial would be motivated by class antagonisms or undue sympathy for fellow enlisted men on trial. But as enlistees become increasingly well-educated and are given greater responsibilities within an increasingly technical military, questioning their capacity to perform jury duty conscientiously seems somewhat inconsistent. It is true that enlisted men may view the proceedings from a different perspective than officers, but that, after all, is what trial by a jury of peers is intended to provide.

The criticism is often heard among enlisted men that the court martial is a "kangaroo court." This lack of confidence in the fundamental fairness of the all-officer court martial is reflected in the high percentage of servicemen who choose under the Military Justice Act of 1968 to waive their right to a jury trial in favor of trial by a military judge.\(^93\) Allowing enlistees to serve on courts-martial would go a long way toward restoring their confidence in the military justice system.

The Bayh and Bennett bills provide that the administrative division of the Regional Command will select the members of general and special courts-martial at random from a pool of all the officers and enlisted men who have served on active duty for at least one year and are permanently stationed within that Regional Command.\(^94\) The Hatfield bill provides for random selection of court-martial members by the convening authority from a master roster of officers and enlisted men at the installation; for trial of an enlisted man, one-half of the court would be officers and one-half enlisted men, none of whom could be junior in rank to the defendant.\(^95\) The Whalen-Price bill provides that the circuit judicial officer will select members of general courts-martial at random from the officers and enlisted men who are eligible and available within the circuit; however, it retains the all-officer court

\(^93\) See statistics in Douglas, The Judicialization of Military Courts, 22 Hastings L.J. 213 (1971); Trial by Judge Alone—Danger?, 3 The Advocate 61 (March 1971) (citing army statistics that in the last three months of 1970, from 95 to 100% of servicemen in special courts-martial waived their right to jury trial for trial by judge alone, as did 86 to 88% of servicemen in general courts-martial).


unless the defendant requests one-third enlisted men. The commander would continue to select as court members for special courts-martial those in his command whom he deemed best qualified.

The Bayh and Bennett bills essentially adopt the jury selection procedure used in federal courts. The Hatfield and Whalen-Price bills retain more of the traditional court-martial selection process. A series of identical bills recently introduced in the House would further expand servicemen's right to a jury trial by requiring court martial convictions to be a unanimous verdict rather than by a two-thirds vote of the members as is the present law (except for a verdict including the death sentence which must be unanimous). This would give the enlisted members on the court, for the first time, the determining votes as to conviction or not. The military has expressed concern over the administrative complexity of random selection proposals, but it appears that the procedures followed in federal courts could be transferred to the military with minor adjustments. Special provisions might be required for courts-martial in isolated military units, for example, with logistical support from other commands necessary in some situations.

Court-Martial Appeals—There are now three levels of appeal from a court-martial conviction: administrative review by the commander-convening authority and legal officers; and judicial review by the Courts of Military Review and the Court of Military Appeals. All general and special court-martial convictions are reviewed by the commander who convened the court. He has the power only to remit or reduce the sentence, but this power has tended to encourage courts to give higher sentences, leaving it to the commander to retain or reduce them consistent with his disciplinary policies.

The second level of appeal is to the Courts of Military Review, each composed of three lawyers, generally career officers, assigned to the Judge Advocate General's office. These judges have no tenure and can be reassigned at any time. Review in these courts is available only in cases involving generals and flag officers or sentences of death, dismissal, dishonorable or bad conduct discharge, or confinement of more than one year. As a result, about two-thirds of the courts-martial, primarily special courts-martial, fail to qualify for appeal to the Courts of Military Review. The final level of appeal is to the civilian Court of Military Appeals made up of three judges appointed by the President to 15 year terms. There is no right to appeal to the Court of Military


Appeals except in cases involving generals and flag officers or the death penalty, and the Court only grants review for a relatively small number of cases appealed from the Courts of Military Review.

