

1 SB204
2 182460-1
3 By Senator Holtzclaw
4 RFD: Veterans and Military Affairs
5 First Read: 16-FEB-17

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8 SYNOPSIS: This bill would conform the Alabama Code of
9 Military Justice to recent amendments to the
10 federal Uniform Code of Military Justice regarding
11 preliminary hearings and victims' rights, clarify
12 jurisdiction and venue of state courts-martial,
13 clarify the procedures for compelling the
14 appearance of witnesses and the production of
15 evidence, and provide further for the
16 administration and prosecution of courts-martial
17 under the Alabama Code of Military Justice.

18
19 A BILL
20 TO BE ENTITLED
21 AN ACT

22
23 To amend Sections 31-2A-2, 31-2A-5, 31-2A-17,
24 31-2A-26, 31-2A-32, 31-2A-46, 31-2A-47, and 31-2A-52, Code of
25 Alabama 1975, relating to the Alabama Code of Military
26 Justice; to conform the Alabama Code of Military Justice to
27 recent amendments to the federal Uniform Code of Military

1 Justice regarding preliminary hearings and victims' rights; to
2 clarify jurisdiction and venue of state courts-martial; to
3 clarify the procedures for compelling the appearance of
4 witnesses and the production of evidence; and to provide
5 further for the administration and prosecution of
6 courts-martial under the Alabama Code of Military Justice.

7 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

8 Section 1. Sections 31-2A-2, 31-2A-5, 31-2A-17,
9 31-2A-26, 31-2A-32, 31-2A-46, 31-2A-47, and 31-2A-52, Code of
10 Alabama 1975, are amended to read as follows:

11 "§31-2A-2.

12 "(a) This code applies to all members of the state
13 military forces at all times and in all places, except it does
14 not apply to a member for any offenses committed while in a
15 duty status under Title 10 U.S.C.

16 "(b) Subject matter jurisdiction is established if a
17 clear and convincing nexus exists between an offense, either
18 military or non-military, and the state military force. When a
19 member is in a duty status under either Title 32 U.S.C. or
20 State Active Duty then a rebuttable presumption exists that
21 the nexus is established. A proper civilian court has primary
22 jurisdiction of an offense when an act or omission violates
23 both this code and civilian criminal law, foreign or domestic.
24 In such a case, a court-martial may be initiated only after
25 the civilian prosecutorial authority has declined to prosecute
26 or dismissed the charge, provided jeopardy has not attached.
27 Courts-martial shall have primary jurisdiction over all ~~other~~

1 military offenses defined in this code. Jurisdiction over
2 attempted crimes, conspiracy crimes, solicitation, and
3 accessory crimes must be determined by the underlying offense.

4 "§31-2A-5.

5 "(a) This code has applicability at all times and in
6 all places, provided that either the person subject to the
7 code is in a duty status or, if not in a duty status, that
8 there is a nexus between the act or omission constituting the
9 offense and the efficient functioning of the state military
10 forces; however, this grant of military jurisdiction shall
11 neither preclude nor limit civilian jurisdiction over an
12 offense, which is limited only by the prohibition of double
13 jeopardy.

14 "(b) Courts-martial and courts of inquiry may be
15 convened and held in units of the state military forces while
16 those units are serving outside the state with the same
17 jurisdiction and powers as to persons subject to this code as
18 if the proceedings were held inside the state, and offenses
19 committed outside the state may be tried and punished either
20 inside or outside the state.

21 "(c) A trial of any offense subject to prosecution
22 under this section may be convened in any county in the state.

23 "§31-2A-17.

24 "Each component of the Alabama National Guard has
25 court-martial jurisdiction over all members of the particular
26 component who are subject to this code. The Adjutant General

1 maintains court-martial convening authority over members of
2 either component subject to this code.

3 "§31-2A-26.

4 "(a) A military judge shall be detailed to each
5 general and special court-martial. The military judge shall
6 preside over each open session of the court-martial to which
7 the military judge has been detailed.

8 "(b) A military judge shall be all of the following:

9 "(1) An active or retired commissioned officer.

10 "(2) A member in good standing of the bar of the
11 highest court of a state or a member of the bar of a federal
12 court for at least five years.

13 "(3) Either a certified military judge or a judge of
14 a court of competent jurisdiction who is approved by the
15 Adjutant General.

16 "(c) In the instance when a military judge is not a
17 member of the bar of the highest court of the state, the
18 military judge shall be deemed admitted pro hac vice, subject
19 to filing a certificate with the ~~senior~~ state judge advocate
20 ~~which is the same force as the accused~~ setting forth such
21 qualifications provided in subsection (b) and with notice and
22 approval of the State Bar and Chief Justice of the Alabama
23 Supreme Court.

24 "(d) The military judge of a general or special
25 court-martial shall be designated by the ~~senior force~~ state
26 judge advocate ~~which is the same force as the accused~~, or a
27 designee, for detail by the convening authority. Neither the

1 convening authority nor any staff member of the convening
2 authority shall prepare or review any report concerning the
3 effectiveness, fitness, or efficiency of the military judge so
4 detailed, which relates to performance of duty as a military
5 judge.

