

Catholic University Law Review

Volume 1
Issue 2 January 1951

Article 6

1951

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Recommended Citation

Henry J. Cappello & Chester J. Dzialo, *Civilian Counsel Under the Uniform Code of Military Justice*, 1 Cath. U. L. Rev. 81 (1951).

Available at: <https://scholarship.law.edu/lawreview/vol1/iss2/6>

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CIVILIAN COUNSEL UNDER THE UNIFORM CODE OF MILITARY JUSTICE

On May 31, 1951, the Uniform Code of Military Justice ¹ (hereinafter referred to as the Code) will be placed in effect, superseding the Articles for the Government of the Navy ² and the Articles of War. ³ Of especial interest to members of the bar not directly associated with the armed forces will be its provisions relating to civilian counsel. With the exception of summary courts-martial, accused personnel may now avail themselves of civilian counsel at any stage of the proceedings from pre-trial investigation to appeal before the highest military tribunal. ⁴ Civilian counsel may be employed in addition to or in lieu of military defense counsel, at the option of the accused. Expense of obtaining civilian counsel will not be borne by the Government, but must be paid by the accused.

In view of the large number of reserves and draftees now in the armed forces and the prospect of continued increase in the size of the military establishment, it seems likely that there will be considerable demand for civilian counsel, particularly in appellate proceedings. Further, under that section of the Code, ⁵ providing for review of any court-martial case involving offenses committed during World War II upon application of the accused, many persons will solicit civilian counsel to process the necessary papers and otherwise advise them. This survey will attempt to indicate some of the more important problems that will be met by civilian counsel, together with suggested approaches to some of these problems.

Investigation and Trial Procedure

General rules of procedure for investigations and courts-martial are contained in the Manual for Courts-Martial of the United States, 1951. This publication is the "bible" of the services in this regard. Charges and specifications must be signed by a person who has personal knowledge of, or who has investigated the matters set forth therein. ⁶ Before a person can be tried by a general court-martial, formal investigation must be made into the charges. ⁷ Formal investigation may be conducted by either an officer-investigator ⁸ or by a court of inquiry. ⁹ The accused has a right to be represented by counsel of his own choice at either type of investigation. Proceedings before these investigatory bodies are essentially judicial in

1. 64 Stat. 108 (1950), 50 U.S.C.A. 551 (July 1950) footnoted below as U.C.M.J.

2. 34 U.S.C. 1200 (1946)

3. 10 U.S.C. 1471 (1946)

4. Art. 32b, 38b, 70d, U.C.M.J.

5. Sec. 12, U.C.M.J.

6. Art. 30a, U.C.M.J.

7. Art. 32a, U.C.M.J.

8. Art. 32b, U.C.M.J.

9. Art. 135, U.C.M.J.

form, but great freedom is allowed in introduction of evidence, examination of witnesses, and similar matters. Findings consist of the facts established by the investigation and such opinion or recommendations of the investigators as desired by the convening authority.

Three distinct types of courts-martial are established by the Code. A summary court-martial is a one man court for the trial of enlisted men for minor offenses. The court represents both the Government and the accused. No provision is made for separate military or civilian counsel.

A special court-martial is a court of any number of members not less than three, having general jurisdiction of non-capital offenses under the Code. It is empowered to inflict punishments of bad-conduct discharge, confinement up to six months, forfeiture of up to two-thirds pay per month for a period not exceeding six months, and other equivalent or less severe punishments. Both officers and enlisted men may be tried by this court. When so requested by an enlisted accused, at least one-third the membership of such court shall be enlisted men, unless the exigencies of the situation prevent such assignment.

A general court-martial is a court of any number of members not less than five and a law officer, having general jurisdiction of all offenses under the Code. It is empowered to adjudge any punishment provided by the Code, including death. This court has jurisdiction of all persons subject to trial by a military tribunal. Enlisted men may serve on this court when requested by an enlisted accused as in the case of special courts-martial.

The principal distinction in procedure between a special and a general court-martial is that in the former there is no law officer. The law officer is a qualified lawyer certified for performance of legal duties. All rulings on interlocutory questions other than challenges are made by the president of a special court-martial; such rulings are made by the law officer of a general court-martial.

