ADVISORY COMMISSION REPORT

VOLUME I

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THE MILITARY JUSTICE ACT OF 1983

DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
WASHINGTON, D.C. 20301

14 December 1984

The Honorable John Tower
Chairman, Committee on Armed Services
U.S. Senate, Washington, DC

The Honorable Melvin Price
Chairman, Committee on Armed Services
U.S. House of Representatives, Washington, DC

Dear Senator Tower and Representative Price

This report of the Military Justice Act of 1983 Advisory Commission discusses the issues, and matters related thereto, mandated to be studied by the Commission pursuant to Public Law 98-209 and the Commission's Charter. The report is also being provided to the Code Committee.

The report is transmitted in four volumes. Volume I contains Commission recommendations and position papers. Volume II contains the transcript of Commission hearings. Volume III contains the Commission's survey of convening authorities and military justice practitioners. Volume IV contains public comments, miscellaneous documents and various statistics.

Sincerely

THOMAS L. HEMINGWAY, Colonel, USAF
Chairman, Military Justice Act of
1983 Advisory Commission

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Report

Executive Summary

The Congress, through the Military Justice Act of 1983, directed the Secretary of Defense to establish a commission to study and make recommendations to the Congress regarding several specified matters related to the military justice system.

The Military Justice Act of 1983 Advisory Commission was established by the Secretary of Defense to conduct the study directed by the Act. The Commission was composed of nine members, five of whom were senior judge advocates with expertise in military justice from each service, one who was a staff member of the United States Court of Military Appeals and three who were civilian attorneys recognized as experts in military justice or criminal law.

The Commission's study was conducted over nearly a one-year period. The evidence gathered by the Commission is extensive. The Commission heard testimony from twenty-seven witnesses, including commanders, senior judge advocates and civilian experts. The Commission conducted an exhaustive survey of convening authorities and military justice practitioners in each branch of military service. The Commission solicited and received public comment from several sources, including retired military leaders, public interest groups, bar associations and experts in military justice and criminal law. A list of sources the Commission solicited comment from appears in Volume IV of this report. The Commission, in its effort to encourage comment from the public sector, published its Charter and notice of hearings in the Federal Register. Each of the matters before the Commission was extensively researched to allow the Commission to transmit this comprehensive report to Armed Services Committees of the Senate and House of Representatives and the Code Committee.

The Commission makes the following recommendations regarding the matters directed to be studied:

(A) That sentencing authority should not be exercised by military judge where the court-martial consists of members.

(B) That military judges and Courts of Military Review should not be given the power to suspend sentences.

(C) That the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement of up to one year: provided, that, 1) a military judge and a certified defense counsel are required to be detailed to every special court-martial in which confinement in excess of six months may be adjudged; 2) no Article 32 investigation requirement for the special court-martial be created; and, 3) no change to current appellate jurisdiction be made.

(D) That military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should not have a guaranteed term of office (tenure).

(E) That the United States Court of Military Appeals should be reconstituted as an Article III court under the U.S. Constitution: provided that, enacting legislation not alter the current jurisdiction of the Court and specify that the Court will not have jurisdiction over administrative discharges and nonjudicial-punishment actions.

(F) That, if the recommendation to reconstitute the Court of Military Appeals as an Article III court is not followed, the Tax Court retirement system should be applied to judges of the Court of Military Appeals.

Although the Commission was not directed to study and make recommendation regarding the membership of the Court of Military Appeals, the Commission recommends that the membership of the Court of Military Appeals be increased from three to five judges regardless of which Article of the Constitution the Court is constituted under.

Organization of the Report

The Commission's Report initially transmitted to the Congress consisted of four volumes:

Volume I: Commission Recommendations and Position Papers
Volume II: Transcript of Commission Hearings
Volume III: Survey of Convening Authorities and Military Justice Practitioners; Survey Description and Analysis
Volume IV: Public Comments, Miscellaneous Documents and Statistics

These four volumes have relabled as chapters and condensed in this printing into a two volume set.

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The Military Justice Act of 1983, Advisory Commission, December 1984. This report was prepared by the Military Justice Act of 1983 Advisory Commission, to be transmitted to the Armed Services Committees of the Senate and House of Representatives and to the Code Committee (established under section 867(g), Title 10, United States Code).

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II. BACKGROUND

The Military Justice Act of 1983 took effect on December 9, 1983. The Act made several important changes to military justice. It also directed the Secretary of Defense to establish a commission to study and make recommendations concerning the following matters:

(a) Whether the sentencing authority in court-martial cases should be exercised by a military judge in all noncapital cases to which a military judge has been detailed.

(b) Whether military judges and the Courts of Military Review should have the power to suspend sentences.

(c) Whether the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement of up to one year, and what, if any, changes should be made to current appellate jurisdiction.

(d) Whether military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure.

(e) What should be the elements of a fair and equitable retirement system for the judges of the United States Court of Military Appeals.

The Secretary of Defense, at the request of the House Armed Services Committee, further instructed the Commission to report on the issue of whether the United States Court of Military Appeals should be an Article III court under the U.S. Constitution.

The Act directed that the Commission consist of nine members, at least three of whom were to be persons from private life who were recognized authorities in military justice or criminal law.

The Act directed that the Commission include in its report findings and comments on the following matters:

(1) The experience in the civilian sector with jury sentencing and judge-alone sentencing, with particular reference to consistency, uniformity, sentence appropriateness, efficiency in the sentencing process, and impact on the rights of the accused.

(2) The potential impact of mandatory judge-alone sentencing on the Armed Forces, with particular reference to consistency, uniformity, sentence appropriateness, efficiency in the sentencing process, impact on the rights of the accused, effect on the participation of members of the Armed Forces in the military justice system, impact on relationships between judge advocates and other members of the Armed Forces, and impact on the perception of the military justice system by members of the Armed Forces, the legal profession, and the general public.

(3) The likelihood of a reduction in the number of general court-martial cases in the event the confinement jurisdiction of the special court-martial is expanded; the additional protections that should be afforded the accused if such jurisdiction is expanded; whether the minimum number of members prescribed by law for a special court-martial should be increased; and whether the appellate review process should be modified so that a greater number of cases receive review by the military appellate courts, in lieu of legal reviews presently conducted in the offices of the Judge Advocates General and elsewhere, especially if the Commission determines

that the special court-martial jurisdiction should be expanded.

(4) The effectiveness of the present systems for maintaining the independence of military judges and what, if any, changes are needed in these systems to ensure maintenance of an independent military judiciary, including a term of tenure for such judges consistent with efficient management of military judicial resources.

The Act directed the Commission to transmit its report to the Committees on Armed Services of the Senate and House of Representatives and to the Code Committee (established under Section 867(g), Title 10, United States Code). The report submission deadline was established as 15 December 1984 by the Defense Authorization Act of 1985.

By memorandum dated November 25, 1983, Mr. William H. Taft, IV, then General Counsel for the Department of Defense, designated the Air Force as executive agent for the Commission and set forth guidelines for the nomination of individuals to serve as members of the Commission.

III. THE RESEARCH AND DATA GATHERING

The Commission devoted several months to examining the matters directed to be studied, discussing and debating alternative approaches related to those matters, and comparing military justice procedure to civilian criminal procedure throughout the United States.

The Commission invited numerous witnesses to testify before it. Commanders who were, or had been, convening authorities testified. Military trial judges and past and present members of the Courts of Military Review appeared. Staff judge advocates and senior judge advocates knowledgable about judge advocate career management also appeared before the Commission. The transcripts of the witnesses' testimony appears in Volume II of this report.

In addition to hearing testimony, the Commission conducted a survey of convening authorities and military justice practitioners. The survey consisted of the distribution of questionnaires to general and special court-martial convening authorities, staff judge advocates, military judges, judges of the Courts of Military Review, trial counsel and defense counsel in all five branches of military service. The survey data was an important tool for the Commission's study and is so extensive that it will find application beyond the Commission's Charter. The Commission's recommendations, however, are not based solely on the results of the survey, but represent the judgment of the Commission members, arrived at after thorough study of the complete spectrum of information before them. Volume III of this report presents the survey report, including the data and its analysis. The Commission benefited greatly from the assistance of the Defense Manpower Data Center in the development of the survey and the data collection.

Several other individuals and organizations interested in military justice provided comment to the Commission in writing rather than through live testimony. Their submissions expanded the base of information upon which the Commission drew. Those written comments appear in Volume IV of this report.

Each service provided important information to the Commission. The Commission received data related to the matters studied, including sentencing practices, the selection, assignment and training of judges, and statistics on judge-alone trials as compared with trials with members, personnel strength, disciplinary action, and court-martial processing times. The Court of Military Appeals assisted the Commission as it examined the matters concerning retirement pay for judges in the federal system and the issue of whether the Court of Military Appeals should be an Article III court under the U.S. Constitution.

Information was sought from civilian experts. A representative of the American Civil Liberties Union testified before the Commission, and the American Law Institute, at the request of the Commission, also provided guidance. The Commission examined not only the legislative history of the Military Justice Act of 1983, but also the legislative history of the founding of the Court of Military Appeals. It also considered prior recommendations by members of Congress and those who testified in congressional hearings on the Military Justice Act of 1983. The National Center on State Courts assisted the Commission in gathering information about sentencing. Members of the Commission examined recent developments in sentencing throughout the United States and read the significant contributions to the academic literature on sentencing in past decades.

Finally, the Commission benefited greatly from its composition. The cross-fertilization of civilian and military representatives and the dialogue among the members with different service backgrounds enabled the Commission to explore a number of subtle and difficult points with confidence as to the reliability and the currency of the information that had been gathered.

PART TWO—MATTERS STUDIED AND RECOMMENDATIONS

IV. GENERAL CONCLUSIONS

The sections that follow address the matters that the Commission was constituted to examine. It will be apparent that there are differing views, both on the Commission and in the military and civilian legal communities, about the appropriateness of implementing specific changes to the military justice system. The most important conclusion that the Commission arrived at, and it is one to which all members subscribe without reservation, is that military justice in 1984 is well suited to achieving the objectives of just results in individual cases while filling the military necessities of mission readiness and good order and discipline. Military justice has much to commend it, and nothing the Commission reports or recommends is intended in any way to disparage the fundamental integrity of the system.

The strength of the military justice system is demonstrated in the tenor of the evidence received by the Commission. Every group that the Commission contacted—commanders, staff judge advocates, trial counsel, defense counsel, and judges—expressed confidence in the system. This is not to suggest that the Commission heard no strong advocates of change in the system. It is to say, however, that virtually everyone intimately involved in military justice believes that an accused today receives a fair trial and that the needs of the military are well served by the system. This is no small point. The Commission found no negativism about the military system. Rather, it found a pride and faith in military law, courts, lawyers and basic procedures.

In its proceedings, the Commission spoke to the commanders, the lawyers, and the judges. While it is true that accuseds were not asked their views, the Commission paid close attention to the views of defense counsel. These lawyers, who would be especially sensitive to considerations affecting the rights of accuseds, generally expressed confidence in the system. Those who know the system agree that an accused in the military has greater protections than a civilian defendant. The Commission believes that an informed accused, offered a choice between the procedures available in civilian or military courts, would find the military procedures preferable in most instances.

This positive view of the military justice system produced a feeling among some observers that such an effective system ought not be disturbed. The Commission was sensitive to the concern that tinkering with a good product does not necessarily improve it. That sensitivity caused it to carefully examine proposals for change, to weigh the possible advantages against the merits of the current system, and to scrupulously avoid recommending any change simply for the sake of change. What follows are recommendations that grow out of a respect for the military justice system, and a desire to keep it working well and to improve it where it is practicable to do so.

The Commission members voted on specific recommendations regarding the matters studied. The Commission's recommendations are supported by a clear concensus established by the majority votes of the members. No issue was decided by one vote.

It would ill serve the Congress and the military justice system to issue a report that purported to give a single answer to each question and to paper over the alternatives that are plainly available. The Commission made no effort to coerce unanimity among its members, but encouraged each member with unique contributions to set forth his views independently in this report. Those views, both in support of and in opposition to Commission recommendations, appear in Part Three of this volume.

The following discussion of each of the matters studied by the Commission is divided into subsections. The discussion of the first five matters presents the major arguments in support of Commission recommendations, then the countervailing considerations. The discussion of these matters concludes with the Commission's recommendations.

V. WHETHER THE SENTENCING AUTHORITY IN COURT-MARTIAL CASES SHOULD BE EXERCISED BY A MILITARY JUDGE IN ALL NONCAPITAL CASES TO WHICH A MILITARY JUDGE HAS BEEN DETAILED

The Advantages of Retaining the Member-Sentencing Option

First, the most commonly asserted rationale for mandatory judge-alone sentencing does not appear to be justified in practice. The Commission has received no persuasive evidence that judge sentencing produces more consistent sentences than court-member sentencing for similarly situated accuseds. While an individual judge may be more consistent in cases over which he presides, judges as a group have demonstrated in numerous studies that their philosophies of sentencing differ, and it is established in the literature that judge sentencing is not a model of consistency. Moreover, where the range of

possible appropriate punishment is not great, uniformity may be more of a hypothetical than a realistic objective.

Furthermore, in the military, the judge is likely to serve as a sentencing authority for a single tour of duty—i.e., three or possibly four years. The expertise that might come from many years on the bench is generally not available to military judges. Schooling and concern for what other judges do might promote equality to some extent, but civilian judges demonstrate that disparities are inevitable when judges or juries sentence in a system that gives the sentencing authority a wide range of choices.

Second, the issue is not being considered on a clean slate. Military personnel have long enjoyed a right to elect member sentencing. Many exercise that right. To remove this option would be a deprivation of an option that many value.

Third, member sentencing is an important area where the non-legal military community becomes involved in the military justice system. By adjudging sentences, members define the military community's punishment norms for given offenses. In addition, participation on courts develops a respect for and knowledge cf the system. A sizeable majority of commanders who testified and who responded to the survey preferred preservation of member sentencing. Lieutenant General Jack Galvin, Commanding General of the Seventh United States Army Corps, Germany, in his statement to the Commission, said:

> Court member duty, to include determination of an appropriate sentence by officers and, where requested, enlisted personnel, is an important duty which benefits the Army as a whole. The fundamental fairness which is a characteristic of the military justice system is instilled in court members and they carry that concept with them from the courtroom.

Fourth, sentencing by members provides important feedback to military judges concerning the values and needs of a particular military community. This feedback assists military judges in setting appropriate sentences in cases tried by military judges alone.

Fifth, a material number of accuseds prefer member trials and sentencing. Even in services in which few accuseds elect member trials, those who wish to do so are making a strong statement about their preferences.

Sixth, if conversion to judge-alone sentencing would result in an increase in adjudged sentences to confinement, as contended by some witnesses before this Commission, there would be a resultant increase in confinement facilities' operating costs.

Seventh, the case that military judge-alone sentencing is efficient was not made. The Commission received little data on the amount of time that members deliberate in sentencing vis-a-vis the amount of time that they spend deliberating on the issue of guilt or innocence. Once a decision is made to have member trials, it does not appear to be a material additional cost to have members also do the sentencing. Commanders willing to work to provide a cross-section of the military community on the court are unlikely to change their selection criteria if members continue to sentence.

Eighth, under present rules of evidence, the members are likely to have virtually the same information as the military judge. Although the military judge might be less influenced by given information, a judge might give less weight to extenuating and mitigating factors than court members. As for community reaction, it would be an advantage that sentencing will represent community values as understood by members, for sentencing in the military is directed at discipline as well as at imposing sanctions for criminal behavior. Discipline is enhanced when members sentence and commit themselves to defining sanctions for violations of military norms.

Ninth, where the military judge travels on a circuit from one command to another to try cases, he may be removed from the attitudes and concerns of a particular command. In consequence, he may be less able than members to arrive at a sentence that will be regarded as fair and as representing the norms of the service and location.

The Advantages of Judge-Alone Sentencing

Most civilian jurisdictions have abandoned jury sentencing in noncapital cases and have adopted judge sentencing. The judge, it is thought, has several advantages over a jury composed of members. First, the judge is able to render a quicker, more efficient sentence, since the judge is not compelled to participate in a group decision-making process. This reduces the time required to process a case in which there is a conviction. If members are not required to deliberate over the sentence, the burdens of serving on a court are considerably reduced. It might be the case that convening authorities would be more willing to have especially valuable members of the military serve on courts if the burden of such service were reduced.

Second, the judge is likely to pay attention to trends in sentencing, and is more likely than members to be concerned about inequality in sentencing that might create an appearance of unfairness. Judges sentence in case after case and thus develop an expertise which works to promote uniformity with respect to their cases. Moreover, judges are schooled in the law and the rationales for sentencing.

Third, a judge might be better able to handle volatile information than court members. The judge's concern for evidentiary and procedural rules might counterbalance the impact of some information.

Fourth, the judge is less likely than members to be affected in sentencing by a concern about what others will think of the sentence. The judge will probably do what justice requires whether or not it is popular. Members might be influenced by concern over the reaction of others to their sentence.

Fifth, many accuseds elect judge-alone trials. In the Navy and Marine Corps the majority of cases are not tried with members. Thus, the change to judge-alone sentencing would not have dramatic institutional impact on these services. Since there are few member trials in these services, the idea that sentencing by members is an important part of the command function is unpersuasive.

The Commission's Recommendation:

The Commission recommends that the proposal should not be adopted. The present procedure of allowing the accused the option of trial by court members or by military judge alone has served the military justice system well and no compelling reason exists for change. The present practice insures the accused the option of participation of military members in court-martial punishment decisions. This fosters understanding of military justice by all service members and belief in the fairness of the system.

Two Commission members, Mr. Sterritt and Mr. Ripple, dissent from the Commission's recommendation. Their positions in favor of judge-alone sentencing appear in Part Three of this volume.

VI. WHETHER MILITARY JUDGES AND THE COURTS OF MILITARY REVIEW SHOULD HAVE THE POWER TO SUSPEND SENTENCES

The Disadvantages of Suspension Power

Punishment in the military, while it bears much similarity to civilian court punishment, is different in important ways. Although some offenders who are punished by civilian courts work for the government, they are not brought before those courts because of their status as governmental workers. All civilian defendants appear simply as persons accused of a crime. Civilian courts punish to deter, rehabilitate and promote respect for law, not to enhance the efficiency of governmental services.

Military punishment does involve some of the same goals as civilian punishment. But military punishment is different to the extent that it furthers discipline and enables the military to fulfill its mission of national defense.

The decision to suspend a discharge reflects a belief that an individual can benefit his service despite a conviction of conduct serious enough to warrant a discharge. Decisions to retain or discharge a person have enormous potential impact on command. These are the kinds of decisions that commanders, who are responsible for the morale and mission readiness of their commands, must make.

Commanders called upon to make these decisions have access to information and opinions that are unavailable to courts and that might not be admissible even if they were available. The decision to suspend a discharge must take into account the needs of the service as well as the interests of the individual. Those who know the individual best—those who supervise the individual and who know his performance record—are best able to make the decision.

Nothing would be more disruptive of command than to have a judge suspend a discharge where a commander for good reason understands that the convicted person should be removed from the unit. The prospect for animosity between judges and commanders under such a system would increase.

Courts of Military Review would exercise suspension power even less effectively than trial judges. By the time Courts of Military Review see cases, the power to suspend is not meaningful. Worse is the danger that if the suspension power were exercised at the appellate level, persons who had returned to civilian life might be forced back into the military against their wishes as well as against the wishes of the commander.

Major General Robert C. Oaks, Director of Personnel Plans, United States Air Force, and a former convening authority, said in his statement to the Commission:

> Military judges are not in a position to assess the effect on discipline, morale and good order that retaining a convicted military member would have on the command. Only the commander can determine this. As opposed to civilian court jurisdictions, the military judge does not exercise supervisory control over the member serving a suspended sentence or over the person administering the convicted member's probation. This is the responsibility of the commander and, as such, only the commander should have the authority to suspend sentences. Specifically, in the civilian community as opposed to military, there is not a single person responsible for the overall conduct of life and good order and discipline such as the commander, and so the commander possesses an option, an opportunity, that is not available in civilian jurisdictions.

