The Military Trial Judge

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United States Air Force

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Special Comment

BY CAPTAIN GEORGE D. SCHRADE*

THE MILITARY TRIAL JUDGE

Since the adoption of the Uniform Code of Military Justice¹ there have been revisions and changes made by Congress and the Court of Military Appeals. Yet it is doubtful if the proper level of maturity has been achieved. In this regard it appears that there has been a tendency during the past several years to afford greater protection for the rights of the individual.² However, this has caused an increasing administrative burden in pretrial, trial, and post trial proceedings. The additional paperwork problem has generated the fear of a complete or partial malfunction of the system in case of a large mobilization or actual war.³ Therefore after over twelve years of operation perhaps it is time to re-evaluate the Code and its procedural aspects to see if there is some area where the administrative burden can be reduced without jeopardizing the rights of the individuals who come before military tribunals seeking justice. Certainly, if the Military Justice procedure can be streamlined with a view to functioning under more adverse conditions then it may strengthen the entire system and afford even more of a guarantee or protection for the rights of the accused.

Under our present system with the new non-judicial punishment amendments, utilization of the summary court-martial has been reduced.⁴ In addition the special court-martial has never

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been an adequate judicial tribunal. For example, the United States Army does not authorize the use of court reporters in a special court-martial, thus a punitive discharge cannot be adjudged because there is no verbatim record, as required by Article 19 of the Code. The Air Force makes court reporters available for special courts-martial and a verbatim record can be obtained. Hence the court may adjudge a punitive discharge if it is authorized by the table of maximum punishment. It is also Air Force policy that, if available, certified judge advocates are assigned as trial and defense counsel in special courts-martial. However, the president of the court, who is a layman, rules on matters of evidence and on motions subject to the objection of members of the court. From the standpoint of the accused and his attorney this is not a favorable situation.

The United States Army has added a unique aspect to their general courts-martial by providing law officers (trial judges) assigned from judicial areas or circuits and these officers serve in this capacity as a primary duty. They are comparable to circuit judges and travel throughout their assigned area presiding at general courts-martial to the exclusion of all other judge advocates. The Air Force does not follow this system of specialization but allows the general court-martial convening authority the discretion of appointing any judge advocate from his or any other command as a law officer provided there is not a conflict of interest or other factor affecting his eligibility and he is certified for such duty by The Judge Advocate General. By using this system, the Air Force maintains a large number of judge advocates reasonably well versed in the duties and responsibilities of this position as well as the latest developments in military law while the Army relies on the selective few chosen to perform this duty exclusively.

It is not the purpose of this paper to debate the policy of either service but rather to set forth a proposal for more beneficial utilization of the law officer in a revised court-martial system. As stated before, the summary court-martial is becoming passé and the special court-martial has its obvious faults; therefore, let us consider a combination of the two courts. In this regard, it is

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suggested that the term special court be retained while the present term summary court be deleted from the system, and that court be abolished. The special court-martial under this proposal retains the powers now ascribed to it under UCMJ except for the changes herein noted. Further, the rights of each accused with regard to appointed counsel, additional counsel, delays, verbatim records, automatic appeal, and enlisted personnel on the court, are unchanged. The officers of the court consist of a properly certified judge advocate as the presiding law officer (trial judge), similar to his civilian counterpart in a court of original jurisdiction; a trial counsel (prosecutor), defense counsel assigned to represent the accused, and court reporter. Both counsel to be certified in accordance with Article 27b of the Uniform Code of Military Justice. The law officer would have authority to conduct pretrial hearings so that preliminary matters could be disposed of and the issues to be presented at trial outlined. Such a hearing should be held only with the consent of the accused and his counsel and not with a view to restricting any defense trial tactics. During the actual trial the law officer rules on all matters of evidence and is the trier of fact unless the accused requested a jury, in which case a court of officers and enlisted men, if requested by the accused, would be impaneled to hear his case. Under this proposal the court or jury hears the case and after proper instruction on the law by the law officer, render a finding of guilty or not guilty. If a finding of guilty is entered, then the jury is excused. After an opportunity to submit matters in mitigation and extenuation has been afforded to the accused the law officer adjudges sentence. This sentence is to be within the limits which are now prescribed for a special court-martial, except that a punitive discharge is not authorized.