In the general court-martial, the senior member presides but the law officer in essence directs the proceedings by ruling on questions of law as they arise. His function is analogous to that of a judge in a jury trial. His rulings are final except upon a motion for a finding of not guilty or on the question of the sanity of the accused. His rulings on these matters will stand unless objected to by the court, in which case the decision is made by vote of the members of the court. The court is in essence a jury deciding issues of fact and, by applying the law as given by the law officer to the facts, arriving at a finding of guilt or acquittal on each of the specifications presented for trial. Procedure of courts-martial, rules of evidence, and related matters as set forth in the Manual for Courts-Martial of the United States, 1951, conform generally to the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure except where these rules are inconsistent with the Code. ¹⁰ Special and general courts-martial are empowered to enforce contempt proceedings against counsel, civilian or military, and the respective Departments through their Judge Advocates General may disqualify or suspend any counsel from practice before courts-martial. ¹¹

The Code gives to military tribunals general power to subpoena witnesses ¹² which process is described in detail in the Manual for Courts-Martial of

10. Art. 36, U.C.M.J.

11. Art. 48, U.C.M.J.

12. Art. 47, U.C.M.J.

the United States, 1951. Witness fees are paid by the Government, including those of expert witnesses when authorized by the convening authority.

Use of depositions is freely allowed by the Code, ¹³ except in capital cases. Counsel should familiarize themselves with the pertinent rules for taking depositions well in advance of trial, since this may be the only practical way to obtain much important evidence. Depositions are particularly valuable in the case of transferred military personnel, whose presence is impossible or impractical at the trial.

Counsel will undoubtedly experience difficulty in the early cases tried under the Code, in obtaining applicable military precedents and court-martial decisions. Using Appendix A as a guide, the local military legal office should be contacted and the assistance of a military defense counsel employed to assist in the use of the local library.

Courts-martial need not volunteer advice to an accused during a trial if he is adequately represented by counsel - especially where he has provided his own counsel. It will be assumed by the court that counsel will perform his duties properly and advise the accused of his rights regarding such matters as self-incrimination, statute of limitations, and former jeopardy.

Counsel is to be advised against the stratagem of "leading the court into error;" this will probably only serve to annoy the court without producing grounds for reversal on appeal. Most appeals will fail if based merely on technical error of law; a conviction will be reversed only if the error prejudices the substantial rights of the accused. ¹⁴ Under previous administrative review of courts-martial the test seems to have been whether or not the trial accorded substantial justice to the accused, without paying much regard to mere technical error. It seems probable that this view will influence decisions under the Code, particularly in initial review.

After a finding of guilty and before sentence is announced, the defense may introduce matter in extenuation or mitigation. Where the introduction of such matter is indicated, counsel for the accused should assemble the necessary witnesses, records, affidavits, and certificates well in advance, so that they will be available for presentation to the court should the accused be found guilty. In addition, the accused may make an unsworn statement to the court in extenuation of his offense or presenting a plea for mitigation.

An important function of defense counsel is to advise the accused of his appellate rights in case of conviction. These rights include the right to be represented by counsel before a board of review and the Court of Military Appeals, the right to communicate directly with military appellate defense counsel in the Judge Advocate General's office and the right to petition for review to the Court of Military Appeals. Where appropriate, counsel should prepare a letter for the signature of the defendant, addressed to appellate defense counsel, to be appended to the record of trial.

Appellate Review

After the convening authority has approved the findings and sentence of a court-martial, it is forwarded directly, or through prescribed reviewing authority, to the appropriate Judge Advocate General. All general courts-martial in which the sentence affects a general or flag officer or extends to death, dismissal of an officer, cadet or midshipman, dishonorable or bad-

13. Art. 49, U.C.M.J.

14. Art. 59a, U.C.M.J.

conduct discharge or confinement for one year or more and special courts-martial involving a bad-conduct discharge are required to be automatically reviewed by a board of review. 15 Other courts-martial are only required to be reviewed by a lawyer designated by the appropriate Judge Advocate General. Although the Code does not set forth any procedure for appeal of court-martial cases not automatically reviewed, it appears to be within the discretion of the Judge Advocates General to forward any case to a board of review. A request for such review by the accused appearing in the court martial record or separately transmitted to the Judge Advocate General or to military appellate defense counsel, would appear to be the most effective method of obtaining such a review.

Cases affirmed by a board of review affecting a general or flag officer or extending to death must automatically be reviewed by the Court of Military Appeals. The Judge Advocates General may in their discretion forward other cases affirmed by a board of review. The accused may petition for review of his case by the Court of Military Appeals within 30 days after his case has been affirmed by a board of review. It is to be noted that there is no authorization for the Court of Military Appeals to grant a review by petition of the accused, or otherwise, unless the conviction has been affirmed by a board of review. Therefore, in cases where automatic review by a board of review is not provided, it will be one of the most crucial functions of counsel to lay the groundwork for obtaining such review.