The Hatfield bill expands servicemen’s rights to appeal court-martial convictions. It permits an appeal to the Court of Military Review where sentence exceeds four months confinement (thus extending the possibility of appeal to special court-martial cases not involving bad conduct discharges) and to the Court of Military Appeals where a sentence exceeds one year.\(^8\)

The Bayh, Bennett, and Hatfield bills also increase the opportunity for servicemen to obtain review of court-martial convictions in federal courts. The Bayh and Bennett bills for the first time permit servicemen to appeal directly to the Supreme Court from a decision of the Court of Military Appeals.\(^9\) The Hatfield bill permits servicemen to sue in federal courts where constitutional rights have been denied by court-martial or other military action or where judicial action is necessary to prevent a chilling effect upon these rights.\(^0\) All three bills permit military lawyers to bring suits for extraordinary relief in federal courts on behalf of their servicemen clients, a right they may not presently exercise.\(^1\)

The reform bills also propose changes in the structure of the military appeals courts with an eye toward greater efficiency. Under the Hatfield bill, judges of the Court of Military Review would enjoy increased security and independence. They would be appointed by the President for three-year terms and their judicial performance would not be rated by military superiors.\(^2\) The Bayh and Bennett bills would enlarge the Court of Military Appeals from three to nine judges, authorizing it to sit in three-judge panels.\(^3\)

**Administrative Discharges**—Although not part of the court-martial system, procedures for administrative discharges are closely related to military justice. They permit a serviceman to be administratively discharged with a less-than-honorable discharge which may have serious

---


\(^0\) S. 4170, 91st Cong., 2d Sess. § 867(a) (1970).


\(^3\) S. 1127, 92d Cong., 1st Sess. § 867 (1971); H.R. 579, 92d Cong., 1st Sess. § 867 (1971).
adverse consequences in his later years. A serviceman is entitled to a
hearing before a board of military officers before he can be adminis-
tratively discharged, but his rights in that hearing are more limited
than in a court-martial. He is entitled to legally trained counsel if
such counsel is reasonably available, but he is not entitled to com-
pulsory attendance of witnesses. Senator Ervin described administra-
tive discharge procedures at a Judge Advocate General's Conference on
July 16, 1969:

Imagine if you will a system of justice with the burden of proving
innocence imposed on the defendant, secret informants, no right
to trial, no right to see the evidence, no right of cross-examina-
tion, no rule against double jeopardy, no protection against punish-
ment even when found innocent, no right to legally qualified coun-
sel, no independent judge, no independent judicial review, and no
clearly defined rules of what is and is not against the law.

This, in harsh terms, and with very little exaggeration, is the sys-
tem which can brand a man as "undesirable," "unfit," or "unsuit-
able," deprive him of his serviceman's rights, his accruing pen-
sion and retirement, his employability, and his honor.

The Ervin bill and anticipated changes in the Hatfield bill would
remedy these deficiencies, extending a number of basic due process
rights to servicemen in administrative discharge proceedings. These
reforms have been pending for about ten years, and the military does
not claim to be in substantial disagreement with Senator Ervin's critical
assessment of the administrative discharge situation.

Conclusion

The observation of Professor William L. McBride in his article,
Towards a Phenomenology of International Justice, is especially re-
vealing in the context of military law. "We are at present," he writes,
"passing through a period (and this is not a uniquely American phe-
nomenon) in which practices that were once regarded as having been
ordained and confirmed by our legal systems are being severely chal-
lenged on the grounds that they do not accord with the fundamental
logic of the systems themselves." A number of military justice

106 See note 9 supra.
107 McBride, Towards a Phenomenology of International Justice, in LAW, REASON, & JUSTICE: ESSAYS IN LEGAL PHILOSOPHY (G. Hughes ed. 1969)
practices no longer accord with the fundamental logic of a military criminal law system in our democracy today. There is serious doubt whether such features of the military justice system as command control, all-officer juries, and limited appeals serve any useful disciplinary purpose in our modern military. On the contrary, there is evidence that such non-judicial practices foster arbitrariness and injustice which undermine morale and discipline.

It is not easy to fashion a military criminal law system which can operate with fairness and impartiality yet preserve traditional military discipline and obedience. The reform bills are compromises which propose a few badly needed structural alterations, but do not attempt to alter the basic military structure of the court martial itself. Nor do they address the basic defects in the traditional military approaches to servicemen's free speech rights, the methods used for training and discipline of troops, and the demands of conformity and obedience. However, these bills do offer a number of workable proposals for removing basic defects in the system. While they will undoubtedly be subjected to much more refining before military justice reform is a reality, they promise concrete steps toward improvement of military justice in the foreseeable future.