The Advantages of Suspension Power

At the current time, military trial judges and Courts of Military Review face the difficult decision in some cases of whether to adjudge or affirm a discharge that they regard as too harsh. The evidence before the Commission demonstrated that the degree to which a military judge's recommendation that a sentence be suspended is adopted varies from command to command. Giving judges the power to suspend sentences would remove

the all or nothing nature of that choice and enable them to impose the sentence that they deem just under all the circumstances.

Just as civilian courts use the probation system to rehabilitate an offender, military courts could use a suspension to give an offender a chance for rehabilitation and to enable the offender to demonstrate that he can render useful military service.

This power is one of compassion as well as one that enables the military to retain errant personnel who might well be good soldiers, sailors or airmen. Since the convening authority can suspend a discharge, suspension is not a new concept. Placing authority to suspend in the hands of judges is consistent with the way that most civilian jurisdictions proceed.

The Commission's Recommendation

The Commission recommends that the proposal should not be adopted. The power to suspend sentences is of importance in civilian courts. That significance makes it superficially attractive to those who propose reforms of military justice. Careful analysis indicates, however, that it would be inadvisable and unnecessary to confer the power on military judges and Courts of Military Review.

It would be inadvisable for several reasons. Commanders would resent a binding decision by a military judge to suspend a discharge that the commander wants enforced. Commanders would see this as an interference with command decisions, and their perception would not be unreasonable.

Unlike civilian courts, which must suspend a sentence if a convicted defendant is to receive any compassion (except in the extraordinary situation of gubernatorial or Presidential clemency), military courts understand that, even though they cannot suspend a discharge, the convening authority may do so. This constitutes a protection against unreasonably harsh sentences in the military justice system not found in civilian courts.

The convening authority is uniquely situated to make the decision whether or not to suspend. The information that the convening authority either possesses or has ready access to cannot easily be duplicated by the military judge. Although some of this information could be presented in court, it would burden the system to present it. Moreover, some of it would not translate into hard data; the feel that superiors have for subordinates might be important to a command decision, although not easily set out in words.

Currently, military judges can make suspension recommendations to convening authorities. Although the Commission received no hard data on this point, the evidence it did receive indicates that convening authorities, more often than not, follow judges' suspension recommendations. To formalize their power, so that judges could actually enter orders of suspension that would be effective unless set aside by commanders, would create a potential for friction and divisiveness that might undermine the support commanders now give to military justice.

Two Commission members, Mr. Honigman and Mr. Ripple, dissent from the Commission's recommendation. Their positions favoring suspension power appear in Part Three of this volume.

VII. WHETHER THE JURISDICTION OF THE SPECIAL COURT-MARTIAL SHOULD BE EXPANDED TO PERMIT ADJUDGMENT OF SENTENCES INCLUDING CONFINEMENT OF UP TO ONE YEAR, AND WHAT, IF ANY, CHANGES SHOULD BE MADE TO CURRENT APPELLATE JURISDICTION

The Advantages of Expanding Jurisdiction

Expanding the jurisdiction of special courts to include confinement of up to one year would conform to the misdemeanor-felony line drawn in federal courts and in many states. It would recognize that not all "lesser" offenses are minimal, and it would remove the need to convene a general court-martial in an effort to seek punishment of a few months more than a special court-martial can presently impose.

Since the six-month limitation on special courts was established at a time when the accused had fewer procedural rights and when lawyers were not involved in the trial of cases as they now are, this jurisdictional expansion does not signify that an accused will receive less protection than in the past. In some respects, the accused could actually benefit if the special court is permitted to impose more than six months' punishment. This option might reduce the need for imposition of a punitive discharge and an accused whose case would otherwise have been tried by general court-martial would avoid the added stigma of conviction by a felony level court.

The data from the Commission's survey indicates that this proposal received the strongest support of any of the proposals from military justice practitioners. That data shows that practitioners believe expanding the confinement jurisdiction of the special court-martial will not impair the fairness of military justice and will significantly reduce the administrative burden and costs in those cases which would be referred to special rather than general courts-martial under such an expanded jurisdiction.

Countervailing Considerations

Expansion of the jurisdiction might result in "sentence inflation"—an overall rise in the length of incarceration because of the increase in the maximum imposable sentence. In some cases, an accused who would get the benefit of an Article 32 investigation, a verbatim record of trial, a minimum of five court members and other rights in a general court-martial will not have the same rights in a special court-martial which may nevertheless impose significant punishment. It is also possible that convening authorities will use special courts when they would otherwise have used general courts in order to deprive an accused of these procedural protections.

Another possibility is that convening authorities would refer cases to the more efficient special courts when they really should convene general courts. Efficiency concerns might become more significant than justice concerns.

Finally, general court-martial judges are usually senior in grade to special court-martial judges. Additionally, general court-martial panels require a minimum of five members while special court-martial panels require only three. Increased punishment would be imposed by less experienced judges or smaller court panels, which is undesirable.

The Commission's Recommendation

The Commission recommends adoption of the proposal. The Commission further recommends that, if the confinement jurisdiction of the special court-martial is increased to one year, there be a requirement that a military judge and certified defense counsel be detailed to every special courts-martial in which confinement in excess of six months may be adjudged.

The counsel-competency requirement should be the same as that presently required for general courts-martial under Article 27(b), Uniform Code of Military Justice (Section 827(b), Title 10, United States Code). There should be no extension of Article 32 investigation procedures to the special court-martial, and appellate jurisdiction should remain as presently structured.

Expansion of the confinement jurisdiction of the special court-martial would have two major beneficial effects. It would simplify the court-martial process for the many cases which are now referred to general courts-martial, but which would be referred to special courts-martial under the changes. This would reduce the cost and administrative burdens associated with general courts-martial while facilitating the timely processing of court-martial cases.

The changes would also bring the distinction between general and special courts-martial more into line with the civilian distinction between felony and misdemeanor courts. This would make the court-martial process more understandable, especially for young military members and the civilian community, whose understanding of judicial procedure is commonly limited to the civilian court system.

The necessity of making the military justice system understandable was expressed by Lieutenant General Galvin when he testified before the Commission. When speaking of the Uniform Code of Military Justice, he said:

> The Code is not military jargon. The Code has got to be completely understood by the average man on the streets of the United States of America. And so that's why I say, and you see in my questionnaire, that given the exigencies of military service, we have to approach the daily run of the mill American system of justice as closely as we can."

Two Commission members, Mr. Ripple and Mr. Sterritt, dissent from the Commission's recommendation. Their position opposing expansion of the confinement jurisdiction of the special court-martial appears in Mr. Ripple's statement in Part Three of this volume.

VIII. WHETHER MILITARY JUDGES, INCLUDING THOSE PRESIDING AT SPECIAL AND GENERAL COURTS-MARTIAL AND THOSE SITTING ON THE COURTS OF MILITARY REVIEW, SHOULD HAVE TENURE

The Disadvantages of Tenure

In practice and by regulation, the military already has provided substantial protections to guarantee military judges independence in the discharge of their judicial duties and responsibilities. The concept of tenure or a guaranteed term of office is unnecessary and suggests that there is a basis in substance for an appearance of a problem which no one involved in the military system believes is real.

More importantly, assignments in the military, unlike judicial assignments in civilian life, do not proceed on the assumption that the judge necessarily will remain in that particular position for a guaranteed time. The needs of the military for job rotation and reassignment make personnel flexibility desirable and in some situations essential to the overall mission.

Assignments in the military are not made on the assumption that the longer one holds a position, the better it is for the incumbent and for the service. Quite a different assumption is made. Career advancement for judges, like other officers, operates upon this different assumption. A guaranteed term of office, which resulted in a judge advocate's assignment to a military judgeship for an extended period, would be detrimental to his or her career progression. This would make the position of a

judge less attractive and could dissuade qualified candidates with career ambitions from seeking the position.

The Advantages of Tenure

Unless military judges, like their civilian counterparts, have a guaranteed term of office, there is an appearance that they are subject to influence in their decision-making.

Moreover, the potential for influence is real and not merely an appearance. A military judge who does not enjoy the independence of tenure has no guarantee that he will continue in his or her judicial position if his or her decisions are unpopular with those who control the judge's assignment. This fact could have a self-limiting effect on the judge's decisions, while a guaranteed term of office might make the position of military judge more attractive and also result in more highly qualified candidates seeking the position. If the term of office is long enough, the experience level of the judiciary will rise.

Finally, the argument that military judges now enjoy a pre-set tour of duty and that their independence is guaranteed in practice proves too much. A statutory provision that merely adjusts the appearance to match the reality of judicial independence will do no harm.

The Commission's Recommendations

The Commission recommends that the proposal should not be adopted. Military judges enjoy judicial independence within the present system. Creating tenure for judges for the sake of appearance would misleadingly suggest that the system does not currently operate with an independent judiciary. Further, the need to maintain assignment flexibility outweighs any possible benefit regarding appearance.

Every witness (including commanders) who testified before the Commission and every person who submitted information on this subject to the Commission indicated a desire that military judges be independent and a confidence that judges are independent now. Although there was testimony to the effect that a commander who was aware of a problem in the manner in which a judge performed his duties—such as drunkenness, failure to appear, etc.—would report that problem to an appropriate person in the chain of command or The Judge Advocate General, there was not a single instance in which any witness testified about an attempt to remove a judge because of the unpopularity or the content of the judge's decisions.

The uncontroverted testimony is that military judges undertake tours of duty like other officers, and that this diminishes any unfavorable sense that lawyers are set apart from other military officers. There is sufficient tenure in the military for judges in the form of stabilized tours of duty.

Every witness who was asked whether he could affect the promotion or salary of a judge whose decisions he disliked indicated that he could not do so. Even if the Commission were to question this uniform testimony, it would be confident that any attempt to punish a judge would be rejected by The Judge Advocates General.

Three Commission members, Mr. Honigman, Mr. Sterritt and Mr. Ripple, dissent from the Commission's recommendation. Their positions in favor of guaranteed terms of office appear in Part Three of this volume.

IX. WHETHER THE UNITED STATES COURT OF MILITARY APPEALS SHOULD BE AN ARTICLE III COURT UNDER THE UNITED STATES CONSTITUTION

The Advantages of Article III Status

In order to understand why the Court of Military Appeals should have Article III status, a number of subsidiary questions must be addressed.

One of the significant themes that emerged throughout the Commission's hearings was confidence in the integrity and impartiality of the judges of the Court of Military Appeals. However, another theme was the need for assuring that the most highly qualified applicants will seek appointment to the Court.

There are three principal reasons for reconstituting the Court of Military Appeals as an Article III Court. First, Article III status is the key to assuring that the Court of Military Appeals is truly independent.

Second, as the highest court in the military, whose jurisdiction extends over millions of persons in times of war and peace (and which is of critical importance to the defense of our nation) the status of the Court of Military Appeals should be equal to the other federal courts. Without Article III status, the Court will not achieve such equality. Not only will the Court of Military Appeals suffer as a result, but its contributions to criminal and constitutional jurisprudence may not be accorded the respect and precedential value, in civilian cases, to which they should be entitled.

Third, Article III status will be an essential inducement in attracting candidates for the Court with the highest standards of professionalism and judicial temperament. Witnesses noted that the range of legal issues which come before the Court of Military Appeals is relatively narrow. An opportunity to interact with their brethren in judicial-conference activities and, upon occasion, to sit on other Article III courts by designation would be of significant assistance in broadening the judi-

cial experience of Court of Military Appeals judges. It would thereby help to attract candidates for whom a broadened range of continued professional growth is a prerequisite for judicial service.

In the last analysis, the health of the military justice system depends upon the continued integrity and excellence of the Court of Military Appeals. Improving the retirement system of the Court will help to draw more qualified men and women to be judges, but no financial package can overcome the absence of Article III status. The Commission believes that Article III status for the Court is necessary to achieve that goal.

(1) *Why is the Court an Article I court with a 15-year appointment period?*

The House of Representatives proposed life tenure for the Court's judges when the Court was created. The Senate originally proposed an eight-year term. As a result of a compromise between the two bodies, a 15-year term was selected. It appears from the legislative history that the House wished the Court of Military Appeals judges to be independent and sought to institute life tenure as the basic protection of independence. The House debates reveal that its members were more concerned with the tenure issue than with the Article III versus Article I question now facing the Commission.

Some individual Senators were concerned about giving the new judges lifetime appointments. There is evidence in the debates that they had doubts about life tenure for judges generally, and there is reason to think that, because this was a new court with no existing track record, some Senators would have preferred not to create life tenure for a judicial body that had yet to hear its first case.

The compromise of a 15-year term gave Congress the power to abolish judgeships or to eliminate salaries for the judges if it so chose over time. It also provided some guarantee that judges would be able to develop expertise and to enjoy a degree of independence as long as they sat on the Court, since 15 years was a longer period than Congress provided for other Article I courts, and it was long enough to assure that a judge would sit longer than any one U.S. President.

A fair reading of the legislative history does not reveal any fundamental judgment that the Court should not be an Article III court.

(2) *Could Congress make the Court an Article III court?*

The legislative history described above demonstrates that the House of Representatives wished to make the Court of Military Appeals an Article III body from the outset. Since that could have been done then, there is nothing to prevent Congress from changing the Court of Military Apeals from an Article I to an Article III court at this time. Following the Supreme Court's decisions in *O'Donoghue* v. *United States,* 389 U.S. 516 (1933), and *Williams* v. *United States,* 289 U.S. 553 (1933) (which held that District of Columbia judges on the Court of Appeals and the Supreme Court were Article III judges, but that the judges of the Court of Claims had only Article I status, making it possible for Congress to reduce their salaries), Congress enacted statutes in 1953, 1956, and 1958 declaring that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals were "established under Article III of the Constitution of the United States." The Supreme Court held that the Court of Claims and the Court of Patent Appeals were Article III courts in *Glidden* v. *Zdanok,* 370 U.S. 530 (1962), although the justices divided over the rationale for the holding.

Today, the Court of Claims and the Court of Customs and Patent Appeals have been combined into the United States Court of Appeals for the Federal Circuit, an Article III court. The former Customs Court is now replaced by another Article III court, the Court of International Trade.

Should Congress decide that the Court of Military Appeals should be an Article III court, the Commission is confident that it could enact the necessary legislation.

(3) *What is the effect of a change to Article III status?*

The effect is that the Court's judges would have life tenure, protection against reductions in salary and from removal in office under any system other than impeachment, and the right to the same benefits, including retirement, currently provided and to be provided in the future to Article III judges.

Article III status could be conferred without expanding the jurisdiction of the Court of Military Appeals. The Constitution does not prohibit limitations on the jurisdiction of Article III courts, nor does it prevent Congress from making certain Article III courts specialized courts, as is the case with the Court of Appeals for the Federal Circuit and the Court of International Trade.

The Commission would not recommend Article III status if an expansion of the Court's jurisdiction were a consequence of such an action.

In enacting its legislation, Congress would have to consider provisions of military law that give the President authority to take certain actions. For example, a question could arise as to whether it is consistent for an Article III Court of Military Appeals to review capital cases if the President is required by law to make a final decision on whether the death penalty should be imposed. Were the President's role viewed as overriding the court's decision, then the court's decision could be termed "advisory" and, thus, outside the proper jurisdiction of an Article III court. However, the Commission believes that the President's commutation power is con-

sistent with judicial authority and would expect to see the Court's jurisdiction upheld in capital cases.

There is little law on which influences or actions by other branches of government would be inconsistent with the designation of the Court of Military Appeals as an Article III court. For example, the President would probably be barred from replacing a sitting chief judge. While the President can appoint the Chief Justice of the United States Supreme Court (with the advice and consent of the Senate), he can only do so when the Chief Justice's seat is open. He lacks any authority to replace a sitting Chief Justice when a vacancy opens for an associate justice. The difficulty with presidential power to remove a sitting Chief Justice or chief judge is that it would suggest the existence of executive power over a court that is supposed to be independent. Thus, presidential power to replace sitting chief judges of the Court would be inconsistent with Article III status.

Congress probably could enact legislation limiting the term of a chief judge to a certain number of years. Or, Congress could enact legislation that would place an age limit on the Chief Judge position, as it already has done for the lower federal courts. Whether Congress could give the President the power to select the new chief judge every 5 or 10 years is a question for which there is no ready answer.

Concern has been expressed that an Article III Court of Military Appeals would seek to expand its jurisdiction. Congress can limit the Court's jurisdiction and can respond to any judicial attempt to broaden that jurisdiction. Moreover, the Supreme Court now has jurisdiction to hear any case the Court of Military Appeals decides, and it too can restrict any undue tendency by the Court toward jurisdictional self-aggrandizement under Article III.

Countervailing Considerations

The principal argument against Article III status is that the jurisdiction of the Court of Military Appeals may be expanded by legislative enactment to encompass matters much broader than review of court-martial cases. The Court could become one of general jurisdiction, and matters presently within the jurisdiction of the federal district courts might be transferred to the Court of Military Appeals. The status of the Court should not be changed, and this risk incurred simply to satisfy the need for a fair and equitable retirement system for judges of the Court of Military Appeals.

The Commission's Recommendation

The Commission recommends adoption of the proposal with the caveat that the enacting legislation expressly limit the jurisdiction of the Court to that which it currently exercises, and that specific language be included in the legislation to preclude the Court's exercise of jurisdiction over administrative discharge matters and nonjudicial punishment actions under Article 15, UCMJ (Section 815, Title 10, United States Code).

The highest court in the military is deserving of Article III status. That its decisions are now reviewable by the Supreme Court indicates the importance Congress attaches to the decisions of the Court of Military Appeals and its role in our national judicial system.

Three Commission members, Captain Byrne, Colonel Mitchell and Colonel Raby, dissent from the Commission's recommendation. Their positions in opposition to Article III status appear in Part Three of this volume.

X. WHAT SHOULD BE THE ELEMENTS OF A FAIR AND EQUITABLE RETIREMENT SYSTEM FOR THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS

The Effect of Article III Status

The Commission recommends above that Congress should reconstitute the Court of Military Appeals as an Article III court. If this recommendation is adopted, then Court of Military Appeals judges will thereafter be within the same retirement system now covering federal judges.

The Commission's Recommendation

If the Court of Military Appeals is not to become an Article III court, the Commission recommends that the Court's retirement provisions duplicate those of the Tax Court judges. This would improve the retirement provisions for the Court of Military Appeals judges and would make judgeships on that court more attractive (although there is no way of knowing how much more).

The Commission sees no reason why judges of the Court of Military Appeals, the highest court in the military system, should receive lesser retirement benefits than those received by Tax Court judges. Since the Tax Court judges serve 15-year terms, the same as do judges of the Court of Military Appeals, the Tax Court is the appropriate model if Article III status is denied the Court of Military Appeals.

Every member of the Commission supports a "fair and equitable" retirement system for Court of Military Appeals judges, but it is easier to reach agreement on the general proposition than to formulate a specific retirement system and demonstrate that it is the best for the Court of Military Appeals as long as that Court remains an Article I body. Retirement for federal judges is premised on their having life tenure and thus being lifetime

appointees. Not only does the premise suggest that retirement should recognize the lifetime commitment judges make, but it also has led Congress to develop a retirement system that provides incentives for judges to remain active, at least in senior status. Retirement is available, but so is an alternative.

The Court of Military Appeals poses a different set of issues, because the judges are not lifetime appointees. Many judges have been appointed to fill out the term of a judge who has left the Court. Thus, these judges may not have served fifteen years. The President may choose not to reappoint a judge, making fifteen years the maximum service on the Court, even for a judge who would be willing to serve longer. The absence of a reappointment guarantee means that prospective candidates for appointment cannot be sure that they will be in a position to secure the maximum advantages of the retirement system, because they cannot know what a future president will do. Thus, the key to reform of retirement provisions, as long as the Court is not an Article III court, is to assure prospective judges that they will be treated as fairly as possible in a system that does not guarantee reappointment. The Tax Court legislation has several options that are fairer than the options available to Court of Military Appeals judges at the present time.

Three Commission members, Captain Byrne, Colonel Mitchell and Colonel Raby propose retirement systems that differ from the Tax Court system proposed by the Commission. Their positions appear in Part Three of this volume.

XI. WHETHER THE MEMBERSHIP OF THE COURT OF MILITARY APPEALS SHOULD BE INCREASED TO FIVE JUDGES

The Commission unanimously recommends increasing the membership of the Court of Military Appeals from three to five members.