Boards of Review are appointed by each Judge Advocate General and are composed of not less than three officers or civilians, who must be members of a bar. It is to be emphasized that, in contrast to most State and Federal appellate courts, they have power to review findings of fact by weighing all available evidence, and to mitigate sentences on the basis of pleas for clemency, as well as to review the issues of law. 16 These additional functions should be borne in mind by the appellate defense counsel in the preparation of his brief and the presentation of his oral argument. Uniform procedure for all boards of review will be prescribed by the Judge Advocates General 17 and is expected to conform quite closely to Federal appellate procedure.

Briefs of the arguments of appellate defense counsel and prosecutor will be required in the form usually prescribed for Federal appellate courts, except that printing will not be utilized. However, in addition to a comprehensive exposition of the legal principles on which the appeal is based (citing applicable precedents), any contested factual findings must be set forth and argued, and data supporting any plea for clemency must be presented in the brief. Counsel should avoid the inherent dangers present in pleading for clemency. These pleas should not form the theme of the brief and should avoid language reminiscent of a "letter to a congressman." They are properly limited to statements reflecting on the good character of the accused and his previous good record. Copies of the record of trial will be supplied to the accused and the Judge Advocate General (board of review) by the court-martial convening authority.

Military appellate defense counsel will be made available to the accused by the Judge Advocate General 18 even if he has employed civilian counsel. This right may be waived, but should the defendant desire the aid of military counsel to assist his civilian counsel in preparing the appeal, such aid will

15. Art. 65, U.C.M.J.

16. Art. 66c, U.C.M.J.

17. Art. 66f, U.C.M.J.

18. Art. 38b, U.C.M.J.

be granted. Undoubtedly, most civilian counsel will find it expedient to obtain assistance of military counsel to assist in locating regulations and decisions pertaining to the case.

The Court of Military Appeals is the highest court of general jurisdiction for military offenses. The Supreme Court of the United States and other Federal courts may interfere in court martial proceedings only through habeas corpus proceedings on questions of jurisdiction or legality of sentence of a military court. ¹⁹ The decisions of the Court of Military Appeals, for all practical purposes, will be final and not subject to review by the Federal Courts.

The Court of Military Appeals is to be composed of three civilians appointed by the President, by and with consent of the Senate, to serve for fifteen years. No members have as yet been appointed but it is expected that the Court will be constituted and will commence its organization early in 1951. This court is authorized to adopt its own rules of procedure. However, in view of the provision that a judge of the United States Court of Appeals may sit on this court, if any member is temporarily unable to perform his duties, ²⁰ it appears that the two courts will be similar in stature, and their procedures substantially the same.

The review of a case by the Court of Military Appeals, in contrast to that of a board of review, will be limited to questions of law. Military defense counsel must be provided by the Judge Advocates General, as for boards of review, and civilian counsel may utilize their services in similar fashion. Since briefs and arguments before this court will be restricted to questions of law, they should conform to the practice of Federal appellate courts, and such rules as may later be prescribed by the Court of Military Appeals.

Probably the greatest problem that will confront civilian counsel in court-martial and appellate proceedings under the Code will be the location of applicable regulations and decisions. This material is not generally available in an ordinary law library, and can usually be obtained only in local libraries of military law offices, or in rare cases only in the libraries of the Judge Advocate General in Washington, D. C. Appendix A has been compiled as an aid in locating and using this material.

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APPENDIX: SOURCES OF MILITARY LAW

1. PROCEDURE

- A. Manual for Courts Martial of the United States, 1951 - the standard publication for the Defense Department setting forth uniform procedure (supercedes Naval Courts and Boards, 1937, Manual for Courts Martial, U. S. Army, 1949 and Manual for Courts Martial, U. S. Air Force, 1949).
- B. Board of Review procedure publications - to be compiled (1951).
- C. Court of Military Appeals procedure publications - to be compiled (1951).
- D. Federal Rules of Criminal Procedure and Federal Rules of Civil Procedure - Court martial and appellate procedure expected to conform as closely as practicable.

19. See *Grafton v. United States*, 206 U.S. 333 (1907); cf. *Hiatt v. Brown*, 399 U.S. 103 (1950).

20. Art. 67a (4), U.C.M.J.

II. WRITTEN LAW

A. United States Constitution, Article I, sec. 8, Cl 14 - the basic grant of power to the Federal Government to regulate military personnel; supplemented by other ancillary provisions of the Constitution.

B. International Law and Treaties - the oftentimes nebulous "Rules of War", embodied in such treaties as the Geneva Convention, 32 Stat. 1779 (1900) have the force of law and are binding on military personnel. Courts-martial may punish offenders for their violation.

C. Uniform Code of Military Justice, 64 Stat. 108 (1950), 50 USCA 551 (July 1950); the basic statutory enactment setting forth the law applicable to military legal processes. (Supersedes Articles for the Government of the Navy, 34 USC 1200 (1946) and Articles of War, 10 USC 1471 (1946)).