6 "(e) No person is eligible to act as military judge
7 in a case if that person is the accuser or a witness, or has
8 acted as investigating officer or a counsel in the same case.

9 "(f) The military judge of a court-martial may not
10 consult with the members of the court except in the presence
11 of the accused, trial counsel, and defense counsel nor vote
12 with the members of the court.

13 "§31-2A-32.

14 ~~"(a) No charge or specification may be referred to a
15 general court-martial for trial until a thorough and impartial
16 investigation of all the matters set forth therein has been
17 made. This investigation shall include inquiry as to the truth
18 of the matter set forth in the charges, consideration of the
19 form of charges, and a recommendation as to the disposition
20 which should be made of the case in the interest of justice
21 and discipline.~~

22 ~~"(b) The accused shall be advised of the charges
23 against the accused and of the right to be represented at that
24 investigation by counsel. The accused has the right to be
25 represented at that investigation as provided in Section
26 31-2A-38 (Article 38) and in regulations prescribed under that
27 article. At that investigation, full opportunity shall be~~

1 given to the accused to cross-examine witnesses, if they are
2 available, and to present anything the accused may desire in
3 the accused's own behalf, either in defense or mitigation. The
4 investigating officer shall examine available witnesses
5 requested by the accused. If the charges are forwarded after
6 the investigation, they shall be accompanied by a statement of
7 the substance of the testimony taken on both sides and a copy
8 of the statement shall be given to the accused.

9 "~~(c) If an investigation of the subject matter of an
10 offense has been conducted before the accused is charged with
11 the offense, and if the accused was present at the
12 investigation and afforded the opportunities for
13 representation, cross-examination, and presentation prescribed
14 in subsection (b), no further investigation of that charge is
15 necessary under this article unless it is demanded by the
16 accused after the accused is informed of the charge. A demand
17 for further investigation entitles the accused to recall
18 witnesses for further cross-examination and to offer any new
19 evidence in the accused's own behalf.~~

20 "~~(d) If evidence adduced in an investigation under
21 this article indicates that the accused committed an uncharged
22 offense, the investigating officer may investigate the subject
23 matter of that offense without the accused having first been
24 charged with the offense if the accused:~~

25 "~~(1) Is present at the investigation.~~

26 "~~(2) Is informed of the nature of each uncharged
27 offense investigated.~~

1 ~~"(3) Is afforded the opportunities for~~
2 ~~representation, cross-examination, and presentation prescribed~~
3 ~~in subsection (b).~~

4 ~~"(e) The requirements of this article are binding on~~
5 ~~all persons administering this code but failure to follow them~~
6 ~~does not constitute jurisdictional error.~~

7 "(a) No charge or specification may be referred to a
8 general court-martial for trial until the completion of a
9 preliminary hearing, unless the preliminary hearing is waived
10 by the accused. The purpose of the preliminary hearing shall
11 be limited to the following:

12 "(1) Determining whether there is probable cause to
13 believe an offense has been committed and the accused
14 committed the offense.

15 "(2) Determining whether the convening authority has
16 court-martial jurisdiction over the offense and the accused.

17 "(3) Considering the form of charges.

18 "(4) Recommending the disposition that should be
19 made of the case.

20 "(b) A preliminary hearing under subsection (a)
21 shall be conducted by a hearing officer who satisfies all of
22 the following:

23 "(1) The hearing officer shall be an impartial judge
24 advocate whenever practicable or, in exceptional circumstances
25 in which the interests of justice warrant, an impartial
26 hearing officer who is not a judge advocate. If the hearing

1 officer is not a judge advocate, a judge advocate shall be
2 available to provide legal advice to the hearing officer.

3 "(2) Whenever practicable, the hearing officer shall
4 be equal to or senior in grade to military counsel detailed to
5 represent the accused or the government at the preliminary
6 hearing.

7 "(c) After conducting a preliminary hearing under
8 subsection (a), the judge advocate or other officer conducting
9 the preliminary hearing shall prepare a report that addresses
10 the matters specified in subsections (a) and (f).

11 "(d) The rights of the accused and victim at the
12 preliminary hearing are as follows:

13 "(1) The accused shall be advised of the charges
14 against the accused and of the accused's right to be
15 represented by counsel at the preliminary hearing under
16 subsection (a). The accused has the right to be represented at
17 the preliminary hearing as provided in Section 31-2A-38 and in
18 regulations prescribed under that section.

19 "(2) The accused may cross-examine witnesses who
20 testify at the preliminary hearing and present additional
21 evidence in defense and mitigation, relevant to the limited
22 purposes of the hearing, as provided for in subdivision (4)
23 and subsection (a).

24 "(3) A victim may not be required to testify at the
25 preliminary hearing. A victim who declines to testify shall be
26 deemed to be not available for purposes of the preliminary
27 hearing.

1 "(4) The presentation of evidence and examination,
2 including cross-examination, of witnesses at a preliminary
3 hearing shall be limited to the matters relevant to the
4 limited purposes of the hearing, as provided in subsection
5 (a).