The Commission was not directed to consider the matter of whether the present membership of the Court is sufficient, but the issue is inextricably interwoven with the consideration of Article III status for the Court. The evidence the Commission received strongly suggests that an increase in the Court's membership is essential, even if it remains an Article I court.

Unfortunately, the Court of Military Appeals has been subject to dramatic shifts in its philosophy when a judge has resigned or retired. Moreover, even where doctrinal shifts are not involved, a new judge necessarily requires some time before he or she comes "up to speed". Currently, each judge represents one-third of the Court. Increasing the Court's membership to five would significantly reduce the impact of the changing of one judge and would enhance both the longevity of precedents and the predicability of future decisions. Such increased stability in the Court's doctrine would substantially assist in the practical functioning of the military justice system in the field.

Another problem experienced with only three judges is that when one judge is absent, for whatever reason, the Court can only function if the two remaining judges agree on case resolution. A five-member court would eliminate this potential paralysis of the Court's administration.

This recommendation is consistent with the position of the American Bar Association Commission on Standards of Judicial Administration. The Standards Relating to Court Organization, section 1.13 recommends that a jurisdiction's highest appellate court should have not less than five nor more than nine members. The Commentary indicates that the number should be odd so that decisions can be reached by majority vote.

To permit the most efficient use of five members, legislation expanding the membership of the Court should further authorize the Chief Judge to designate panels to hear appeals.

Increasing the membership of the Court of Military Appeals from three to five judges would enable the Court to effectively deal with a rising caseload and would reduce the significance of changes in court membership. This would greatly enhance stability and confidence in our nation's highest judicial body in the military justice system.

PART THREE—POSITION PAPERS

XII. PAPERS ON SINGLE ISSUES

Sentencing by Military Judge Only

Colonel K. A. Raby, USA

The Commission was directed to study whether the sentencing authority in all noncapital courts-martial to which a military judge has been detailed should be exercised exclusively by the military judge. This is a controversial and multifaceted issue. There exist good reasons both for rejecting and adopting this proposal. On bal-

ance, for the reasons hereinafter discussed, a substantial majority of the Commission recommends against mandatory military judge only sentencing.

I. Historical Summary

Court-martial members historically were vested with the authority and responsibility for determining if an accused were guilty and, in the event of a conviction, for adjudging an appropriate punishment for the offender. Prior to 1948, these members were officers. In 1948, the "Elston bill" (62 Stat. 627, June 24, 1948; P.L. 80–759) contained a provision (Article of War 4) allowing enlisted accused to request enlisted personnel as court-martial members. This provision later was included by Congress within Article 25, Uniform Code of Military Justice (hereinafter called UCMJ or Code), 10 U.S.C. § 825. Thus, for almost thirty-five years, accused enlisted service members have enjoyed a statutory right to request that at least one-third of the court-martial membership be enlisted persons. Like an all-officer court, an officer-enlisted court also votes on an appropriate sentence if an accused is found guilty of any offense under the Code. The Military Justice Act of 1968, in the meantime, abolished the quasi-judicial position of "Law Officer", and created the office of "Military Judge." Military judges were empowered, upon an accused service member's written request, to conduct a court-martial without court members, that is, to conduct a judge alone trial. In such instances, if an accused were convicted, the military judge would determine and announce an appropriate punishment. In all cases, unless the accused expressly exercised in writing the statutory option for a judge alone trial, he would be tried and, if convicted, sentenced by court-martial members selected by the convening authority.

The fact that commanders and officers of the line have continued to play an integral part in the military justice system is not unusual. Their personal involvement is an inherent part of overall command responsibility. The uniqueness of the military justice system repeatedly has been recognized by the Supreme Court of the United States. Most recently in the case of *Chappell* v. *Wallace* the Court stated:

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting. [1]

It is the additional but major role of the military justice system to enhance combat readiness that sets it apart from civilian judicial systems. Assuredly, both systems must be fundamentally fair, and each constantly must seek to achieve the just disposition of criminal offenses. However, the obligation imposed upon the military justice system to enhance combat readiness by maintaining a "rule of law atmosphere" in which good order and discipline can flourish and in which the military leadership can devote its efforts to manning, equipping, and effectively training our armed forces has no civilian counterpart. It is this historic relationship which bonds the leadership and the military justice system together, and through this bonding each provides a foundation of institutional legitimacy for the authority of the other.

General Robert W. Sennewald, Commander, United States Army Forces Command, placed high value on this relationship when he said:

> I feel very strongly that the military justice [system] is an integral part of the command environment. . . . I would reject any effort to take the commander out of the military justice system any more than [the commander has] been removed thus far. . . . [2]

> [M]ilitary justice provides the underpinning to [that] command environment. [3]

With the above factors in mind, attention should now be given to the reasons cited against and for sentencing by military judges alone.

II. Reasons Asserted Against Judge Alone Sentencing

The principal reasons cited by those who oppose the proposal to remove court-martial members from the sentencing process and to vest such authority solely with military judges are as follows:

Adoption of the proposal would terminate an important statutory right of service members. This right gives service members pending court-martial an option to select whether to be tried and, if convicted, sentenced by a military judge or by a panel composed of officer and enlisted members, or to make no statutory election and thus ensure that they are tried and, if convicted, sentenced by officer court-martial members only. (An accused's request for judge alone trial, however, requires approval by the military judge. In practice, a military judge would rarely deny such a request and then only based upon reasonable grounds.) [4]

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[1] 103 S.Ct. 2362, 2365 (1983). See also Testimony of BG Raymond W. Edwards, USMC (Retired), former Navy Assistant Judge Advocate General for Military Law, at page 347 ("[N]ot only must the commander have . . . a criminal justice system, but also a system [of] instilling discipline in the command so that when the command is called upon to perform its stated mission they will be trained and ready to accomplish the mission.").

[2] Testimony of GEN Robert W. Sennewald, USA, at page 268.

[3] *Id.* at page 276. "[S]ometimes we associate commander involvement with injustice and I absolutely reject that." *Id.* at page 277.

[4] If the military judge denies an accused's request for a bench trial, the judge must state the basis for the denial on the record. *United States* v. *Butler*, 14 M.J. 72 (CMA 1982); MCM, 1984, R.C.M. 903(c)(2)(B) (Discussion); See also Testimony of CDR Kevin J. Barry, U.S. Coast Guard, military judge, at page 328.

The maintenance of good order and discipline is a command responsibility, and being required to serve from time to time as a court-martial member, to include the adjudging of an appropriate sentence in the event of conviction, instills in the military leader a greater understanding of the nature and scope of overall leadership responsibilities.

The perception of service members that their leaders may and often do participate throughout the entire court-martial process, to include the sentencing phase, personalizes the process in the eyes of unit members and provides an immediate reeinforcement of command authority.

Participation in the entire court-martial process, to include the sentencing phase, makes officers more sensitive to the role of the "rule of law" in the exercise of command authority and they carry the concept of fundamental fairness with them from the courtroom, which benefits the Army as a whole.

The public's perception that the military justice system is fair and their continued confidence in the system are necessary in order to achieve general public support for the armed forces. Public perceptions regarding the fairness of the system are enhanced when service members have options such as that of selecting their sentencing authority.

Excluding officers and enlisted personnel from the sentencing process connotes distrust for the judgment and fairness of these persons.

Excluding officers and enlisted personnel from the sentencing process will neither significantly decrease case disposition time nor significantly reduce the opportunity for prejudicial error in court-martial sentencing procedures.

A court-martial panel enjoys, through its combined experience, a knowledge of the existing standards of conduct and disciplinary needs of the military community that is not shared by the military judge and, thus, it can contribute an important dimension to the military justice system and to the sentencing of individual accused.

Participation in the sentencing phase of a court-martial enhances the overall quality of the member's participation in the court-martial process.

Sentencing by members provides important feedback to military judges concerning the values and needs of a particular military community. This feedback assists military judges in setting appropriate sentences in cases tried by military judges alone.

Sentencing by the military judge only will not engender overall sentence uniformity or consistency and it may necessitate other changes in sentencing procedure.

In some trials, military judges are made aware of information adverse to an accused which is not admissible against the accused in sentencing. In order to ensure a fair sentencing proceeding in such cases, a service member must retain the option to select the sentencing authority.

III. Reasons Asserted In Favor of Judge Alone Sentencing

Service members have no vested right to retain the option to select the sentencing authority.

Military judges are professional jurists who are better qualified by reason of education, training, experience, and knowledge to adjudge appropriate sentences. Members may not perform their sentencing duties appropriately in certain situations.

Military judges adjudge sentences which are more uniform and consistent than those adjudged by court-martial members.

Military judge alone sentencing will reduce court-martial processing time.

Military judge alone sentencing will reduce errors in court-martial sentencing procedures.

Military judge alone sentencing will relieve commanders of the need to expend valuable line officer assets for this purpose, which is particularly critical in wartime.

Military judges are aware of the needs of the military community and they also are aware of the collateral consequences of their sentences. Court-martial members are not as familiar with the disciplinary needs of the military community and do not understand fully the collateral consequences of their sentences, such as good-time credit and parole.

Court-martial members dilute the military standards of discipline by frequently awarding sentences which are too lenient.

The military should follow the American Bar Association's recommended standards for sentencing, the practice of all other Federal courts, and the practice of all but a few states, by adopting mandatory military judge only sentencing.

Continuing a service member's forum option through the sentencing phase enables an accused to "forum shop" for the court-martial composition which is likely to award the most lenient sentence.

Continuing a service member's sentencing option may encourage the military judge to adjudge excessively lenient sentences to ensure that future accused will continue to select trial by military judge alone.

Adopting military judge alone sentencing would lessen the potential for the appearance of unlawful command influence in sentencing procedures.

Adopting military judge only sentencing would inhibit any attempts by court members to trade off findings and sentence in order to obtain a majority with respect to either.

IV. Discussion

A. Reasons Against Judge Alone Sentencing

During the hearings held by this Commission, some individuals indicated that they did not consider the service member's option to select the sentencing forum to be either a "substantial right" or a "fundamental right," but others disagreed. [5] Clearly the option is not required by any known principle of constitutional law or military due process; however, as previously discussed, Congress has made the option available in some form since the Code was enacted, and the current option combinations have been in effect for approximately 15 years. [6] Thus, most active duty military personnel have known no other sentencing system. The enlisted court-martial member option initially was enacted by Congress [7] because it was perceived that most enlisted persons wanted it, and that rationale was persuasively used in support of Article 25, UCMJ. [8] In placing the enlisted court-martial member option within Article 25, Congress believed it was vesting enlisted service members with a statutory right. [9] As the option rights given by Congress are statutory in origin, Congress may abolish or change them. However, it is important to recognize that "rights," and not mere privileges or customs, are involved. An examination of these option rights establishes that the rights are considered important and are used by a substantial number of enlisted accused. For example, in the U.S. Army, general court-martial statistics reflect that in calendar year 1982, enlisted persons elected judge alone trials only 60.7% of the time. Enlisted accused selected officer courts in 306 cases or 18.6% of the time, and they selected enlisted-officer courts in 340 cases or 20.7% of the time. This shows that about four out of every ten accused did not want a judge alone court-martial. In special courts-martial empowered to adjudge bad-conduct discharges during the same period, military judge alone trials were used only 67% of the time—the figure rises slightly to 67.7% for non-BCD special courts-martial. In calendar year 1983, there was an increase in the Army in the use of judge alone trials, but 31.6% of the accused, or about three out of every ten, did not want judge alone general courts-martial. In 1983, only 76.1% of the accused selected judge alone trials in special courts-martial empowered to adjudge bad-conduct discharges. This means about one out of every four accused did not want a judge alone trial. In non-BCD special courts-martial, only 67.8% of the accused selected trial by military judge alone.

Air Force statistics show that in both 1982 and 1983, accused selected judge alone trials only 57% of the time when being tried by general court-martial (43% selected court members). In 1982, 39% of the Air Force accused selected special courts-martial with members, and 40% made the same election in trials by special court-martial in 1983. Navy statistics for fiscal year 1982 show that judge alone general courts-martial were selected only 67.3% of the time; however, the option was used 94.5% and 92.1% of the time in BCD and non-BCD special courts-martial, respectively.

In fiscal year 1983, Navy statistics show that general courts-martial were tried by judge alone only 72.6% of the time, or about one out of every four accused selected trial and sentencing by member courts. Judge alone cases dominated the Navy's statistics for fiscal year 1983 for BCD and non-BCD special courts-martial, where the rates of use were 91.7% and 91.46%, respectively. Considering the remote locations in which many Navy special courts-martial are conducted, the statutory limitation on the confinement authority of special courts-martial,[10] and the discretion vested in convening authorities to negotiate guilty plea agreements, it is not surprising that fewer accused elect trial by member courts in special courts-martial. It is significant that under these conditions, 9% to 40% of the accused, depending on the service, desire not to select the judge alone option. These statistics refute the impression conveyed by some witnesses before this Commission that the limited use of the trial by members option indicated that the option was unimportant to accused service members. The high

[5] Testimony of BG Richard G. Moore, USMC (Retired) at page 197. See Testimony of LTG Jack Galvin, USA, Commander, United States VII Corps, at page 174 (who, although opposed to abolishing a service member's option to select the sentencing authority mode, does not consider the option a "fundamental right"). See, generally, the results of this Commission's Questionnaires to Convening Authorities (Questions 54, 55), to Staff Judge Advocates (Questions 57, 58), to Military Judges (Questions 57, 58), to Court of Military Review Judges (Questions 56, 57), to Trial Counsel (Questions 55, 56), and to Defense Counsel (57, 58). Although these groups were divided in their response as to whether elimination of the option would "appear" to deprive accused personnel of a "substantial right," all groups except defense counsel were in substantial agreement that elimination of member sentencing would not, in fact, constitute a deprivation of a "substantial right." (In retrospect, the problem with these questions is that the term "substantial right" is not further defined. Is it a constitutionally vested right, a statutorily vested right, a right that should not be changed by law, a right of major significance, etc?)

[6] See Article 16, UCMJ (10 USC § 816), and Article 25, UCMJ (10 USC § 825).

[7] P.L. 80-759 ("Elston bill"), 62 Stat. 627, June 24, 1948.

[8] See pages 1140-1143, Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess., on H.R. 2498 (March 31, 1949).

[9] *Id.* at page 1146 (Mr. Smart: "an enlisted man is going to know that he *has the right* before he goes to trial to have enlisted persons on that court" (emphasis added)); *id.* at page 1147 (Mr. Brooks: "Your idea is . . . that *the right* is so important . . . that the accused should be required to sign the application to indicate that he is fully apprised of his *right?*" (emphasis added)); *id.* at page 1148 (Mr. Larkin: "this is at the option of the accused;" "it is his *right* to exercise it" (emphasis added)).

[10] Article 19, UCMJ (10 USC § 819). A special court-martial cannot adjudge confinement in excess of six months.

degree of importance which this option holds for accused is shown by the memorandum this Commission received from the Chief, U.S. Army Trial Defense Service (USATDS), Colonel Harold L. Miller.[11] In this memorandum, the Trial Defense Service Chief elected to officially comment on only two of the issues being studied by this Commission; sentencing by judge alone was one of these issues. The memorandum pertinently states:

> TDS opposes . . . mandatory judge alone sentencing in all non-capital cases. *The option* of requesting to be sentenced by a panel or by judge alone *is an important right* afforded the accused (emphasis added).

Another important basis for retaining the current sentencing system was raised by several senior commanders who testified before the Commission that judge alone sentencing would remove commanders one step further from the disciplinary system and that participation, albeit only when requested by an accused, was an important part of their command responsibility.[12,13] General Robert W. Sennewald believed that although a military judge might bring a fresh perspective to the sentencing procedure, there is "that responsibility that the commander has that the judge can never assume;" "that responsibility is unique for the military. . . . [T]hat's why the involvement must be there."[14]

Colonel William W. Crouch, Commander, 2d Armored Cavalry Regiment, VII Corps, U.S. Army, Europe, described the extreme importance of this responsibility as follows:

> [The line officer] is the man in my view that is responsible for the ethical and moral fiber, the end environment that a unit must live under, and when confronted with a live enemy I want that [officer] capable of rendering those judgments that ensure that fabric of society which [he or she] is protecting . . . remains as stable as it can be in the most chaotic circumstances.[15]

Through the continuous exercise of command responsibility and by setting the example, the military leader establishes the moral and professional tone for his unit. As observed by General Sennewald, USA, military justice is "an integral part of the command environment." Thus, the extent and quality of the leaders' participation in the military justice system becomes an important factor in the combat readiness equation of a unit. The perception of service members that their leaders participate throughout the entire court-martial process is believed to personalize the process, and to provide an immediate reenforcement to command authority.[16] General Sennewald describes the importance of the concept of command participation in the sentencing phase of a court-martial as follows:

> [I]t has to do with the soldier . . . committing an act, found guilty, and [being] sentenced by people who he sees and works with and deals with, being sentenced by the [command] chain, being sentenced by the institution as opposed to a judge alone who is . . . someone he can't identify with as well. . . . It's the relationship, essentially it's a senior group, well senior to him obviously, enlisted if he so desires, who are now being involved in controlling . . . that person's fate as opposed again to the judge [who] . . . does not have that same relationship.[17]

Lieutenant General Walter F. Ulmer, USA, Commander, III Corps, also places a very high value on officers and soldiers perceiving themselves as being a part of the entire judicial process.[18] He believes that their participation adds to a feeling of unity of command and that "there is in [a] large sense participation in responsibility when a member of a military court knows that he

[11] Memorandum for the Advisory Commission on the Military Justice Act of 1983, Subject: The Military Justice Act of 1983, dated 3 July 1984.

[12] Testimony of GEN Sennewald, USA, *supra,* note 2, at pages 275 and 277; Testimony of Col William W. Crouch, USA, Commander, 2d Armored Cavalry Regiment, VII Corps, U.S. Army, Europe at page 219; Testimony of LTG Coverdale, USAF, *supra* note 5, at page 308. See Testimony of LTG Walter F. Ulmer, Jr., USA, Commander, III Corps at pages 259–260, and 262. Cf. Testimony of COL D. M. Brahms, USMC, Staff Judge Advocate, Camp Pendleton Marine Corps Base at pages 319 and 325. See, generally, the results of this Commission's Questionnaires to Convening Authorities (Questions 58–61), to Staff Judge Advocates (Questions 59, 60), to Military Judges (Questions 62, 65), to Court of Military Review Judges (Questions 61–64), to Trial Counsel (Questions 57–62), and to Defense Counsel (Questions 59–64). These questions were designed to test whether depriving members of sentencing authority would deprive the command of authority or be perceived adversely by nonlawyer officers. The majority of all groups agreed that military judge alone sentencing would not deprive the command of important powers. But most convening authorities from the Army, Marine Corps, and Air Force, as well as the majority of Army staff judge advocates, believe that such a procedure would create the appearance that command authority had been diminished. The majority of all groups believed that adoption of this proposal would cause at least slight resentment among commanders, but all groups rejected the view that this resentment would cause military judges to render inappropriate sentences. Not surprisingly, convening authorities overwhelmingly rejected any philosophy that would favor reducing commanders' responsibilities and corresponding authority regarding military justice matters.

[13] See also Report of War Department Advisory Committee on Military Justice (Vanderbilt Report), 13 December 1946 at page 12, subparagraph III.C.3., which concluded shortly after World War II that the service of enlisted persons as court-martial members could serve another important function. "Qualified enlisted men should be eligible to serve as members of general and special courts-martial. . . . We realize that there is a sharp division of opinion on the subject. . . . We think, however, that some improvement of the morale of the enlisted men may follow from increasing their knowledge of the functioning of the Army system of justice, their confidence in its operation, *and their feeling of responsibility for the enforcement of Army discipline*" (emphasis added).

[14] Testimony of GEN Sennewald, USA, *supra* note 2, at page 277.

[15] Testimony of COL Crouch, USA, *supra* note 12, at page 219.

[16] See Testimony of GEN Sennewald, USA, *supra* note 2, at page 274; Testimony of LTG Coverdale, USAF, *supra* note 5, at pages 308 and 315. See also Testimony of Commodore Butterworth, USN, *supra* note 5, at pages 296 and 297.

[17] Testimony of GEN Sennewald, USA, *supra* note 2, at page 274. See also Testimony of BG Edwards, USMC (Retired), who, although favoring judge alone sentencing, also supports the commander's analysis of the importance of command participation, *supra* note 1, at pages 355 and 356.