D. Laws Relating to the Navy, Annotated (1948) (LRNA) and Military Laws of the United States, Annotated (1939), 8th Ed. with supplements to 1944; compilations of Federal statutory enactments particularly applicable to the respective services. Although all the statutory enactments of Congress are "law" for the purposes of the administration of military justice, those particularly applicable to the military have been collected and annotated in these publications. Titles 10, 34 and 50 of U.S. Code Annotated are also valuable.

E. Regulations - The President as Commander-in-Chief of the Armed Forces has delegated to his military subordinates the responsibility of issuing such orders and directives as are necessary and proper for order and discipline. Such regulations are inferior to statutory enactments, which will prevail in case of conflict. It would be impossible to indicate accurately or completely all activities that issue regulations having the force of law. Probably every independent command issues "Regulations" in one form or another, which are binding as law on personnel under the command jurisdiction, provided they have been duly promulgated and do not conflict with higher authority. Lawyers practicing before military courts should be familiar with the following important regulations.

1. U. S. Navy

- a. Navy Regulations, 1948.
- b. General Orders.
- c. Uniform Regulations.
- d. Manuals of Bureaus and Offices.
- e. Navy Department Semi-Monthly Bulletins - compilation of letter directives of Navy Department Bureaus and Offices.

2. U.S. Army - direction to the below listed "Regulations" is had through the "Index of Administrative Publications" SR 310-20-5.

1. Army Regulations.
2. Special Regulations.
3. Readjustment Regulations.
4. Joint Army-Air Force Adjustment Regulations.
5. General Orders.
6. Bulletins.
7. Circulars.
8. Commercial Traffic Bulletins.
9. Joint Procurement Circulars.
10. Department of the Army Pamphlets.
11. Army Service Force Manuals.

3. U.S. Air Force

- a. Index to Army Administrative Publications Applicable to the Air Force.
- b. Index to Air Force Standard Publications.
 1. Air Force Regulations.
 2. Air Force Letters.
 3. Air Force Manuals.
 4. Air Force Bulletins.

III. UNWRITTEN LAW

A. Decisions of Federal Courts. -- Under Art. 134, UCMJ, Crimes against Federal criminal statutes may be punished by courts martial where such an offense is not separately set out in the Code. The decisions of Federal courts are binding on courts martial in regard to these offenses.

B. Decisions of State Courts. -- Under Art. 134, UCMJ, violation of a State criminal statute may be tried under the specification "conduct to the prejudice of good order and discipline". Decisions of State courts may be cited for the guidance of a court martial but are not binding in the determination of what constitutes such conduct.

C. Opinions and decisions of the Heads of Executive Departments of the Government. The opinions and decisions published by the Attorney-General, and Comptroller General are binding on courts-martial.

D. Court Martial Reports

1. Navy

- a. Court Martial Orders, 1938-19--, the current series of reports, published monthly, containing opinions and decisions of the Judge Advocate General and Secretary of the Navy and reports of selected court martial cases reviewed.
- b. Compilation of Court Martial Orders 1916-1937 with Index. A three volume compilation of Court Martial Orders for this period.
- c. Naval Digest 1916 and 1921. An alphabetical digest of opinions and decisions, superseding previous Court Martial Orders.
- d. Unpublished opinions of the Judge Advocate General. Long form opinions of all cases reviewed by the Judge Advocate General - available only in Navy JAG Library, Washington, D. C.

2. Army

- a. Bulletin of the Judge Advocate General of the Army 1942-19--. Current series of reports, published monthly, similar to Navy Court Martial Orders.
- b. Digest of Opinions of the Judge Advocate General of the Army 1865-1940 (1941 supplement). Series of reports superseded by the "Bulletin" (*supra*).
- c. Board of Review Opinions 1929-19--. Bound opinions of Army Boards of Review. There are several series of opinions, one for each Area Board of Review created in World War II.
- d. Unpublished opinions of the Judge Advocate General - available in Army JAG Library.

3. Air Force

- a. Court Martial Reports (1948-). A Yearly compilation of long form holdings and opinions of Air Force legal bodies. Printed and headnoted in accordance with "Am. Juris." practice.
- b. Digest of the Judge Advocate General of the Air Force, 1948-19--. A quarterly digest of selected opinions and other matter of interest to the Air Force.

IV. PERIODICALS

A. JAG JOURNAL. -- Published monthly by the Navy Judge Advocate General containing informal articles of current legal interest written by officer and civilian attorneys. Similar in scope to university and bar association law journals. May be cited in Navy judicial proceedings.