6 "(e) A preliminary hearing under subsection (a)
7 shall be recorded by a suitable recording device. The victim
8 may request the recording and shall have access to the
9 recording as prescribed by the Manual for Courts-Martial.

10 "(f) If evidence adduced in a preliminary hearing
11 under subsection (a) indicates that the accused committed an
12 uncharged offense, the hearing officer may consider the
13 subject matter of that offense without the accused having
14 first been charged with the offense if the accused is all of
15 the following:

16 "(1) Present at the preliminary hearing.

17 "(2) Informed of the nature of each uncharged
18 offense considered.

19 "(3) Afforded the opportunities for representation,
20 cross-examination, and presentation consistent with subsection
21 (d).

22 "(g) The requirements of this section are binding on
23 all persons administering this chapter, but failure to follow
24 the requirements does not constitute jurisdictional error.

25 "(h) For the purposes of this section, the term
26 "victim" means a person who is alleged to have suffered a
27 direct physical, emotional, or pecuniary harm as a result of

1 the matters set forth in a charge or specification being
2 considered and is named in one of the specifications.

3 "§31-2A-46.

4 "The trial counsel, the defense counsel, and the
5 court-martial shall have equal opportunity to obtain witnesses
6 and other evidence as prescribed by regulations and provided
7 by law. Process issued in court-martial cases to compel
8 witnesses to appear and testify and to compel the production
9 of other evidence shall apply the principles of law and the
10 rules of courts-martial generally recognized in military
11 criminal cases in the courts of the Armed Forces of the United
12 States, but which may not be contrary to or inconsistent with
13 this code. Process shall run to any part of the United States,
14 or the territories, commonwealths, and possessions, and may be
15 executed by civil officers as prescribed by the laws of the
16 place where the witness or evidence is located or outside of
17 the United States. A court-martial convened under this code
18 may subpoena and compel the presence of witnesses and the
19 production of documents in the same manner as a circuit court
20 in a criminal case. Such subpoena, however, shall be signed
21 and issued by the military judge and shall comply with the
22 requirements of Chapter 21 of Title 12. Any reference therein
23 to the issuance of process by a clerk of court shall not apply
24 in a court-martial proceeding.

25 "§31-2A-47.

1 "(a) Any person not subject to this code who does
2 all of the following may be punished by the military court in
3 the same manner as a criminal court of the state:

4 "(1) Has been duly subpoenaed to appear as a witness
5 or to produce books and records before a court-martial or
6 court of inquiry, or before any military or civil officer
7 designated to take a deposition to be read in evidence before
8 such a court.

9 "(2) Has been duly paid or tendered the fees and
10 mileage of a witness at the rates allowed to witnesses
11 attending a criminal court of the state.

12 "(3) Willfully neglects or refuses to appear, or
13 refuses to qualify as a witness or to testify or to produce
14 any evidence which that person may have been legally
15 subpoenaed to produce.

16 "(b) The fees and mileage of witnesses shall be
17 advanced or paid out of the appropriations for the
18 compensation of witnesses.

19 "(c) At the request of the military judge or the
20 convening authority and upon receipt of proof that a person
21 not subject to this code has refused to appear or testify or
22 produce evidence as set forth in subsection (a), the circuit
23 court of the county where the court-martial has been convened,
24 upon application, shall institute criminal contempt
25 proceedings against such person under the provisions of Rule
26 33, et seq., of the Alabama Rules of Criminal Procedure.

27 "§31-2A-52.

1 "(a) No person may be convicted of an offense except
2 as provided in Section 31-2A-45(b) (Article 45(b)) or by the
3 concurrence of two-thirds of the members present at the time
4 the vote is taken.

5 "(b) All other questions to be decided by the
6 members of a general or special court-martial shall be
7 determined by a majority vote, but a determination to
8 reconsider a finding of guilty or to reconsider a sentence,
9 with a view toward decreasing it, may be made by any lesser
10 vote which indicates that the reconsideration is not opposed
11 by the number of votes required for that finding or sentence.
12 A tie vote on a challenge disqualifies the member challenged.
13 A tie vote on a motion relating to the question of the
14 accused's sanity is a determination against the accused. A tie
15 vote on any other question is a determination in favor of the
16 accused.

17 "(c) Pursuant to its authority under Article XV,
18 Section 271 of the Constitution of Alabama of 1901, the
19 Legislature finds and declares that Article I, Section 11 of
20 the Constitution of Alabama of 1901, does not apply to a
21 court-martial proceeding. Courts-martial existed before the
22 existence of the Constitution, and their existence is
23 recognized in the Constitution. Further, courts-martial are an
24 executive agency belonging to the executive branch, not the
25 judicial branch, and were created by the Legislature pursuant
26 to its authority under Article XV, Section 271, to provide for
27 disciplining the militia."

1 Section 2. This act shall become effective on the
2 first day of the third month following its passage and
3 approval by the Governor, or its otherwise becoming law.