[18] Testimony of LTG Ulmer, USA, *supra* note 12, at page 259.

or she may have to participate in the sentencing as well as in the . . . finding of guilty or not guilty." [19] Lieutenant General Ulmer believes that unit cohesion results from a leader's overall participation in organizational activities; whether it be supply economy, equal opportunity, tank gunnery, or military justice, participation creates "a greater feeling that he or she is part of the team." [20] Command participation in the military justice process reenforces both the leadership position and the disciplinary authority of the commissioned and noncommissioned officers of a unit and can foster a greater sense of unit cohesion. The extent to which this occurs is affected in no small measure by the perceptions service members have of the quality of their units and the professionalism and fairness of their leaders.

Most commanders recognize the psychological and sociological importance that perceptions play in influencing individual and group behavioral patterns. Thus, several senior officers have expressed concern as to whether service members' perceptions of fairness regarding the military justice system will be adversely affected by taking away their option to select the sentencing authority in general or special courts-martial. The potential impact of these perceptions probably played no small role in forming the basis of the belief of Colonel D. M. Brahms, USMC, Staff Judge Advocate, Camp Pendleton Marine Corps Base, that the reduction of the nonlawyer's role in the military justice system will adversely affect the line officer's disciplinary authority and influence. [21] Lieutenant General Coverdale, USAF, desires to retain the member sentencing option even if members are giving lighter sentences, in part because he believes the awareness which results from members' total participation "helps them, also . . . in their leadership role with their people." [22] Mr. Eugene R. Fidell, [23] who presented the American Civil Liberties Union's (ACLU's) position in opposition to mandatory sentencing by military judges, primarily based the ACLU's position on the perceptions of service members concerning the importance of their right to select their general or special court-martial sentencing authority. Mr. Fidell stated:

> [W]e would oppose any change in current law because many members of the armed services do believe that sentencing by the jury, if the accused so chooses, including the option for enlisted members is an important safeguard. We recognize that this is a departure from civilian federal practice, and the fact is, of course, that the ACLU's position is to prefer use of the civilian model to the extent practicable. . . . Nonetheless . . . we have concluded that the perception among persons subject to the code—enlisted persons which are the bulk of the affected class . . . is that this can be an important safeguard. . . . [24]

The views of the ACLU concerning the perceptions of soldiers are basically the same considerations which prompted the American Legion to support the enlisted court-martial member option when the Congress was holding its original hearings on the UCMJ. At that time, Brigadier General Franklin Riter, Commander of the Department of Utah, American Legion stated:

> If . . . the placement of enlisted [members] on courts is prompted by the desire to strengthen the courts in the eyes of both the public and the enlisted personnel, this change is justified, and it is upon this basis that the American Legion supports such change. The results will be watched with great interest, and it is hoped that such reform will give increased confidence in the military justice system. [25]

Lieutenant General James J. Lindsay, Commander, XVIII Airborne Corps, believes that service members want this sentencing option, and he agrees that their perceptions concerning the military justice system are "absolutely" important to overall morale. [26] Commodore R. M. Butterworth, USN, Commander, Submarine Group II, believes the "average modern sailor" appreciates the tradition of member-sentencing in courts-martial at the accused's option. [27] Lieutenant General Ulmer believes that only soldiers who get into trouble or have a friend in trouble think much about military justice—they are more concerned that their company commander is a fair person. [28] However, he also believes "there is some connotation of distrust in the judgment and responsibility and fairness of military court members if you were to exclude them from the sentencing process in all cases." [29] Captain Frederic G. Derocher, USN, Staff Judge Advocate, Commander Surface Force, Atlantic Fleet, who favors military judge only sentencing, counsels that it is "an extremely speculative area to try and assess the perception of the class of individuals [who become accused]." [30] Major General Robert C. Oaks, USAF,

[19] *Id.* at page 263.

[20] *Id.* at page 265.

[21] Testimony of COL Brahms, USMC, *supra* note 12, at page 319. Contra Testimony of BG Moore, USMC (Retired), *supra* note 5, at page 196.

[22] Testimony of LTG Coverdale, USAF, *supra* note 5, at page 315.

[23] Chairman of the Committee on Military and Veterans Rights of the District of Columbia Bar.

[24] Testimony of Mr. Fidell, *supra* note 23, at page 78.

[25] Statement of BG Franklin Riter, Commander of the Department of Utah, American Legion, Hearings before a Subcommittee of the Committee on Armed Services, U.S. Senate, 81st Cong., 1st Sess., on S. 857 and H.R. 4080, at page 183 (May 9, 1949).

[26] Testimony LTG James J. Lindsay, USA, Commander, XVIII Airborne Corps, at page 224.

[27] Testimony of Commodore Butterworth, USN, *supra* note 5, at page 298.

[28] Testimony of LTG Ulmer, USA, *supra* note 12, at page 260.

[29] *Id.* at page 259.

[30] Testimony of CAPT Frederic G. Derocher, USN, Staff Judge Advocate, Commander, Surface Force, Atlantic Fleet, at pages 301 and 302.

Chief, Personnel Plans, USAF (who is a command pilot with over 3000 hours flying time, mostly in fighter aircraft) believes that "the preservation of discipline within the armed forces" is the primary goal. [31] He concedes that discipline can be achieved either by judge or member court-martial sentencing, but stresses that:

> discipline is enhanced when the system imposing punishment is perceived as fair and . . . the perception of fairness is enhanced by our current system of having the individual have the option of either judge sentencing or court member sentencing. . . . [D]iscipline is enhanced in every instance when the individual perceives that the system is going to be fair to him. [32]

Major General Oaks concludes that elimination of the sentencing authority option would be "perceived as a degradation in the fairness of the military justice system," and could result in a weakening of discipline. [33]

Lieutenant General Jack Galvin, USA, Commander, VII Corps, stresses that:

> the principal purpose of [military justice] is the maintenance of discipline on the battlefield. No change which detracts from that purpose should be adopted. But another factor which we in uniform lose sight of is the fairness with which our military justice system is perceived by the civilian community. [34]

Lieutenant General Galvin's observations are quite accurate. In fact, Mr. Eugene Fidell, representing the ACLU, was quick to point out that the existence of the sentencing authority option is one of the factors the military has frequently cited as evidence that its criminal justice system is equal with or superior to the civilian criminal justice system. [35] Lieutenant General Robert F. Coverdale, Vice Commander-in-Chief, Military Aircraft Command, when discussing the public's perception of the option said:

> I hope that the perception would be that the military system is better than the civilian system—because we offer an individual not only a judge but also a court by members of his peers. [36]

The Army's Chief Trial Judge, Colonel James G. Garner, believes that more than a perception of fairness is generated by giving service members the sentencing authority option. He believes the option is, in fact, "fundamentally fair," that it works, and that we should keep it. [37] We believe that the perception created by a service member's exercise of the statutory right to select the sentencing authority is extremely important. The right is directly related to the maintenance of morale and military discipline. Further, the public's perception (including that of thousands of veterans who enjoyed this statutory right) of the military justice system is to some degree favorably influenced by this option and the other statutory rights which the Code paternalistically provides to the Americans in uniform.

Several senior officers testified that by participating in the sentencing phase of a court-martial, members both took from and gave to the military justice system something of value. Lieutenant General Galvin, USA, believes that "[t]he fundamental fairness which is a characteristic of the military justice system is instilled in court-members and they carry that concept with them from the courtroom." [38] It helps prepare them for "all kinds of leadership positions." [39] Additionally, most of the senior commanders who testified before this Commission believe very strongly that members could make a major contribution to the court-martial process by adjudging a just sentence for a convicted accused. Lieutenant General Coverdale, USAF, believes that:

> [i]n sentencing by court members there is reflected a broad based experience in all aspects of the military organization. This potentially brings to the court process another perspective that judges may not always have.
>
> In sum, it brings a mixture of experiences in the military community. *I believe this perspective is important* (emphasis added). [40]

These views are supported in the testimony of General Sennewald, USA, [41] Lieutenant General Ulmer, USA, [42] Vice Admiral Robert Dunn, USN, Commander, Naval Air Forces, US Atlantic Fleet, [43] Major General Oaks, USAF, [44] Lieutenant General Lindsay, USA ("I think a panel . . . take[s] into . . . account the standards of the unit . . ."), [45] and Colonel Crouch, USA.[46,47] Obviously, these views are shared by senior

[31] Testimony of MG Robert C. Oaks, Chief, Personnel Plans, USAF, at page 231.

[32] *Id.* at page 231.

[33] *Id.* at pages 229, 230, 234 and 235.

[34] Testimony of LTG Galvin, USA, *supra* note 5, at page 174.

[35] Testimony of Mr. Fidell, ACLU, *supra* note 23, at page 80.

[36] Testimony of LTG Coverdale, USAF, *supra* note 5, at page 311.

[37] Testimony of COL James G. Garner, Chief Trial Judge, U.S. Army Trial Judiciary, at page 117.

[38] Prepared statement of LTG Galvin, USA, *supra* note 5, at page 174. See, generally, Commission's Questionnaire to Convening Authorities (Questions 49–53). Convening authorities overwhelmingly believe that court-martial duty better prepares junior officers for leadership.

[39] Testimony of COL Crouch, USA, *supra* note 12, at page 220.

[40] Testimony of LTG Coverdale, USAF, *supra* note 5, at page 308. See also Letter of MG Donald W. Bennett, USAF, Commander, Twenty-Second Air Force (MAC), Travis Air Force Base, to COL Thomas L. Hemingway, dated 29 August 1984.

[41] Testimony of GEN Sennewald, USA, *supra* note 2, at page 269 ("I think [court-martial members] must represent the military community across the board.").

[42] Testimony of LTG Ulmer, USA, *supra* note 12, at page 259.

[43] Testimony of VADM Robert Dunn, USN, Commander, Naval AF, US Atlantic Fleet, at pages 242 and 243.

[44] Testimony of MG Oaks, USAF, *supra* note 31, at pages 231 and 233.

[45] Testimony of LTG Lindsay, USA, *supra* note 26, at pages 228 and 229.

[46] Testimony of COL Crouch, USA, *supra* note 12, at pages 215 and 220. See also Testimony of LTG Coverdale, USAF, *supra* note 5, at pages 314 and 315. Contra Testimony of BG William H.J. Tiernan, USMC (Retired), former Director, Judge Advocate Division, Headquarters, Marine Corps, at page 338.

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commanders from more than one service, as have been most of the views above discussed. However, certain witnesses (typically, military lawyers) stated either that court-martial members did not have a true sense of feeling for the needs of the military community or that the military judge had an equally good perspective of the disciplinary needs within a command. [48] Brigadier General Richard G. Moore, USMC (Retired), former Deputy Director of the Judge Advocate Division, Headquarters, Marine Corps, summarizes his viewpoint as follows:

> I do not feel that many members today [at a large installation] have any more understanding of the actual impact of the sentences on the [smaller] command of which the accused is a member than do military judges. . . .
>
> They do understand, however, what is going on on that [larger] base, that station and in many ways those officers have a better understanding than . . . military judges. . . . [E]ducate our military judges so that they have the understanding. . . . [I]n my opinion that education is . . . practical and feasible and necessary. [49]

However, Colonel James G. Garner, Chief Trial Judge, U.S. Army Trial Judiciary, expressed this view:

> We have a habit . . . of loosely referring to a court-martial panel as the jury. . . . [I]t is not a jury; [i]t was never designed to be a jury. . . . [I]t was designed to be a blue ribbon panel. They were to be picked because of their expertise and their knowledge. They wanted . . . the people who were mature; the people who knew how to make decisions; the people who were aware of the military requirements. . . . [T]hey represent the decision-making level of the Army. . . . [W]e teach them something about military justice; they know the situation in the Army. [50]

Although several witnesses have testified that, in their services, the best qualified officers were not selected for court-martial duty, numerous senior commanders testified that they carefully selected their courts. Considering the basic mental and physical qualifications required of commissioned officers, the high level of civilian education possessed by such officers, [51] and their undeniable general knowledge of the military profession, these officers clearly comprise a "blue ribbon" decision-making body when compared with civilian juries. We believe that court-martial members constitute a highly educated decision-making body that possesses a unique knowledge of the military community. This knowledge can add a different and important element to court-martial sentencing procedures. [52] In fact, Colonel Harold L. Miller,

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[47] See also Letter from Mr. David Court (a civilian lawyer practicing military law in the Federal Republic of Germany) to Chairman, Military Justice Act of 1983 Advisory Commission, dated 18 April 1984. Mr. Court favors a system in which an accused may exercise two separate options in selecting the findings and sentencing authority, judge or members, independent of each other. He notes that by using this system, "the 'conscience of the community' reflected by the sentence of a panel need not be lost."

[48] Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at page 344; Testimony of BG Moore, USMC (Retired), *supra* note 5, at page 197; Testimony of CAPT Derocher, USN, *supra* note 30, at pages 299 and 300; Testimony of COL Donald B. Strickland, Chief Trial Judge, USAF, at pages 134–136; Testimony of BG John R. DeBarr, USMC (Retired), former Director, Judge Advocate Division, Headquarters, Marine Corps, at page 158; Testimony of COL Earl E. Hodgson, Jr., Chief Judge, Air Force Court of Military Review, at pages 165 and 166; Testimony of CAPT Albert W. Eoff, II, Chief Judge, Navy/Marine Corps Court of Military Review, at page 247. See also Testimony of BG Edwards, USMC (Retired), *supra* note 1, at page 347.

[49] Testimony of BG Moore, USMC (Retired), supra note 5, at page 197. Compare Commission's Questionnaire to Convening Authorities (Questions 39–42), to Staff Judge Advocates (Questions 41–44), to Military Judges (Questions 43–47), to Court of Military Review Judges (Questions 45–48), to Trial Counsel (Questions 41–44), and to Defense Counsel (Questions 43–46). Most convening authorities believed that military judges were "slightly" or "somewhat" informed about local military events and problems. Lawyers and judges as a group believed that military judges were better informed regarding these matters than convening authorities did. The same basic pattern emerged regarding whether military judges were aware of the disciplinary impact of their sentences, with military judges giving themselves the highest group ratings. In contrast, 52.34% of the convening authorities questioned rated court-martial members as being "somewhat" or "greatly" aware of the disciplinary impact of their sentences. Lawyers generally agreed that court-martial members were aware of the disciplinary impact of their sentences, but military judges rated these court members somewhat lower. When asked whether sentences adjudged by judges or members more fairly reflected the sense of justice of the community, convening authorities and defense counsel (except Air Force and Coast Guard defense counsel) selected court members' sentences. All other groups (with military judges in the lead) selected military judges' sentences in response to this question.

[50] Testimony of COL Garner, USA, *supra* note 37, at pages 3 and 4. Reading of COL Garner's entire testimony is recommended, as he has conducted considerable research in the area of court-martial sentencing.

[51] For example, as of September 30, 1984, the civilian education level of company and field grade commissioned officers on active duty in the U.S. Army was as follows:

	H.S. Grad	*Bachelor's Degree*	*Master's Degree*	*Doctor's Degree*	*Total Degrees above Bachelor's*
2LT	100%	97.5%	2%	.02%	2%
1LT	for	average	5	.07	5
CPT	all	for all	14	.17	15
MAJ	grades	grades	54	0.7	55
LTC			73	1.3	74
COL			78	2.8	81
Force Average			28%	.49%	29%

Source: Education Branch, Plans, Programs and Analysis Division, Officer Personnel Management Directorate, MILPERCEN.

[52] See Testimony of Colonel Garner, Chief Trial Judge, USA, *supra* note 37, at pages 115–117; see also Testimony of LTG Ulmer, USA, *supra* note 12, at page 260 ("It's an extraordinarily important duty. Of course it gives credibility to the judicial part of the system. *I can't imagine someone saying that court members are picked because of who's available.* . . . I spend a great deal of time looking for balance, maturity. . . . I try to get a reasonable [mix] of other factors, experience and so forth on the courts. . . ." (Emphasis added.)); Testimony of COL Crouch, USA, *supra* note 12, at page 221. Compare Commission's Questionnaire to Convening Authorities (Questions 47, 48), to Staff Judge Advocates (Questions 51, 52), to Military Judges (Questions 53, 54), to Court of Military Review Judges (Questions 54, 55), to Trial Counsel (Questions 51, 52), and to Defense Counsel (Questions 53, 54). The majority of all groups believed that the "best qualified" personnel were "sometimes" or "usually" selected for court-martial

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Chief, Trial Defense Service, United States Army, stated his strong opposition to mandatory judge alone sentencing:

> Another important consideration is the military background of the panel members. They are selected from a cross section of the Military Community and are actively involved in the business of being soldiers. The panel members, unlike the judge, live or work in the barracks, and motorpools, train at the training sites, operate and maintain the tanks, jump from the airplanes, fire the weapons and supervise the troops. They are the experts in military community affairs and represent the voice of the community. Accordingly, they are often in a better position to determine an appropriate sentence and the effect of that sentence on the accused and the community. [53]

The Chief of the Army's Trial Defense Service also stated that prior to sentencing, when ruling on evidentiary matters, a military judge may become exposed to certain information that would not be admissible in sentencing. Although the military judge is presumed to ignore this type of information, such information is, in fact, hard or impossible to ignore. In such cases, "[s]entencing by the panel . . . eliminates the [possibility] of the sentence being improperly influenced." [54]

Some officers expressed the belief that the jury should retain full responsibility for the trial, including both findings and sentencing, so they more fully would grasp the seriousness of their duties. [55] As viewed by Lieutenant General Ulmer, USA:

> [I]f you know you're going to have to sit through the entire process and that you might very well be part of determining the sentence, I think you're going to be a bit more attentive and a bit more thoughtful about the whole operation. [56]

The Chief Trial Judge of the U.S. Army Trial Judiciary, Colonel Garner, offered yet another very important basis for the retention of the accused's court-martial sentencing authority option. He believes that court member sentences provide valuable feedback to the trial judge about the views and concerns of the military community, and that the best procedure is for the trial judge to tailor realistic and informative sentencing instructions that will properly educate and guide the court members in performing their responsibilities.

> I learn a lot about what they as representatives of the military community view as being serious or not serious. I like to see their sentences because it helps me in my sentencing process. What they do is input. . . . They tend to level what I do. I'd like to keep them there. . . . [T]hey continually remind us somewhat of what the community standard should be. [57]

We believe that if sentencing by military judge alone is adopted this very important source of feedback will be lost, and another bonding link between the military justice system and the command may be severely weakened. Moreover, having lost the feedback from the military community, military judge sentences may become more disparate as time passes and prior experience patterns are lost or become outdated.

B. Reasons For Judge Only Sentencing

The most common and authoritative argument advanced in the civilian community for sentencing by judges only is that judges, by virtue of their training, will render less disparate, more uniform sentences. [58]

This rationale was also advanced by those military witnesses who favored sentencing by military judges only. This view was ably expressed by Brigadier General Edwards, USMC (Retired), as follows:

> [T]he time has come to give the sentencing to the military judge. This will give us more consistent and enlightened sentencing tailored to the accused and to the offense, taking into consideration the interests of society. . . . This consistency in sentencing will assist the military justice system in maintaining the respect of the military society. [59]

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duty, although the lawyers who actually see the members in court (military judges, trial counsel, and defense counsel) tended to have a slightly lower opinion of members' qualifications than other groups. Convening authorities and staff judge advocates generally thought that members were "seldom" or "sometimes" selected for such duty based primarily upon their "relative expendability." The other groups believed that "relative expendability" played a slightly greater role in court member selection.

[53] Memorandum, *supra* note 11, at paragraph 3.

[54] *Id.* at paragraph 2.

[55] Testimony of COL Crouch, USA, *supra* note 12, at page 215.

[56] Testimony of LTG Ulmer, USA, *supra* note 12, at page 265. See also Testimony of BG Edwards, USMC (Retired), *supra* note 1, at pages 353 and 354.

[57] Testimony of COL Garner, USA, *supra* note 37, at page 117. See also Testimony of COL Hodgson, Chief Judge, Air Force Court of Military Review, *supra* note 48, at page 166.