Hence, the accused could have trial by either law officer or jury, with the former having complete power to adjudge the sentence as is common in the Federal Criminal Court.6 Further the law officer should have the independent authority to suspend all or any portion of the sentence he adjudges. By this method a certain degree of uniformity within the same jurisdiction may be obtained. In addition, it would interject the thinking of an

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independent third party concerning matters pertaining to sentencing. The convening authority retains the discretionary authority he now has both with regard to findings and sentence.

Thus the special court-martial could become a tribunal similar to civilian criminal courts of limited jurisdiction and provide the features of certified counsel for both the government and the accused, an actual jury and a judge empowered much like his civilian counterparts. Further, eliminating the authority of the special court-martial to adjudge a punitive discharge would increase its effectiveness as the proper tribunal for all minor offenses.

It is also submitted that while command influence is sometimes considered a challenge to the fairness of any military judicial proceeding, such challenge could be eliminated by placing the law officer outside the command of the convening authority. This requirement might cause a personnel problem in certain remote areas but the term "circuit rider" is not unfamiliar to the judiciary and certainly could be utilized in the military. Further, certified law officers from the other Armed Forces might be utilized with proper coordination. Surely, we cannot fail to recognize that a shortage of lawyers in the military service may be a problem concerning this entire suggestion—but not an insurmountable problem.

The problem of records of trial may be partially solved by requiring a verbatim record only in contested special court-martial cases and all general court-martial cases. In addition, an automatic review of such cases by the Board of Review should be a requirement. Under this proposal the accused would be benefited by having his case recorded and reviewed regardless of the discharge factor. The present verbatim record requirement exists only for general courts-martial and all special courts-martial adjudging a punitive discharge. This includes uncontested cases where there are certainly not many errors committed. However, contested cases where issues are raised and litigated are the ones deserving of the verbatim requirement regardless of the sentence adjudged.

Concerning a general court-martial only a slight change is proposed. If the convening authority desired that the case be heard before a court with power to adjudge a punitive discharge, referral of the case to a general court-martial would be necessary. The only difference in this proposal and the present system other
than the aforementioned pretrial conference would be to empower the law officer of the general court-martial with the authority to sentence based on the recommendation of the court. After the mitigation portion of the trial, the court itself announces a recommended sentence, which by necessity would be within the limits prescribed by the table of maximum punishments. The law officer could reduce but not increase the recommended sentence. This, of course, only after the court had made a finding of guilty based on proper instructions by the law officer. Unlike the special court-martial, there is no provision for the waiving of a jury trial. Thus, before a punitive discharge could be adjudged a court would have to make such a recommendation.

If the accused entered a plea of guilty after being advised of his right to plead not guilty then the law officer would have the authority to render a directed verdict and enter into the mitigating portion of the trial without undue procedural requirements. In addition, the law officer has authority to suspend any sentence he might adjudge; the convening authority retaining his present discretionary authority with regards to finding and sentence.

This proposal with regard to both the special and general court-martial has as its aim protecting the rights of the individual while eliminating certain present administrative burdens through a streamlined system complimenting its civilian counterpart. The utilization of certified law officers as the sole judges concerning matters of evidence should generally benefit the accused, as it places into the hands of a lawyer questions of law for his decision rather than a layman which is the case in the present special court-martial. This proposal also interjects an additional person of independent authority into the sentencing procedure with the power to suspend the sentence he adjudges. This would make for more uniformity in sentencing and provide an additional opportunity for leniency on behalf of the accused.

The requirement of a verbatim record in every contested case benefits the accused while the directed verdict cases in general courts-martial and the non-verbatim uncontested special courts-martial cases eliminates a vast amount of paper-work. Also the utilization of the one man judge and jury type of special court-

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martial could very easily contribute to the solution of the problems presented by a general mobilization. Here we would have a flexible system where one lawyer could be utilized to try several cases in the time required under our present system to try one case, without the administrative problem generated by a special court-martial.

In conclusion, it is submitted that basically we have a good system of justice in the Armed Forces, but it can be improved. In viewing the entire scope of our present system one of the greatest hardships is caused by the administrative burdens which have been created. If these can to some extent be eliminated without jeopardizing the rights of any person seeking justice, without compromising the very rights for which our form of government stands, one of which is equal justice for all under the law, then a service is done for all those who are subject to the UCMJ. To this end, we should strive, lawyer and layman alike, to make our system of military justice the finest in the world guaranteeing to all concerned the same rights and privileges that are afforded his civilian neighbors.