[58] See, generally, Note, *Jury Sentencing in Virginia,* 53 Va. L. Rev. 968 (1967); LaFont, *Assessment of Punishment—A Judge or Jury Function?,* 38 Tex. L. Rev. 835 (1960). See also Kress, *Who Should Sentence: The Judge, The Legislature or . . . ?,* 17 Judges Journal 12 (1978); S. Rubin, Law of Criminal Correction, 145–51 (2d ed. 1973); ABA *Standards Relating to Sentencing Alternatives and Procedures,* § 1.1 (rev. ed. 1968). Compare Eckert and Ekstrand, *The Impact of Sentencing Reform: A Comparison of Judge and Jury Sentencing Systems* (June 1982) (unpublished manuscript, Arthur D. Little, Inc., Wash., D.C.); A. Partridge and W. Eldridge, *The Second Circuit Sentencing Study—A Report to the Judges of the Second Circuit* (Federal Judicial Center, August 1974). See also Note, *White-Collar* vs. *Street Crime Sentencing Disparity,* 21 Court Review, No. 3 (1984).

[59] Testimony of BG Edwards, USMC (Retired), *supra* note 1, at page 347. See Testimony of BG Moore, USMC (Retired), *supra* note 5, at page 195 (military judges' sentences are perhaps more equitable and stable). See also Letter of Rear Admiral John S. Jenkins, USN (Retired), former Judge Advocate General of the Navy, to Chairman, Military Justice Act of 1983 Advisory Commission, at page 2; Letter of Attorney Jack B. Zimmermann, a board certified criminal law specialist, to Chairman, Military Justice Act of 1983 Advisory Committee, at para. 1 (Mr. Zimmermann, however, favors the state of Texas' sentencing system); Testimony of BG DeBarr, USMC (Retired), *supra* note 48, at page 154; Testimony of Chief Judge Owen L. Cedarburg, Coast Guard Court of Military Review, at page 281 (Judge Cedarburg, however, opposes mandatory judge only sentencing); Testimony of

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Several witnesses also indicated that court-martial members adjudge more sentences which fall outside the normal range of sentence fluctuation. [60] Sentencing by the military judge only should reduce those sentences on "both ends of the spectrum." [61] However, several witnesses were not convinced that sentences by military judges would be more appropriate and consistent, [62] because military judges, when compared to each other, adjudge disparate sentences. [63] Moreover, uniformity of sentencing is not necessary to preserve confidence in the military justice system, as every case is different. [64] In fact, striviving for sentencing uniformity can conflict with our concept of individualized sentences. [65]

We believe that sentences adjudged by military judges would be relatively more uniform than those adjudged by court-martial members. However, substantial sentencing disparity would still exist, and judge alone sentencing might encourage a new set of strictures, including mandatory minimum sentencing, inflexible sentencing guidelines, or other corrective actions. [66] Moreover, the concept of individualized sentencing indirectly contributes to overall morale; service members are treated as individuals and not as just another part of the big "military machine." Treating service members as individuals fosters an atmosphere in which unit cohesion can flourish. On balance, the price to be paid for achieving a higher degree of sentence uniformity (with its potential problems) appears greater than the benefits inherent in such uniformity.

It has been asserted that adopting mandatory military judge alone sentencing would reduce the potential for an appearance of unlawful command influence in this phase of the proceedings. [67] This argument is not persuasive. Allegations of unlawful command influence can be leveled against trial judges as well as court members. [68] Further, as the accused can select either trial by military judge alone or trial by members, any perception that command influence permeates the sentencing process is greatly reduced, if not neutralized. No change in the court-martial process can completely protect every accused from a commander or senior military lawyer dedicated to the use of illegal command influence. The best protection against such individual acts of misconduct is prompt and proper disciplinary action against the miscreant, rather than overhauling an important portion of the military justice system.

It has been suggested that resort to mandatory military judge alone sentencing would curtail the so-called "compromised" court-martial results which occur when the members agree to convict the accused of some lesser offense based upon an expressed or tacit agreement to impose a sentence more severe than that normally anticipated for the offense of which the accused was convicted, or when certain members acquire the votes to convict the accused of the greater offense in exchange for an agreement promising a reduced sentence. [69] Chief

LTG Galvin, USA, *supra* note 5, at page 174 (LTG Galvin is opposed to mandatory sentencing by military judge only). See, generally, Commission's Questionnaire to Convening Authorities (Question 56), to Staff Judge Advocates (Question 62), to Military Judges (Question 60), to Court of Military Review Judges (Question 59), to Trial Counsel (Question 60), and to Defense Counsel (Question 62). All groups (except Navy/Marine Corps Court of Military Review judges, who split evenly) agreed overwhelmingly that military judge sentencing is more consistent in similar cases than is member sentencing.

[60] Testimony of BG Edwards, USMC (Retired), *supra* note 1, at page 349; Testimony of CAPT Eoff, USN, *supra* note 48, at page 254; Testimony of COL Hodgson, USAF, *supra* note 48, at pages 163 and 164; Testimony of BG Tiernan, USMC (Retired), *supra* note 48, at page 337; Testimony of CAPT Derocher, USN, *supra* note 30, at page 299; Testimony of MG Kenneth J. Hodson, USA (Retired), former The Judge Advocate General of the Army, and former Chief Judge, U.S. Army Court of Military Review, at page 90. See, generally, Commission's Questionnaire to Convening Authorities (Questions 43, 44, 46), to Staff Judge Advocates (Questions 45, 46, 50), to Military Judges (Questions 48, 49, 52), to Court of Military Review Judges (Questions 49, 50, & 53), to Trial Counsel (Questions 45, 46, 50), and to Defense Counsel (Questions 47, 48, 52). When asked in the questionnaire how often court-martial members' and military judges' sentences were inappropriately harsh or lenient, convening authorities generally rated members and judges about equally, except for Air Force convening authorities who believed that members gave inappropriate sentences more frequently than judges. All lawyer groups, particularly judges, believed that members gave inappropriate sentences more frequently than judges. (Defense counsel, however, came the closest among the lawyer groups to rating the members and judges as equal in this regard.) When asked directly whether members or judges could better adjudge appropriate sentences, most convening authorities favored the members; however, most lawyer groups favored the judges by a large margin.

[61] Testimony of COL Hodgson, USAF, *supra* note 48, at pages 163 and 164; Testimony of COL Strickland, USAF, *supra* note 48, at page 135 (however, balancing all factors, COL Strickland comes out 51 to 49 against mandatory military judge alone sentencing). See also Letter from Mr. David Court, civilian attorney (military law practitioner), *supra* note 47, at para 1.

[62] Testimony of Mr. Fidell, representing the ACLU, *supra* note 23, at page 81; Testimony of MG Oaks, USAF, *supra* note 31, at page 135; Testimony of BG Donald W. Hansen, USA, former Chief Judge, U. S. Army Court of Military Review, at pages 110 and 111.

[63] Testimony of BG Hansen, *supra* note 62, at pages 110–111; Testimony of MG Oaks, USAF, *supra* note 31, at page 230. See also Testimony of COL Strickland, USAF, *supra* note 48, at pages 135 and 144; Testimony of COL Garner, USA, *supra* note 37, at pages 115 and 116; Testimony of Chief Judge Cedarburg, *supra* note 59, at page 287–288; A. Partridge and W. Eldridge, *supra* note 58.

[64] Testimony of LTG Galvin, USA, *supra* note 5, at page 180; Testimony of COL Strickland, USAF, *supra* note 48, at page 144 ("[Y]ou don't need uniformity of sentences. Every case is a little bit different.").

[65] Testimony of COL Garner, USA *supra* note 37, at pages 115–116.

[66] *Id.* at pages 115–116.

[67] Testimony of MG Hodson, USA (Retired), *supra* note 60, at page 90.

[68] See, e.g., Testimony of Mr. Fidell, representing the ACLU, *supra* note 23, at pages 81–82.

[69] See Testimony of COL Hodgson, USAF, *supra* note 48, at pages 169 and 170. See, generally, Commission's Questionnaire to Staff Judge Advocates (Question 61), to Military Judges (Question 59), to Court of

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Judge Owen L. Cedarburg, USCG, who has had extensive Navy court-martial experience and is a former Chief Judge of the Navy/Marine Corps Court of Military Review, has "not seen many instances of what [he] considered to be a brokered verdict." [70] His viewpoint is corroborated by Colonel Crouch, USA. [71]

We find no persuasive evidence that compromise results occur on anything more than an infrequent basis. Moreover, there is no guarantee that, when placed in a similar situation, a particular military judge might not reach such a mental compromise.

It has been suggested that the statutory right of service members to select the sentencing authority supports a practice which is equivalent to forum shopping. One witness testified that the option gives service members "too much leverage" and constitutes one of the "weaknesses" of the military justice system, especially at the special court-martial level. [72] However, numerous witnesses indicated that this statutory right is being exercised in a mature, informed, and meaningful manner. [73] We are convinced that the option is not being exercised on a mere "gamble" but is, rather, being carefully exercised, normally based on sound legal advice given by a defense counsel in order to maximize the effectiveness of the selected trial strategy. Accordingly, to the extent that the charge of forum shopping implies some unethical or improper motive on the part of a service member who exercises a given option, we reject this view.

It has been suggested that the military justice system be revised to require mandatory judge alone sentencing because this is the procedure supported by the American Bar Association and followed by most states. [74] However, it has also been suggested that in accordance with the 1974 recommendation of the ABA's Standing Committee on Military Law, the Commission recommend that the accused be given the right to select sentencing by judge alone, even in a case in which the service member has been convicted by court-martial members. [75] While we respect the various views of the American Bar Association, its organs, and its members, these views do not alone justify either the forfeiture or the expansion of the existing right of a service member to select the sentencing authority. [76]

It also was suggested that military judge alone sentencing would reduce both the number of legal errors committed during trial and the amount of court-martial processing time. [77] The result of this type of change can, however, be very unpredictable. For example, if judge alone sentencing ultimately leads to the use of the civilian-type presentencing reports, [78] both manpower costs and court-martial processing time could increase significantly. If more service members elect trial by court members and contest the merits of their cases because of judge only sentencing, both court-martial processing costs and case processing time could rise dramatically. Moreover, even if these reasonably anticipated new costs and processing time increases do not arise to off-set any anticipated reductions in resource expenditure, the benefits to be gained will be minimal. As most sentencing proceedings currently last only a few hours, minimal

Military Review Judges (Question 58), to Trial Counsel (Question 59), and to Defense Counsel (Question 61). The lawyer groups were asked whether doubts as to guilt among members ever resulted in compromises on sentencing. All groups indicated that compromises "sometimes" occur.

[70] Testimony of Chief Judge Cedarburg, *supra* note 59, at page 287.

[71] Testimony of COL Crouch, USA, *supra* note 12, at page 220.

[72] Testimony of BG Tiernan, USMC (Retired), *supra* note 48, at page 337.

[73] Testimony of LTG Galvin, USA, *supra* note 5, at pages 174–175; Testimony of CDR Berry, USCG, *supra* note 4, at page 329; Testimony of Chief Judge Cedarburg, *supra* note 59, at page 281. See also Testimony of CAPT Eoff, USN, *supra* note 48, at page 255.

[74] Testimony of MG Hodson, USA (Retired), *supra* note 60, at pages 89 and 90, citing para 1.1, ABA *Standards Relating to Sentencing Alternatives and Procedures,* (Sep. 1968 Rev. ed.); Letter from Judge Tim Murphy to Chairman, Military Justice Act of 1983 Advisory Commission, dated 4 May 1984. But see Testimony of BG Moore, USMC (Retired), *supra* note 5, at page 86.

[75] Letter from Chief Judge Robinson O. Everett, U.S. Court of Military Appeals, to Chairperson, Military Justice Act of 1983 Study Commission, dated 23 August 1984. See also Testimony of CDR Berry, USCG, *supra* note 4, at page 9 (favoring a full option). But see Commission's Questionnaire to Convening Authorities (Question 67), to Staff Judge Advocates (Question 69), to Military Judges (Questions 70), to Court of Military Review Judges (Question 69), to Trial Counsel (Question 67), and to Defense Counsel (Question 76). In a related question, all groups soundly rejected a modification of the mandatory judge only sentencing which would allow the military judge the discretion to return the case to the members for sentencing where members had decided the findings.

[76] Chief Judge Everett acknowledges that this proposed expansion of a service member's sentencing options may decrease the number of military judge alone courts-martial. Such a derivative result would increase court-martial costs and delay case processing in direct relation to the frequency with which the new option were exercised rather than judge alone trial. These adverse side-effects could outweigh the value of the option and would require a careful cost-benefit analysis prior to implementation. Further, it is anticipated that those witnesses who believe the service member's current sentencing authority option fosters forum shopping would probably level a similar charge against any attempt further to increase the number of options available to service members. See Commission's Questionnaire to Defense Counsel (Question 72). About 50% of the defense counsel believed that adoption of judge alone sentencing would have no significant effect on the accused's decision to request trial by military judge alone, although a strong 41% of the defense counsel (45% of the Air Force's defense counsel) responded that the proposal's adoption would cause a decrease in requests for judge alone trials. This is significant support for the conclusion that fewer judge alone trials will occur if the proposal is adopted.

[77] Testimony of BG DeBarr, USMC (Retired), *supra* note 48, at page 154. Cf. Testimony of BG Tiernan, USMC (Retired), *supra* note 48, at page 340.

[78] See, e.g., Letter of Judge Tim Murphy, *supra* note 74, at page 2 ("It goes without saying, certainly in any BCD case, that *a Presentence Report is indispensable. . . .*"). Compare Testimony of BG Moore, USMC (Retired), *supra* note 5, at page 198 ("The military society does not have the 'luxury' to prepare full presentencing reports.").

manpower costs will be saved by removing court members from the sentencing process. Further, as few complex legal issues are addressed during sentencing, a minimal number of legal errors would be prevented by military judge only sentencing. Finally, most sentencing errors, even when prejudicial in nature, can be cured by sentence reassessment by the Court of Military Review. [79]

During hearings, it was suggested that military judge only sentencing could relieve busy commanders of the burden of using line officer assets for this purpose, especially during wartime. However, several senior commanders expressed their desire to retain all their current court-martial responsibilities, even during wartime. [80] It is questionable whether military judge only sentencing would, by itself, relieve commanders of substantial administrative burdens—burdens which most commanders seem willing to shoulder as an inherent part of their command responsibility. Court members would inevitably be required to determine guilt or innocence when the accused declined a judge alone trial on the merits, and any movement to modify this right would face serious constitutional and military due process challenges. As members must be provided upon request, a commander would reap little relief from administrative burdens merely because a member is excused from the normally shorter sentencing phase. Of course, if the option were adopted, a member could no longer plead guilty and elect member sentencing, but this savings might be more than off-set by a significant increase in the number of contested courts-martial. As previously noted, some witnesses before this Commission and 41% of all defense counsel forsee an increase in the number of contested cases if mandatory military judge only sentencing is adopted.

Some witnesses have indicated that, because a service member can elect to be sentenced by court members, military judges feel compelled to give more lenient sentences than appropriate to provide a continued incentive for judge alone trials. [81] However, Chief Judge Cedarburg, USCG, viewed the situation as follows:

> I know that there are judges who hammer and there are other judges who are lenient; but I also know that the hammers under the present system don't get a chance to sentence because they don't go before them. They choose the trial by members. [82]

The Army's Chief Trial Judge, Colonel James G. Garner, doubted that the procedure of giving low sentences to encourage more judge alone trials occurred very often. [83] His views are supported by Lieutenant General Ulmer, USA, who believes that if such manipulation exists "that still might be a reasonable price for the flexibility" that the system now enjoys. [84]

We believe that while some military judges may occasionally lower sentences to encourage judge alone trials, judges can be trusted (as can court members) to make an honest effort to fulfill their responsibilities in a lawful manner. [85] We also believe, after reviewing all available statistics, that any such tempering of sentences by military judges has not adversely affected the military justice system. Moreover, as stated by Major General Oaks, USAF:

> [The sentencing authority] option in fact makes the judge's decision . . . more fair, because he knows he's being played off. If I know that I'm always going to sentence . . . there is a possibility that I would be less attentive to my responsibilities. . . . It's competition. . . . I just know . . . [it's] good for [judges] to realize [they don't] have absolute power all the time. [86]

We also agree with the views of Major General Oaks that:

> [I]f this dynamic [of adjudging a low sentence to encourage more judge alone trials] . . . has driven sentences down to where . . . the sentences are no longer appropriate for the crime . . . then we have another problem. . . . [*T*]*o to take away that option* [sentencing authority selection] *of the individual because the system can't face up to its responsibilities for fair and appropriate punishment, I'm not sure that's the way to get at the problem* [87] (emphasis added). [88]

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[79] See Testimony of BG Moore, USMC (Retired), *supra* note 5, at page 195.

[80] See Testimony of LTG Ulmer, USA, *supra* note 12, at pages 260–261. See also Testimony of GEN Sennewald, USA, *supra* note 2, at pages 270–271.

[81] Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at page 337; Testimony of BG Edwards, USMC (Retired), *supra* note 1, at pages 357–358. See also Testimony of BG Hansen, USA, *supra* note 62, at pages 111–112. See, generally, Commission's Questionnaire to Staff Judge Advocates (Question 47), to Military Judges (Question 50), to Court of Military Review Judges (Question 51), to Trial Counsel (Question 47), and to Defense Counsel (Question 49). There appears to be a common perception among lawyers that military judges are influenced not to exceed the sentences adjudged by members in similar cases so as not to discourage requests for military judge alone trials. One question tested this perception among lawyers by asking whether judges moderate their sentences for this reason. All groups except for Army and Air Force Court of Military Review judges and Marine Corps staff judge advocates agreed that they do. Unfortunately, convening authorities were not asked for their opinions about this issue.

[82] Testimony of Chief Judge Cedarburg, USCG, *supra* note 59, at pages 287–288.

[83] Testimony of COL Garner, USA, *supra* note 37, at page 118.

[84] Testimony of LTG Ulmer, USA, *supra* note 12, at page 263.

[85] However, the ACLU considers retention of the sentencing authority option an important safeguard against "possible undue influence" on judges and members. Testimony of Mr. Fidell, *supra* note 23, at page 82.

[86] Testimony of MG Oaks, USAF, *supra* note 31, at page 231.

[87] *Id.* at pages 234–235.

[88] In fact, the lengths of sentences to confinement of prisoners at the United States Disciplinary Barracks has been increasing dramatically over the last few years. For example, the average sentence for drug offenses in March 1980 was one year, nine months. By August 1984 it had risen to four years, six months. Similar increases are seen in all categories of offenses.

Some witnesses informed the Commission their personal observations indicated that court-martial members do not appropriately perform their sentencing duties in certain types of cases. Specifically, some witnesses cited examples of cases in which they believed the accused was acquitted by members when conviction was appropriate, and others recounted cases in which the accused's punishment was, in their opinion, too lenient. [89] One witness indicated that he did not believe line officers could be trusted in a combat scenario to judge the combat offenses of other soldiers. [90] However, this witness and others readily acknowledged that court members make an honest effort to follow their oaths of office. [91] Another witness believed that such deviations occur "very, very infrequently." [92] Moreover, judges have also been observed to impose sentences perceived as too lenient. [93] As Chief Judge Cedarburg stated, both judges and court-martial members engage in "brokered" decision-making in very limited circumstances. He doubts that this result can be avoided merely "by adopting . . . military judge alone sentencing," as he has also seen "disparate sentences which are handed down by judges." [94] The undersigned are aware of certain combat and other emotionally charged cases which, when measured subjectively, could be perceived as having lenient results. These cases include both judge and member decision-making, and are offset by many cases which, when subjectively viewed, yielded harsher results. In fact, court-martial members have rendered harsh decisions in combat related cases which resulted in subsequent clemency. [95] On balance, however, these emotionally charged cases, in those few instances in which inappropriate leniency does occur, do not warrant the stripping of a valuable option from service members.

It is recognized that military judges are professional sentencers who are better qualified by reason of education, training, experience, and knowledge to adjudge appropriate sentences. [96] Numerous witnesses indicated that military judges are aware of the needs of the military community [97] and of the collateral consequences of their sentences. [98] However, in order to sentence professionally, military judges must receive continuing education and training. [99] Obviously, a trained military judge should be more aware of the collateral consequences of sentences than a court-martial member. However, as previously discussed, we believe that in certain cases court members are in a better position to sentence in accordance with the needs of the military community and the offender. For example, while military judges may be more aware of the types of sentences imposed by other courts-martial, the court-martial members are more aware of the classes of offenses being handled by nonjudicial punishment and nonpunitive measures. Thus, members may be aware of dozens of similar cases that have been disposed of without resort to courts-martial, while a judge is aware of the results of but a few similar cases brought to trial. Court members may not have the legal acumen of a military judge, nor should they be expected to be equally trained in the law. However, they are superior to a civilian jury [100] and are competent to adjudge appropriate sentences. [101] Several witnesses recognized this fact and believed that any problem with court member sentences could be minimized, if not neutralized, by giving more detailed sentencing instruc-

[89] Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at pages 345–346; Testimony of BG Edwards, USMC (Retired), *supra* note 1, at pages 350–351. See also Testimony of Colonel Hodgson, USAF, *supra* note 48, at page 166. If members are too lenient in sentencing, adoption of this proposal certainly would subject service members to harsher punishments from judges.

[90] Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at page 346.

[91] *Id.* at page 346; Testimony of BG Edwards, USMC (Retired), *supra* note 1, at page 353. See also Testimony of BG DeBarr, USMC (Retired), *supra* note 48, at page 159; Testimony of Chief Judge Cederburg, *supra* note 59, at page 292; Testimony of LTG Coverdale, USAF, *supra* note 5, at page 314 (LTG Coverdale was not personally aware of any cases in which court-martial members announced sentences which showed a clear disregard for the value of human life.).

[92] Testimony of Chief Judge Cedarburg, USCG, *supra* note 59, at page 292.

[93] *Id.* at pages 287–288. See also Testimony of COL Strickland, USAF, *supra* note 48, at page 135; Testimony of LTG Ulmer, USA, *supra* note 12, at page 260; Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at page 346.

[94] Testimony of Chief Judge Cedarburg, USCG, *supra* note 59, at pages 287–288.

[95] See, e.g., Chicago Daily News, page 1, Friday, April 2, 1971 (Nixon orders Calley free from jail pending review, acting as angry pleas flood the White House.).

[96] Testimony of COL Strickland, USAF, *supra* note 48, at pages 134–136; Testimony of COL Hodgson, USAF, *supra* note 48, at page 164; Testimony of BG DeBarr, USMC (Retired), *supra* note 48, at page 154; Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at page 346; Testimony of BG Edwards, USMC (Retired), *supra* note 1, at pages 347, 350–351. See also Testimony of Commander Berry, USCG, *supra* note 4, at page 330.

[97] Testimony of COL Strickland, USAF, *supra* note 48, at page 135; Testimony of COL Hodgson, USAF, *supra* note 48, at pages 165–166.

[98] Testimony of COL Strickland, USAF, *supra* note 48, at page 135. See also Testimony of COL Garner, USA, *supra* note 37, at page 117. See, generally, Commission's Questionnaire to Convening Authorities (Question 45), to Staff Judge Advocates (Question 49), to Military Judges (Question 51), to Court of Military Review Judges (Question 52), to Trial Counsel (Question 49), and to Defense Counsel (Question 51). Respondents were asked which sentencing authority had the most knowledge of the ramifications of sentences imposed and were given choices of "officer panels," "officer and enlisted panels," "military judges," and "all equally qualified." While all lawyer groups overwhelmingly selected "military judges," convening authorities (except Air Force convening authorities, who also selected "military judges") narrowly selected "officer and enlisted" panels over the other choices and chose "military judges" slightly less frequently.

[99] Testimony of BG Moore, USMC (Retired), *supra* note 5, at pages 194–195 (Military judges possess more expertise in sentencing only when they are properly selected and trained.).

[100] Testimony of COL Garner, USA, *supra* note 37, at pages 115–117.

[101] Testimony of CDR Berry, USCG, *supra* note 4, at page 330.

tions.[102] The undersigned believe that most court members have the intelligence and basic ability to adjudge appropriate sentences when properly instructed as to the applicable law and procedures. Thus, the superior legal knowledge of the military judge should not alone be dispositive of this complex issue.

It became apparent during the course of the hearing that the concern of many who favored judge only sentencing was the perception that court-martial members adjudge sentences which are too lenient, undermining military discipline.[103] Captain Albert W. Eoff, Chief Judge, Navy/Marine Corps Court of Military Review, believes "sentences as a rule are very light now. . . . I don't think under the present system the government gets a fair shake on sentencing before members. . . . I think that members, since they don't know what a good sentence is for an accused . . . tend to go light."[104] He believes that before 1969 (the year in which the main provisions of the Military Justice Act of 1968 took effect), members were "much more knowledgeable" and maximum sentences were "more prevalent" in special courts-martial empowered to adjudge bad conduct discharges.[105]

It appears that these witnesses are convinced that adopting mandatory sentencing by military judges will uniformly increase adjudged sentences and that this result will, in turn, best aid the maintenance of military discipline. However, these views are not shared by most senior commanders who testified before the Commission, none of whom believed that the sentences of court members were generally unacceptable or that they were substantially lower than those of military judges.[106] Lieutenant General Ulmer, USA, presented his view:

> [E]verything else being equal, I might trust [the court members'] judgment in terms of the appropriateness of the sentence a bit more than I would a judge alone. . . .[107]

Moreover, Lieutenant General Ulmer believes that, overall, "the quality of justice" which a service member now receives "is probably higher than that of his civilian counterpart by a significant order of magnitude."[108] Evaluation of the available statistics given the Commission does not reveal any absurd sentencing practices by judges or members; however, it is clear from the testimony before the Commission that occasionally inappropriate sentences are adjudged. Nonetheless, the Army's court-martial statistics for calendar years 1982 and 1983 do not support a finding that sentences by court-martial members are unacceptably low,[109] although members generally do impose sentences slightly less severe than military judges. For example, the Army tried 1783 general courts-martial in 1983. Judge alone trials were conducted 68.4% of the time. Judges convicted in 94.9% of their cases (however, we do not know what percentage of these cases were guilty pleas). Officer panels in general courts-martial convicted in 86.6% of their cases, compared to a conviction rate of 82.4% for officer-enlisted court-martial panels. Punitive discharges were adjudged by military judges in 95.2% of the cases in which there was a conviction, compared with an 82.8% discharge rate for officer panels and an 82.3% discharge rate for officer-enlisted member panels. Following conviction, confinement was adjudged 96.8% of the time by military judges, 80.7% by officer-enlisted courts, and 84.5% by officer courts. The imposition of reduction in grade, forfeitures, and fines follows the same basic pattern. In special courts-martial empowered to adjudge bad conduct discharges, similar but more pronounced patterns emerge. Conviction rates were 95.6% for trials by military judges, 82.0% for officer-enlisted panels, and 86.3% for officer panels. Military judges imposed bad conduct discharges in 78.1% of the cases in which convictions resulted, compared with 56.8% for officer-enlisted panels and 58.6% for officer panels.

An analysis of Air Force statistics from 1977 through 1983 establishes that "there is virtually no difference in severity of sentences between courts-martial composed of judge alone and those having members," and that the general trend in the Air Force for all courts-martial over the past four years "has been to stiffer sentences." Thus, the reports from the Air Force and the Army do not support the testimony of those who claim that low sentences by courts-martial are detrimental to the disciplinary posture of the Armed Forces. The Navy and

[102] Testimony of COL Garner, USA, *supra* note 37, at page 117; Testimony of COL Strickland, USAF, *supra* note 48, at page 138. Cf. Testimony of MG Oaks, USAF, *supra* note 31, at pages 234–235; Testimony of BG Moore, USMC (Retired), *supra* note 5, at pages 197, 198 (BG Moore favors judge only sentencing); Testimony of BG DeBarr, USMC (Retired), *supra* note 48, at page 159 (BG DeBarr favors judge only sentencing); Testimony of CAPT Derocher, *supra* note 30, at page 302 (He favors judge only sentencing, but concedes that "any change which increases the amount of information going to the sentencing authority . . . is all to the good.").

[103] Testimony of BG Edwards, USMC (Retired), *supra* note 1, at pages 349; 354; Testimony of CAPT Derocher, USN, *supra* note 30, at 299–300, 302 ("[I]t's [that] significant number of lenient sentences that . . . I find disturbing."); Testimony of BG Tiernan, USMC (Retired), *supra* note 46, at pages 344, 346.

[104] Testimony of CAPT Eoff, USN, *supra* note 48, at page 254. Note: Most of the witnesses before the Commission acknowledged that the occasional high sentence could be spotted and corrected within the system.

[105] *Id.* at 251.

[106] Testimony of Commodore Butterworth, USN, *supra* note 5, at pages 293–294; Testimony of LTG Coverdale, USAF, *supra* note 5, at pages 311, 314; Testimony of LTG Lindsay, USA, *supra* note 26, at page 225; Testimony of COL Crouch, USA, *supra* note 12, at page 220; Testimony of MG Oaks, USAF, *supra* note 31, at pages 236. See also Testimony of VADM Dunn, USN, *supra* note 43, at pages 243, 244; Testimony of LTG Ulmer, USA, *supra* note 12, at page 259.

[107] Testimony of LTG Ulmer, USA, *supra* note 12, at page 260.

[108] *Id.* at page 266.

[109] Court-martial statistics from the services are included in Chapter 4 of the Commission's report.

Marine Corps have not provided statistics to the Commission from which comparisons can be made between reported sentences by judges alone and by members. It is not surprising that, in the Army, court members adjudge lower sentences, especially in special courts-martial. Many witnesses who appeared before this Commission (nonlawyers and lawyers) acknowledged that an accused normally exercises the sentencing options in a mature, informed manner and on advice of the defense counsel. It would be expected that member courts would be requested in factually contested cases, cases with a sympathetic accused, cases with unique extenuation or mitigation, and other "compassionate" cases. In such cases, if justice is being tempered by mercy, somewhat lower sentences would be anticipated. But do court members' inclinations to be merciful undermine discipline? Some witnesses before this commission believe so. Others, as previously cited, believe the value of occasional command participation in the sentencing process is far more important. Major General Oaks, USAF, analyzed the issue at its base level. He said:

> I guess we have to say what is our goal? Is our goal tough sentences? Is our goal fair sentences? [110]

Lieutenant General Coverdale, USAF, believes that continued command participation in the military justice system is so important that he would accept lesser sentences if necessary to maintain the *status quo.* [111] This is not a unique point of view. Numerous senior officers believe that continued command participation in the sentencing phase of courts-martial and the perceptions of service members concerning the overall fairness of the military justice system are important factors in the molding of cohesive, combat ready organizations. We agree. Severe sentences are not always fair sentences, and when sentences consistently are too severe, service members' respect for the law and their support of the organization's disciplinary system will dissipate. Clearly, there are times when the heinous nature of the crime, the offender's past record of criminal misconduct, the existence of substantial aggravating circumstances, or the presence of other unique military factors (for example, offenses against national security) may alone or in combination warrant the imposition of a serious penalty. However, in the long-term, it is the military leadership's support for and operation of a fundamentally fair system of military justice that will effectively promote a command atmosphere in which morale, good order, discipline, and justice can co-exist and flourish. Every senior commander asked by the Commission stated that if he were ever subjected to court-martial, he would want the option to choose between judge or member sentencing. [112] In fact, Major General Oaks, USAF, suggested that the proper test to employ in resolving this issue is whether the individual questioned would want the right to choose the sentencing forum. [113] We too would want that right.

V. Military Confinement Costs and Resources

If conversion to military judge only sentencing would result in a uniform increase in adjudged sentences, as contended by some witnesses before this Commission, the impact this would have on military confinement facilities must be considered.

For example, in January 1981, the Office of the Deputy Chief of Staff for Personnel (DAPE-HRE), Headquarters, Department of the Army, dispatched message P291700Z Jan 81 to major Army commands. That message modified prisoner transfer criteria because the rising prisoner population was taxing the existing facilities and the prison cadre at the United States Disciplinary Barracks (USDB) and the United States Army Retraining Brigade (now redesignated as the United States Army Correctional Activity to reflect its modified confinement mission). The message noted that the prisoner "crunch" necessitated "extreme, immediate, but temporary, measures." An example of those subsequent measures was the announcement of a 90-day administrative "drop" of confinement time for prisoners at the USDB. By slowly increasing local confinement capabilities and by amending prisoner transfer criteria, the situation was stabilized and the "drop" was phased out. However, any major upward shift in the length of prisoner sentences could result in a new prisoner "crunch", and new administrative control measures would be required to keep the prisoner population stabilized.

The maximum operating capacity of the USDB is 1500 prisoners (assuming a perfect prisoner distribution as to sex and custody level). It must also be considered that it costs the American taxpayer about $4400 per year to confine and rehabilitate a prisoner at the USDB. Unless prisoners' sentences were to increase by at least one year per prisoner as a result of adopting the judge only sentencing proposal, the general deterrent benefit would be rather insignificant in its impact on military discipline. Assuming a moderate one year per prisoner increase, operating costs at the USDB would rise by ap-

[110] Testimony of MG Oaks, USAF, *supra* note 31, at page 234.

[111] Testimony of LTG Coverdale, USAF, *supra* note 5, at pages 314–315.

[112] Testimony of VADM Dunn, USN, *supra* note 43, at page 243; Testimony of GEN Sennewald, USA, *supra* note 2, at page 276; Testimony of LTG Coverdale, USAF, *supra* note 5, at page 315; Testimony of MG Oaks, USAF, *supra* note 31, at page 236. See also Testimony of LTG Lindsay, USA, *supra* note 26, at page 223 ("I just feel that . . . option should be there. . . ."); Testimony of Commodore Butterworth, USN, *supra* note 5, at page 293 ("[T]hat's an option that should be retained."); Testimony of LTG Ulmer, USA, *supra* note 13, at page 263 (soldiers should have this option).

[113] Testimony of MG Oaks, USAF, *supra* note 31, at page 236.

proximately six and one-half million dollars per year over the next three year period. [114]

The average length of sentences soon may rise without the adoption of judge only sentencing. The Manual for Courts-Martial, United States, 1984, has made major changes in military sentencing procedures. First, the new Manual lists many additional specifications for violations of the general article, Article 134, UCMJ, and prescribes maximum permissible punishments for these specifications. Further, the new Manual has modified several of the old punishments to more closely conform to the punishments prescribed for similar Federal offenses. Most of these maximum limits were adjusted upward. In the area of drug distribution alone, major increases in adjudged and approved punishments of drug dealers have occurred since the maximum permissible confinement level (excluding acceleration clauses) was raised from 5 to 15 years. Further, based on recent case law trends, the 1984 Manual provides detailed guidance designed to facilitate the introduction of more information in aggravation during the sentencing procedure. For example, the new Manual authorizes certain victim impact information and enables the chain of command to testify in greater detail concerning a service member's rehabilitation potential (or lack thereof). The effects of these changes should be analyzed before significant new measures are introduced into the military's sentencing procedure. [115] As Lieutenant General Lindsay, USA, observed, the Code right now "is finely balanced and I don't think we ought to change it just for the sake of appearances." Time may reveal that no further procedural changes should be made; or, perhaps, the modification of the sentencing instructions to the members will suffice to correct any deficiencies. [116] Certainly, a therapeutic massage, if effective, would seem preferrable to radical surgery.

VI. Conclusions and Recommendations

After carefully balancing all the factors for and against sentencing by military judges only, it is our view that the amendment to the Uniform Code of Military Justice should not be made. As Major General Oaks, USAF, so cogently stated:

> We must insure that any revision to the current system does not hinder the military commander in maintaining good order and standards of discipline . . . nor can we permit any infringement upon the rights of an accused military member. [117]

The adoption of mandatory judge alone sentencing would violate both of these tenets. The two groups of service members with the greatest direct interest in this issue reject the proposal. Commanders, who are responsible for justice and discipline, oppose it. Defense counsel, who presumably represent the interests of potential accused, have registered their opposition to it through their questionnaire responses. [118] The only way judge only sentencing can be adopted is to denigrate service members' existing statutory rights. Moreover, as above discussed, the perception of command participation throughout the entire military justice process is an important factor in molding unit cohesion. As recognized by Lieutenant General Galvin, USA:

> There is a need in the military that doesn't exist at the college and that is a need for cohesion. . . . [T]ime after time we've been told by scientists and by soldiers and by everybody that soldiers risk death in combat for their buddies. So *anything that steps between that cohesion that soldiers feel for each other at the lowest levels is very dangerous to the completion of military missions.* It's a threat we have to be careful of. [119]

It is this concern that has prompted many senior officers to admonish this Commission, regarding military sentencing procedures, "If it's not broke, don't fix it." We find nothing so broken that it needs to be "fixed", and strongly recommend against mandatory judge only sentencing. However, it is recommended that the Code Committee task the Joint Service Committee on Military Justice to study court-martial sentencing instructions with a view toward initiating any changes determined necessary to make sentencing instructions more meaningful to the court members while preserving the accused's due process rights. This "fine tuning" would be an appropriate method of resolving this matter while protecting service members' existing rights.

In resolving this issue and the other important issues pending before the Commission, we cannot lose sight of the importance of the military justice system to the commander or of the reason why the military leadership must remain inextricably bound to this system. As so succinctly stated by Colonel William W. Crouch, USA, Commander, 2d Armored Cavalry Regiment, VII Corps, U.S. Army Europe:

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[114] The USDB estimates that it costs $40 per day per prisoner to meet operating costs and staff salaries. If staff salaries are deducted, the cost is $12 per day per prisoner. Since salaries are relatively fixed over minor fluctuations in prisoner populations, the figure of six and one-half million dollars represents $12 × 365 days × 1500 prisoners, the most conservative figure possible. In reality, the USDB is at near capacity. Therefore, any significant increase in population would require new facilities. The Federal Bureau of Prisons estimates that it costs twenty-six million dollars to build a 400-prisoner facility. Of course, the new facility then incurs operating costs.

[115] In fact, the lengths of sentences of prisoners at the USDB rose sharply even before the MCM, 1984, went into effect. See note 89, *supra.*

[116] See Testimony of COL Garner, USA, *supra* note 37, at page 117.

[117] Testimony of MG Oaks, USAF, *supra* note 31, at pages 229–230.

[118] The ACLU, likewise representing indirectly the interests of accused service members, also opposes mandatory judge alone sentencing. See note 23 and accompanying text.

[119] Testimony of LTG Galvin, USA, *supra* note 5, at page 184 (emphasis added).

> Military justice system during time of war . . . as morality and ethics decay, as soon as the shooting starts, that's one of the few things that remains constant. That there is a system of morality and that [it] is buttressed by a constant system of impartial justice. . . . I think particularly in the kind of combat that unfortunately I can envision, if I ever need it, I'll need it then. [120]

Minority Report in Favor of Proposed Change to Judge-Alone Sentencing

Christopher J. Sterritt
Military Justice Act of 1983
Advisory Commission

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I. The Proposed Change

The Military Justice Act of 1983 provides that this commission shall make recommendations concerning the following matter:

> Whether the sentencing authority in court-martial cases should be exercised by a military judge in all noncapital cases to which a military judge has been detailed.

Congress has directed that we examine this question in light of "the experience in the civilian sector with jury sentencing and judge-alone sentencing." It also has directed that we consider this question in light of "the potential impact of mandatory judge-alone sentencing on the Armed Forces." After considerable study of this question, it is recommended by this commission member that the proposed change be adopted. [1]

(a) Constitutional Authority

Under Article I Section 8 of the United States Constitution, Congress has the power "to make Rules for the Government and Regulation of the land and naval Forces." It is long established that Congress pursuant to this grant of power may define criminal offenses and proscribe punishments for cases arising in our armed forces. *Dynes* v. *Hoover,* 61 U.S. (20 How.) 65 (1858). This authority is similar to Congress' power to define criminal offenses and proscribe punishments in federal civilian cases. *See Whalen* v. *United States,* 445 U.S. 684, 690 (1980). Included within such authority is the power to establish courts-martial and the manner in which they must proceed to inflict punishment on a member of the armed forces. *Ex Parte Milligan,* 4 WALL. 218 (1866).

The decision as to whether a judge or a jury should be entrusted with the sentencing function is generally accepted as a matter of sentencing policy of the legislature. *Chaffin* v. *Stynchcombe,* 412 U.S. 17, 22–23 (1973). The election of either as a sentencing authority is not mandated by the Constitution. *See Spaziano* v. *Florida,* 104 S.Ct. 3154, 3162–165 (1984). However, most jurisdictions have followed contemporary thinking on sentencing and structured their systems to determine "an appropriate sentence" which in type and extent fit both the crime and the offender. *United States* v. *Wasman,* 104 S.Ct. 3217, 3220–221 (1984); *Williams* v. *New York,* 337 U.S. 241, 247 (1949).

The proposed change is clearly a matter which is within the constitutional power of Congress and one to be determined on the basis of that legislative body's sentencing policy for members of the armed forces. Neither the adoption or rejection of the proposed changed will raise questions under the Fifth or Eighth Amendment to the Constitution. *See Chaffin* v. *Stynchcombe, supra* and *Solem* v. *Helm,* 33 CrL 3217 (1983). However, great care

[120] Testimony of COL Crouch, USA, *supra* note 12, at pages 216.

[1] A majority of most groups surveyed favored on balance sentencing only by military judges in all noncapital cases. Only convening authorities and defense counsel opposed judge-alone sentencing. Exceptions within these groups were judges of the Navy Court of Military Review who opposed the proposed change and defense counsel of the Coast Guard who favored the proposed change. The approximate percentage of responses in favor of the proposed change are as follows:

	A	N	MC	AF	CG	Total
CA	23	40	27	30	50	33
SJA	46	67	71	62	100	62
MJ	71	88	83	60	86	77
CMRJ	67	40	—	83	100	63
TC	57	57	56	67	83	58
DC	31	29	22	38	56	33

See generally, Casida, *Working Group Memorandum on Analysis of Questionnaire Data—Sentencing Only By Military Judges in Noncapital Cases,* Section 3(a) (1984).

should be exercised by Congress as to the impact the proposed change may have on the President's constitutional role and responsibility as Commander-in-Chief of the Armed Forces. *See generally Swaim* v. *United States,* 165 U.S. 553 (1897).

(b) Present System

An initial comment is warranted as to the nature of the sentencing authority in courts-martial cases as it presently exists under the Uniform Code of Military Justice. There are three types of court-martial: general, special and summary. Article 16, Uniform Code of Military Justice, 10 U.S.C. § 816. The jurisdiction of each type of court-martial varies to the extent of the severity of the sentence it may adjudge. *See* Articles 18, 19, 20, UCMJ. With the exception of a summary court-martial, the determination of forum rests solely with military authorities. *See* Articles 30(b) and 34, UCMJ, *c.f.* Article 20, UCMJ.

At a general court-martial, a military accused may be sentenced by a court of at least five members instructed by a military judge (Article 16(1)(A); Article 36, UCMJ: R.C.M. 1005–1006, *Manual for Courts-Martial, United States, 1984*), or by a military judge alone. Article 16(1)(B). At a special court-martial, a military accused may be sentenced by a court of at least three members, instructed by the senior member of the court (R.C.M. 502(b)(2)(c), Manual, *supra*), by a court of at least three members instructed by a military judge or by a military judge alone. Article 16(2)(A)(B)(C). At a summary court-martial, a military accused can be sentenced only by a commissioned officer. Article 16(3), UCMJ.

At a general court-martial, a military accused has the right to request that he be tried and sentenced by a military judge alone, but such a request must be approved by the military judge. Article 16(1)(B). Otherwise, he will be tried and sentenced by the members. Article 16(1)(A). *See generally Note, Jury Sentencing in Virginia,* 53 Va. L. Rev. 968, 969 (n.2) (1967). At a special court-martial, a military accused has the right to request that he be tried and sentenced by a military judge alone if a military judge has been detailed to the court but the trial judge must approve the request. Article 16(2)(C). Otherwise, he will be tried and sentenced by the members of the court. Article 16(2)(A)&(B), UCMJ. This sentencing option is similar to the right of a defendant in some civilian jurisdictions to waive a jury trial on findings and sentence if consented to by the Government and approved by the trial judge. *E.g., Note, Jury Sentencing in Virginia, supra* at 975–76. At a summary court-martial, a military accused can be tried and sentenced only by a commissioned officer. Article 16(3), UCMJ.

The members of a court-martial are detailed to serve on a court by the convening authority in accordance with certain statutory requirements. Article 25, UCMJ. This authority may be delegated to his staff judge advocate, legal officer or any other principal assistant. Article 25(e), UCMJ. Commissioned officers, warrant officers and enlisted persons may be detailed as members of a court-martial depending upon their status and the status of the military accused in rank, grade and unit. In general, the convening authority or his delegate must detail such members of the armed forces who are best qualified in his opinion in terms of age, education, training, experience, length of service and judicial temperament.

A military judge is detailed to a general or special court-martial in accordance with service regulations by a person assigned as a military judge and directly responsible to the Judge Advocate General or his designee. This authority to detail may be delegated to persons assigned as military judges. Article 26(a), UCMJ. R.C.M. 503(b), Manual, *supra.* A military judge must be a commissioned officer on active duty who is a member of the bar of a Federal court or member of the bar of the highest court of a State and who is certified to be qualified for such duty by the Judge Advocate General. Article 26, UCMJ. R.C.M. 502(c), Manual, *supra.*

(c) Scope of Proposed Change

A preliminary observation is warranted concerning the scope of this proposed change to the Uniform Code of Military Justice. It is expressly limited to those "noncapital cases to which a military judge has been detailed." A military judge must be detailed to a general court-martial. Articles 16(1) and 26(a), UCMJ. A military judge must be detailed to a special court-martial in order for that court to be empowered to award a bad-conduct discharge except in those cases where a military judge cannot be detailed because of physical conditions or military exigencies. Articles 16(2)(B), (C), 19 26, UCMJ. Finally, a military judge need not be detailed to a summary court-martial. Article 16(3), UCMJ.

In this light it is clear that the proposed change would not entirely eliminate sentencing by members at courts-martial. Members of the command could still sentence a military accused in those cases which a convening authority referred to a summary court-martial or a special court-martial not authorized to award a bad-conduct discharge or in emergency situations. These cases would normally entail minor offenses, primarily military in nature or effect, which warrant purely disciplinary punishments consistent with retention of the accused in the military service. More serious offenses, comparatively civilian in nature or effect, would be punished by more severe sentences including punitive separation as determined by the military judge.

There is no provision in the Uniform Code of Military Justice which permits findings of guilty to be entered by members and then permits the accused to elect either

members or the military judge as the sentencing authority. The proposed change, similar to practice in most civilian jurisdictions, would make the military judge the sentencing authority in all cases to which a judge has been detailed, regardless of the accused's election as to the authority to determine his guilt.

(d) Military Traditions

It has been suggested to this commission on several occasions that sentencing by members at courts-martial constitutes an important tradition in our armed forces. [2] The proposed change will affect this tradition by greatly limiting the number and types of cases in which a court of members will impose sentence. Accordingly, such a change should be commented on in terms of the nature of this tradition, the values or interests it promotes and its present vitality and importance.[3]

The tradition of member sentencing in our modern-day court-martial was a part of the British system of military justice adopted by our founding fathers. *See* Winthrop, *Military Law and Precedents,* 21–24 (2nd ed. 1920 Reprint). For over 150 years, the members sentencing an accused were exclusively officers, personally detailed from the local command by the officer convening the court. *Id.* at 70; Byers, *The Court-Martial As A Sentencing Agency: Milestone or Millstone,* 41 Mil.L.Rev. 91, 93–94 (1968); Stuart-Smith, *Military Law: Its History Administration and Practice,* 83 Law Quarterly Rev. 478 (1969). Enlisted-person participation in courts-martial as members first appeared in 1948 and neither in practice or theory seriously affected the officer nature or domination of the court. Furthermore, it was not until 1968 that Congress instituted sentencing by a military judge not attached to the command as an option to sentencing by members. In view of these legislative developments, member sentencing cannot be said to have played a traditional role as a safeguard against severe sentences by a trial judge. Instead, it is best understood in terms of tradition as constituting sentencing by officers from the local command, rather than by a single officer or the commander himself.

More particularly, sentencing by officers at courts-martial originated in the monarchial armies of Britain and France in the sixteenth century. *See* Clode, *Military and Martial Law,* 80–91 (1874). This tradition devolved from the practice of the King in delegating his prerogative to administer justice in the army to its commander. As armies increased in size, became more decentralized in location and the duties of command became more complicated, further delegations of this power to boards of officers occurred. *See* Mitchell, *The Court of the Connetablie,* (Yale Univ. Press 1947). A court of members was the equivalent of a court of lay judges in the civilian community, except it also performed the function of the jury in determining guilt or innocence. *Clode, supra* at 152–54. Dawson, *History of Lay Judges,* p. 272 (Harv. Univ. Press 1960). In this light, sentencing by officers can be construed as representing extended command control or identification with the court-martial sentence. *See* Winthrop, *supra* at 447.

This tradition of sentencing by officer-members at court-martial has also been considered valuable to the military accused. In England, officer-courts were on occasion analogized to a civilian jury. *See* Clode, *supra* at 120. In the United States, this tradition has been characterized as providing the accused with a panel of experienced decision-makers in serious matters. *See* DeHart, Courts-Martial p. 38–40 (1846). At later times, it has been viewed as a "blue ribbon" panel on the basis of the superior educational qualifications of officers. *See* Hearings on S.H. on S957, Before a Subcommittee of the House Committee on Armed Services, 81st Cong. 1st Sess. 94 (1949). More recently, some have equated this tradition to a jury of one's peers in the sense of having direct knowledge of community interests. *See* Hearings on S.2521, Before a Subcommittee of the Senate Committee on Armed Services, 97th Cong., 2d Sess. 49 (1982).

In the above context, the critical question is whether the proposed change undermines to an unacceptable degree the values or interests promoted by the tradition of member-sentencing at court-martial. In resolving this question, consideration must be given to the effectiveness of the present day form of this tradition in promoting these values. In addition, consideration must be given to the effect the proposed change will have in promoting these values or interests.

It must be remembered that the original form of this tradition was sentencing by officers from the local command in all cases at general and special courts-martial or their statutory predecessors. This tradition clearly has not been preserved by Congress in its pristine state. In 1948, Congress provided for the first time that enlisted persons may sit on court-martial if requested by a military accused. In 1968, Congress created the military

[2] Only convening authorities were questioned concerning the importance of the tradition of the option to be tried and sentenced by members. (Question 62) With regard to the proposed change to mandatory judge alone sentencing, 27% said it was not important and 30% said it was very important. A substantial portion, 42% indicated that it should have some importance in this decision.

	A	N	MC	AF	CG	Total
CA	18	33	25	20	35	27 N
	44	44	37	43	31	42 S
	38	23	38	36	33	31 V

[3] All groups surveyed, except the Court of Military Review Judges who split evenly, agreed overwhelmingly that military judge sentencing is more consistent in similar cases than member sentencing. *See Analysis of Questionnaire Data, supra,* Section 3(h).

judge and authorized him to try and sentence an accused without members if requested by the accused. These changes already have significantly encroached upon the above tradition from the point of view of command by leaving to the accused the decision of whether to be sentenced by local officers. Command control or identification with the sentencing process in this context is largely illusory and further restricted by the prohibition against command influence. Article 37, UCMJ. The proposed change continues this legislative trend, but little, if any, of this tradition from the command's point of view presently remains to be undermined. From the accused's point of view his interest in the tradition of officer-sentencing, namely an experienced, qualified and informed military sentencing authority, still exists. The proposed change, however, will enhance this traditional interest by providing sentencing by a professional military judge with access to command information. Accordingly, it is the conclusion of this member of the commission that the proposed change does not seriously undermine any tradition of value in our armed forces today.

The practice of a single officer imposing punishment at a military court is also not unknown in the history of our armed forces. The "Drum Head Court," the emergency procedureless court of the English tradition, however, has never been sanctioned in our law or practice. *See* Winthrop, *supra* at 490 n. 43. Instead, the Field Officer's Court created by Congress for the Army in 1862 and abolished in 1898 and the Deck Court created by Congress for the Navy in 1909 and abolished in 1951 are examples of our single-officer sentencing tradition. These inferior tribunals were conducted by a single officer who was neither a lawyer nor professional judge, but who was guided by legal rules and was quite restricted in his punishment powers. *See generally,* Davis, *Military Law,* p. 48 n.4 (1913); *Naval Courts and Boards,* p. 470 (1937). The summary court-martial created for the Army in 1898 and for all the services in 1951 is a continuation of this limited sentencing practice at court martial.

The practice of judge-alone sentencing at general and special courts-martial today is not a continuation of this tradition. Originally promoted by the Navy as the "law officer" court, the Code Committee recommended its adoption by Congress as a means in guilty plea cases to save time, money and effort and to bring court-martial practice more in line with procedures in federal criminal trials and most civilian jurisdictions. Annual Reports of the United States Court of Military Appeals and Judge Advocates (1952–1953) pp. 4, 24–25, 30. After repeated recommendations for such a court, Congress created the military judge in 1968 and gave him this sentencing power in cases where the accused elected to be tried and sentenced by judge alone.

II. Experience in the Civilian Community

Congress had directed this commission to comment on:

> ". . . the experience in the civilian sector with jury sentencing and judge—alone sentencing, with particular reference to consistency, uniformity, sentence appropriateness, efficiency in the sentencing process and impact on the rights of the accused."

The American Bar Association has strongly recommended the abolition of jury sentencing and the adoption of judge sentencing in 1968 and again in 1979. Their comments supporting these recommendations provide an excellent overview of the experience in the civilian sector.

(a) Comment 1968 ABA Standards

AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE

STANDARDS RELATING TO

Sentencing Alternatives and Procedures

Amendments recommended by the

SPECIAL COMMITTEE ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE

J. Edward Lumbard, Chairman

and concurred in by the

ADVISORY COMMITTEE ON SENTENCING AND REVIEW

Simon E. Sobeloff, Chairman

Peter W. Low, Reporter

September 1968

The standards proposed in the Tentative Draft of December 1967, with the amendments recommended herein, were approved by the House of Delegates on August 6, 1968. The commentary in this supplement is substantially in the form in which it accompanied the proposed amendments submitted to the House.

Standards with Commentary

PART I. SENTENCING AUTHORITY

1.1 Who should sentence.

Authority to determine the sentence should be vested in the trial judge and not in the jury. This report does not deal with whether the death penalty should be an available sentencing alternative and, if so, who should participate in its imposition.

Commentary

a. Background

Whatever the sentencing structure, sentences invariably involve a mixture of determinations by several agencies acting at different times. In almost every instance, an important decision must be made, often irrevocably, either by the judge or by the jury at or closely following the determination of guilt. Even jurisdictions which employ the so-called "indeterminate" sentence typically follow this pattern. In California, Hawaii, and Washington, for example, the trial judge still makes what for the majority

of cases is the most important sentencing decision, namely whether the defendant is to be imprisoned or released on probation. See CAL. PENAL CODE §§ 1168, 1203 (1966 Supp.); State v. Kui Ching, 46 Hawaii 135, 376 P.2d 379 (1962); Hayner, *Sentencing by an Administrative Board,* 23 LAW & CONTEMP. PROB. 477 (1958). The purpose of this section is to express a conclusion on the issue of who as between judge and jury should exercise the power which is assigned to this point in the process.

With the exception of capital cases, a clear majority of the jurisdictions in this country place responsibility for decision at this stage exclusively with the trial judge. As many as thirteen states leave the sentencing decision to the jury for some or all non-capital crimes. Even in these states, however, the judge still has an important role, both in dealing with cases where the jury is not involved in determining guilt and in exercising certain powers of review over the jury determination. The statutes are collected and discussed in Note, *Jury Sentencing in Virginia,* 53 VA. L. REV. 968, 969 n.2 (1967), and Note, *Statutory Structures for Sentencing Felons to Prison,* 60 COLUM. L. REV. 1134, 1154–55 (1960).

b. Considerations

The source of jury sentencing in this country is generally attributed to distrust of judges appointed and controlled by the Crown. See, *e.g.,* Note, *Jury Sentencing in Virginia,* 53 VA. L. REV. 968, 970–72 (1967); Betts, *Jury Sentencing,* 2 N.P.P.A.J. 369, 370 (1956). Modern arguments for its retention have been aptly summarized by Judge Betts:

1. The anonymity of jurors makes them less subject to the pressures of public feelings and opinion than the elected judge, who must seek popular favor at the next election.
2. The brief tenure of the jury makes corruption or improper influence especially difficult.
3. Jury-fixed punishment diminishes popular distrust of official justice.
4. The judgment of the jury may be more sensitive than that of a judge because its members, unlike the judge, are not often confronted with the recurrent problems of court cases and therefore do not become calloused.
5. A jury lacking in sentencing power tends to acquit a defendant it believes guilty when it fears that the sentence the judge will probably impose is too severe.
6. Because it is a composite, a jury levels individual opinions and provides a reconciliation of varied temperaments, and therefore is more apt to assess a fair punishment.

Id. at 371. See also Note, *Jury Sentencing in Virginia,* 53 VA. L. REV. 968, 988–95 (1967); Note, *On Modernizing Missouri's Criminal Punishment Procedure,* 20 U. KAN. CITY L. REV. 299, 304 (1952).

But in spite of the surface appeal that some of these arguments might have, recent opinion has been nearly unanimous that jury sentencing in non-capital cases is an anachronism and that it should be abolished. The study by the President's Crime Commission contains an explicit recommendation to this effect. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967) *; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 26 (1967.). † The Wickersham Commission came to a similar conclusion. See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 23–28 (1931). Both the Model Sentencing Act (§ 12) and the Model Penal Code (Articles 6 and 7) clearly deny to the jury a role in sentencing, again with the exception of capital cases. See Appendices B and C, *infra.* The extensive support of this conclusion in the law reviews is collected in Note, *Jury Sentencing in Virginia,* 53 VA. L. REV. 968, 970 n.3 (1967). It is there reported that the legal literature contains only one article which advocates a different position, and that published in 1918. See McQuown, *Reformation of the Jury System,* 6 KY. L.J. 182 (1918).

There are many reasons for the overwhelming opposition to determination of punishment by the jury in non-capital cases. Sentencing by a distinct jury at each trial is necessarily a guarantee of significant disparity between sentences. A jury which is to sentence only once, and which has no way of developing a feel for the types of other cases which typically arise and the pattern of dispositions which have been deemed appropriate in the past, can hardly be expected to impose a sentence which is consistent in principle with sentences imposed by other equally disadvantaged juries. The point is reinforced by a study in Atlanta cited by the President's Crime Commission to the effect that those who committed some offenses for the first time were more likely to receive a higher sentence than those who were repeaters. See PRESIDENT'S COMM'N, THE COURTS 26. Another example can be found in the distortion of the use of probation which has resulted from jury sentencing in Virginia. In that state, the jury is authorized to select only a prison sentence, while the judge is empowered to mitigate such a sentence by setting is aside and imposing probation. Yet a defendant who might readily be placed on probation if he pleaded guilty or if he waived a jury and tried his guilt to a judge will often be sentenced to prison because the jury cannot impose probation and the judge will defer to the jury's verdict. The result is that at no point is probation seriously considered on its merits, solely because of the intervention of the jury in the sentencing process. See Note, *Jury Sentencing in Virginia,* 53 VA. L. REV. 968, 973–75 (1967).

It is also clear that sentencing by the jury is inconsistent with the principle that the sentencing decision should be based upon complete information about the defendant himself as well as his offense. Much of the information most helpful at the sentencing stage is properly inadmissible on the question of guilt, and to admit it only on the question of sentence is highly prejudicial if the jury is to consider both questions at the same time. Separation of the questions, on the other hand, involves separate trials, a time consuming and costly venture that presents little gain in compensation.

A third reason for eliminating jury sentencing is that it invites compromise of the basic premise that conviction must follow only on a determination of guilt beyond a reasonable doubt. A jury may well resolve doubt as to guilt by compromising on a light sentence. A related point is that disagreement over the penalty may well produce a hung jury—and thus the expense of a new trial—even though the jury is properly convinced as to guilt. And a defense attorney can sometimes be placed in a quite awkward posture by having to argue before a jury that his client is not guilty, but that if he is, he should receive only a light sentence.

* Hereinafter cited as PRESIDENT'S COMM'N, THE CHALLENGE OF CRIME.

† The Task Force Reports of the President's Crime Commission are hereinafter cited by subject as follows: PRESIDENT'S COMM'N. THE COURTS.

But clearly the most telling argument against jury sentencing is that a proper sentencing decision calls on an expertise which a jury cannot possibly be expected to bring with it to the trial, nor develop for the one occasion on which it will be used. The day is long past when sentencing turned solely on the degree of moral approbation which the offense commanded. An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors, from the likelihood that the defendant will commit other crimes to the types of programs and facilities which may induce a change in the pattern of activity which led to the offense.

It must be granted, of course, that many trial judges lack the necessary expertise to make a proper sentencing decision. The answer does not lie, however, in retention of the power by an even less qualified jury. The answer lies in better trained and better selected judges, plus the help that devices such as those suggested in Parts IV and VII of this report can offer. These, coupled with a requirement that the sentencing decision be forced into the open (see § 5.6, *infra*) and subject to review (see ABA STANDARDS, APPELLATE REVIEW OF SENTENCES [Tent. Draft, April 1967]), at least offer the hope of more constructive sentences. That this approach may still fall short of perfection is of a wholly different order than the clear inadequacy of leaving the determination to an uninformed and unprofessional jury.

(b) Comment 1979 ABA Standards

Chapter 18

Sentencing Alternatives and Procedures

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PART I. SENTENCING AUTHORITY

Standard 18-1.1. Abolition of jury sentencing

Sentencing involves a judicial function, and the jury's role should not therefore extend to the determination of the appropriate sentence. These standards do not deal with whether the death penalty should be an available sentencing alternative and, if so, who should participate in its imposition.

History of Standard

The changes from the original edition are largely stylistic and are intended to reflect the concept of "structured" discretion endorsed in this edition. Accordingly, the reference to authority being "vested in the trial judge" in the original edition has been deleted as inconsistent with the shared responsibility that should exist between the judicial agency responsible for the promulgation of guidelines and the sentencing court. It continues to be recognized, however, that the primary responsibility for refining the sentence to reflect relevant characteristics of the crime and the criminal will remain with the sentencing court.

Related Standards

ALI, Model Penal Code arts. 6, 7
NAC, Corrections 5.1
NAC, Courts 5.1

Commentary

Jury sentencing in noncapital cases remains today an anachronism that has long outlived its original justifications. The early reasons behind its appearance—the colonial distrust of judges appointed by the crown (and later of federalist-dominated courts), the frontier belief that the people should decide for themselves, and the general lack of difference in either training or competence between the judge and the jury throughout much of the nineteenth century [1]—are increasingly remote and irrelevant today as

[1] This is the historical analysis of jury sentencing reached by the National Commission on Law Observance and Enforcement ("Wickersham Commission") in 1931 in its REPORT ON CRIMINAL PROCEDURE 27 (quoted in S. RUBIN, THE LAW OF CRIMINAL CORRECTION 150 (2d ed. 1973)). States with jury sentencing in noncapital cases have generally had such a provision since the date of their entry into the Union. Texas, *e.g.*, although it lacked experience with British courts, adopted a constitutional requirement of jury sentencing in 1845 because of similar dissatisfaction with Spanish and Mexican governments. *See* Betts, *Jury Sentencing*, 2 NATL. PROBATION & PAROLE A.J. 369, 370 (1956); Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 970–972 (1967). Originally intended as a protection against a distant central government and grounded in a history of political and religious persecutions that the crown-appointed judges under the Stuarts enforced, jury sentencing today serves no such buffer function.

the contemporary view of sentencing shifts toward seeing it as a fundamentally legal enterprise. In the decade since the first edition of these standards appeared, nothing has occurred to call into question the basic judgment then reached: "[T]he most telling argument against jury sentencing is that a proper sentencing decision calls on an expertise which a jury cannot possibly be expected to bring with it to the trial, nor develop for the one occasion on which it will be used." [2] Related objections have been made by a variety of commentators and can be summarized as follows:

1. The jury necessarily receives less information than the court, since no presentence investigation is conducted for it. Indeed, where the defendant does not take the stand, the jury will generally have little more than the description of the offense as provided by the prosecution to guide it. [3]

2. Giving the punishment decision to the jury may undercut the integrity of its determination of the defendant's guilt. In difficult cases the temptation may arise for the jury to compromise the issues of guilt and punishment, convicting the defendant but imposing a light sentence. [4] The end result of such trade-offs is erosion of a basic principle of due process: the individual should be convicted of a crime only where the trier of the fact is convinced beyond a reasonable doubt.

3. Jury sentencing places the defense in a particularly awkward position where the proceeding is a unitary one. [5] Having to argue simultaneously that the defendant is not guilty and that, if guilty, the defendant should receive leniency, defense counsel is faced with the proverbial Hobson's choice: emphasizing the latter argument may undercut the effectiveness of counsel's advocacy of the client's innocence. In addition, if counsel does present evidence in mitigation of sentence, the client's character may thereby be placed in issue, permitting damaging evidence otherwise inadmissible to be introduced.

4. Sentencing disparities are made inevitable because the jury is unable to evaluate the case before it with the knowledge of how similar cases have recently been handled.

5. Experience suggests that jury sentencing results in the reduced use of probation. This may result either because a statute does not expressly permit the jury to select a sentence of probation or because, where the court is empowered to overrule the jury's decision, it may feel disinclined to reverse what seemingly is an expression of the community's judgment. [6]

6. To the extent that substantive appellate review is permitted of the jury's sentence, it is always less effective than it can be where the appellate court is provided with a statement of reasons from the sentencing court explaining the sentence imposed.

7. An unfortunate incentive for the preservation of jury sentencing may have arisen in the aftermath of *Chaffin* v. *Stynchcombe.* [7] There is a danger, perhaps slight but still injurious to the appearance of justice, that jury sentencing may be retained in some jurisdictions to dissuade the defendant from taking an appeal or from seeking a jury trial on remand. In *North Carolina* v. *Pearce,* the Supreme Court held that a defendant who successfully challenges conviction on appeal may not be constitutionally subjected to the "hazard of vindictiveness" that would exist if the defendant could be given a longer sentence were the defendant again convicted after a retrial. [8] In such cases, it ruled, the original sentence set a ceiling that could not be exceeded except in certain exceptional instances where new information arose after the original sentencing. Inevitably, the question arose whether the *Pearce* rule applied as well to a jury sentencing following retrial. In *Chaffin,* a majority of the Court said it did not, since the jury, not knowing of the prior conviction or sentence, could not be vindictive. In dissent, Justice Marshall pointed out that "a real possibility" exists in some jurisdictions that the jury would learn of the prior conviction, particularly since jury sentencing is prevalent in rural areas where such a retrial following a successful appeal may take on the quality of a "notorious public event." [9] This potential chilling effect may not rise to the level of a constitutional violation, but from the public policy perspective of these standards there is no redeeming feature to jury sentencing to offset the deterrent that it may represent to the defendant considering an appeal.

A related danger also exists. Where the sentencing court has the power to override the jury's sentence and impose a lesser one, it is likely that the court's decision not to override will frequently be made with knowledge of the prior conviction and sentence. [10] If a danger of "vindictiveness" against the litigious defendant exists (as *Pearce* seemingly found), it is difficult to see why this danger is any less present in the context of trial court review of the jury's sentence than in the situation where

[2] ABA, SENTENCING ALTERNATIVES AND PROCEDURES, commentary at 46 (1968).

[3] Although the jury *may* receive information about the offender's past record or reputation at trial, much of the information essential to the individualized consideration of the defendant will be properly inadmissible at trial. Thus, jury sentencing is also inconsistent with standard 18-5.1, which generally requires a verified presentence investigation. *See also* Cooper v. State, 158 Ind. App. 82, 301 N.E. 2d 772 (1973) (noting the inadequate level of information received by the jury in reaching a sentencing decision); Fields v. State, 502 S.W.2d 480, 493 (Ark. 1973). Denied information, the sentencing jury is prone to reach extreme results in an often hasty fashion. *See* State v. Caffey, 365 S.W.2d 607 (Mo. 1963) (sentence of twenty years for possession of cocaine imposed after total deliberation time of thirty-five minutes).

[4] The NAC standards reach the similar conclusion that "doubts about the guilt of the accused are resolved by a light sentence." NAC, CORRECTIONS, commentary at 148. A converse phenomenon has been less noted but is equally possible and injurious to the interests of justice: unable to decide how to punish the offender, the jury may be unable to reach a verdict on the issue of guilt. *See also* LaFont, *Assessment of Punishment—A Judge or Jury Function?,* 38 TEX. L. REV. 835, 843-844 (1960); S. RUBIN, *supra* note 1, at 148.

[5] Stubbs, *Jury Sentencing in Georgia—Time for a Change?,* 5 GA. ST. B.J. 421, 428 (1969).

[6] *See* S. RUBIN, *supra* note 1, at 148. Under Virginia law, the jury is not authorized to impose a sentence of probation, and observers have found that the court, which is authorized to mitigate the sentence selected by the jury, is generally reluctant to set aside the jury's decision. *See* Note, *supra* note 1, at 973-975. *Cf.* Roman v. Parrish, 328 F. Supp. 882, 885-887 (E.D. Va. 1971). Even where local law does not restrict the options available to the jury, it is less likely to be familiar with the available range of nonincarcerative sentencing alternatives or prison conditions generally. *See* part VIII generally.

[7] 412 U.S. 17 (1973).

[8] 395 U.S. 711 (1969).

[9] 412 U.S. at 39-40.

[10] Gilbreath, *The Constitutionality of Harsher Sentences on Retrial in Virginia,* 62 VA. L. REV. 1337, 1347-1349 (1976). In some cases, the judge at the second trial was the same as at the first trial. Although this case can be easily distinguished from that of *Chaffin,* state decisions have also refused to invalidate a higher sentence following the second trial in this situation. *See* McClung v. Commonwealth, 215 Va. 654, 212 S.E.2d 290 (1975), *cert. denied,* 431 U.S. 954 (1977).

Pearce clearly applies because the trial court directly imposes the sentence.

Against these arguments, two themes have been raised in justification of jury sentencing. First, as the Supreme Court has noted, a state might find that such a procedure guarantees the maintenance of "a link between contemporary community values and the penal system." [11] Second, a state could determine that "juries are more likely to act with compassion, fairness and understanding than the judge." [12]

Although the Supreme Court was careful to make clear that these were only conclusions that a state might reach without offending the due process clause (and not positions that the Court itself endorsed), neither argument appears convincing when examined with the more critical scrutiny that a nonconstitutional perspective permits. Both the "Greek chorus" justification—that is, that the jury can approximate the role of a community legislature—and the second hypothesis—that juries are more apt to temper justice with mercy—make a number of heroic assumptions about the judgmental capacity, deliberative style, and representative character of the typical jury. Evidence supporting either theory is conspicuous by its absence. A more realistic assessment might be to find the performance of juries at sentencing highly erratic, sometimes harsh and punitive, sometimes easily manipulated and sentimental. [13]

In any event, even if their justifications had validity, the cost of jury sentencing would remain prohibitively high, since the retention of jury sentencing both ensures continued inconsistency and regards the development by appellate courts of a rationalized body of common law dealing with the sentencing decision. Compassion in sentencing need not be purchased at a price that necessarily sacrifices consistency. The common denominator to both of these justifications of jury sentencing is a sense that the penalty structure of many penal codes may at times be overly severe and not in conformity with any commonsense scale of proportionality among offenses.

A more direct and less haphazard means of achieving greater congruence between the statutory penalty structure and contemporary community attitudes exists today as an alternative to reliance on the jury. A guideline drafting agency patterned along the lines set forth in part III of this chapter can also seek to maintain a current linkage between contemporary community values and the penal system. [14] By specifying relevant aggravating and exculpating factors and promulgating different guideline ranges for offenses it deems of differing gravity, such an agency can both mitigate the severity of the penal code and uphold community expectations about the relationship between society's values and the penal system—and it can do so in a way that is far more visible, accountable, and consistent than a jury system.

Considerations similar to those enumerated above have in common led the President's Crime Commission, the National Advisory Commission, and others to join with the ABA in rejecting jury sentencing in noncapital cases. [15] This degree of consensus appears to have had an impact. Since the first edition of these standards, the number of states permitting juries to determine sentence has fallen from thirteen to seven. [16] Even in those jurisdictions that retain jury sentencing, its continuation is under review, and the discretion given the jury is generally limited by provisions either authorizing the sentencing judge to overrule the jury's sentence [17] or limiting jury sentencing to occasions when it is requested by the defendant. [18]

(C) Statistical Survey

Several statistical surveys have indicated that there is no evidence of systematic or extensive jury sentencing disparity or severity. *See* L. Exstrand, and W. Eckert, *The Impact of Sentencing Reform A Comparison of Judge and Jury Sentencing of Judge and Jury Sentencing Systems* (Eckert, Little Inc. June 1982), Kalven, Harry, *The American Jury* (Boston Little Brown Co. 1966).

Results and Conclusions

[11] Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

[12] Chaffin v. Stynchcombe, 412 U.S. at 22 (citing Stubbs, *supra* note 5, at 426); *see also* Proffitt v. Florida, 428 U.S. 242, 252 (1976).

[13] A survey of Missouri judges has so concluded, emphasizing the tendency for "sentimentality" and the "oratory and personality of an impressive counsel" to play disproportionate roles in the jury's deliberations. Jouras, *On Modernizing Missouri's Criminal Punishment Procedure,* 20 U. KAN. CITY L. REV. 299, 302, 304–305 (1952); *see also* Stubbs, *supra* note 5, at 428–429.

[14] *See* standard 18–3.1(c)(iv).

[15] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145 (1967); NAC, CORRECTIONS, commentary at 148–149; NCCD, MODEL SENTENCING ACT § 12; ALI, MODEL PENAL CODE arts. 6 and 7; and NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT art. 3—all deny a role to the jury in sentencing. The virtually unanimous conclusion of the law reviews that jury sentencing is unsound is collected in Note, *supra* note 1, at 970 n.3. Nonetheless, jury sentencing has been upheld against various constitutional attacks. *See* Spencer v. Texas, 385 U.S. 554 (1967); Witherspoon v. Illinois, 391 U.S. 510 (1968); Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972); Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977); Fields v. State, 255 Ark. 540, 502 S.W.2d 480 (1973); Roman v. Parrish, 328 F.Supp. 882 (E.D. Va. 1971).

[16] Definitional issues, of course, exist as to what is meant by "jury sentencing" where the court retains a power to set aside the jury's sentence. But for an analysis of the statutes of the seven jurisdictions said to retain jury sentencing as of 1976, *see* Gilbreath, *supra* note 10, at 1339 n.13 (listing Arkansas, Indiana, Kentucky, Missouri, Oklahoma, Tennessee, and Texas as retaining jury sentencing, but excluding Virginia). Although Indiana has recently abolished jury sentencing (IND. CODE ANN. § 35–50–1–1 (Burns 1979)), it is probably more appropriate to consider Virginia a "jury sentencing" state in view of the deference given the jury's determination by the court. Despite a recommendation of a legislative commission to abolish jury sentencing, Missouri has recently elected to retain it. MO. ANN. STAT. § 557.036 (Vernon Supp. 1979). A legislative commission is currently considering the Virginia statute.

Some fifteen states and the District of Columbia limit the jury's sentencing role to capital cases, and some of these confer only advisory, as opposed to final, authority. *Id.*

[17] *See* VA. CODE § 19.2–303 (1975). *See also* S. RUBIN, *supra* note 1, at 146.

[18] Usually, but not always, the jury's authority is limited to cases in which guilt has been established by that jury. *But see* TEX. CRIM. PROC. CODE ANN. art. 37.07 (Vernon Cum. Supp. 1979). Although Tennessee has historically permitted the jury to fix sentences even following a plea of guilty, its statute does limit harsher sentences following a retrial. TENN. CODE ANN. § 40–2701 (1975). Oklahoma gives the defendant some choice as to the sentencing authority. OKLA. STAT. ANN. tit. 22, § 926 (West 1958); *see also* TENN. CODE ANN. § 40–2704 (1975).

Especially objectionable, however, are those systems under which the defendant may not waive a jury trial without the prosecution's consent, thereby permitting the prosecution to seek to obtain a harsh sentence from the jury which it doubts the court would grant. It is this aspect of the Virginia practice which has drawn the sharpest criticism, but which was nonetheless upheld in Vines v. Muncy, 553 F.2d at 345 (citing Singer v. United States, 380 U.S. 24 (1965)).

Are juries more disparate in sentencing? Results based on the Ansari-Bradley test are reported in Table 1.

There appears to be no evidence of systematic or extensive jury sentencing disparity in these results. We see in the table that among the general population comparisons the null hypothesis could not be rejected in any of the six crime categories. A similar pattern prevailed when the number of prior convictions was controlled. Among defendants with no prior convictions, five crime category comparisons were made between systems. (There were insufficient data for a meaningful comparison in the rape category.) All five tests failed to reject the null hypothesis. This further supported the alternative position that the jury system is *not* the more disparate of the two. When comparisons were made in all six crime categories among defendants with one or more prior convictions, the results were similar. The null hypothesis could be rejected only in the aggravated assault category. All remaining comparisons failed to reject. This pattern does not support the contention of widespread jury sentencing disparity.

While the major finding was lack of evidence in support of greater jury disparity, the exception was also of interest. The results do indicate greater jury sentencing disparity in the aggravated assault category. More specifically, it seems to have occurred when defendants had a record of prior convictions. What caused juries to be sensitized by these factors is the issue. It suggests that juries are *capable* of reacting to a set of circumstances in a way that produces system disparity. If this be the case, other combinations may exist that produce the same results. Identifying these and ultimately the reasons for their effect merit further inquiry.

Are juries more or less *severe* in the sentences they impose? The data shown in Table 2 attempted to answer that question. These results are remarkably similar to those reported for disparity. *Again, there appeared to be no evidence of a systematic difference between the two groups.* Among the general population (all subjects), the null hypothesis could not be rejected in any of the six crime categories. The results were similar when controls were imposed for prior convictions status. In those cases where defendants had no prior conviction, the pattern was identical. All five tests (there was insufficient data to make a comparison in the rape category) failed to reject the null hypothesis of no difference. Where defendants did have a record of prior convictions, only one category, murder, showed evidence of a difference between the two systems. Overall, the sentencing patterns of the judge and jury systems on this question of severity appear virtually identical, with sixteen of seventeen comparisons failing to reject the null hypothesis.

It is important to note those areas in which a difference was found. The one exception in both the tests for disparity, aggravated assault, and those for severity, murder, showed some similarity. Both crime categories involved imply physical harm to the victum. Furthermore, the significant differences occurred among defendants with a record of prior convictions. This may suggest some of the conditions under which juries can be sensitized. Potentially heinous crimes in which physical harm is inflicted by repeat offenders may be one set of circumstances under which juries show greater inconsistency in their decisions. This conclusion is highly tentative, however, and must be verified with additional evidence. But it does suggest a direction for future research in attempting to determine the viability of the jury's role in sentencing.

Conclusions drawn from this study must be sensitive to its limitations. First and foremost, the evidence, that jury systems are no less consistent does *not* mean that a qualitative difference does not exist between these systems. The reasons for their degree of variance remains unanswered. Conceivably, jury discrepancy may be the result of reaction to those passions and prejudices previously noted, while judge system variance may be based upon the "rational" consideration of circumstances. Other explanations are equally plausable. We state only that there is no evidence of a systematic difference between the two systems.

Other limitations are equally important. This study used data from one judicial system for a relatively short period of time. Furthermore, the analysis was limited to only one race and gender group (black males). And finally, only six crime categories were studied. These features were included in order to increase control and maximize the generation of data. But they also had the effect of limiting the scope of the findings. Conclusions drawn from these results should be aware of these and other constraints.

The results of this study suggest that jury and judge sentencing systems may not differ in the disparity or severity of their sentencing outcomes. This should not be accepted as conclusive evidence that jury sentencing systems are more or even as compatible with the ideals of a democratic political system. More information on this and other related topics must be analyzed before such a determination can be made. But these results can, and perhaps should, be used to caution us against abandoning the jury system on the unverified assumption that it produces extremely disparite or severe outcomes. This particular "reform" position appears even less viable from the results of this study. In fact, a case can even be made for a greater "democratization" of the court system by reverting to greater use of the jury sentencing system. Those eleven states with jury systems may wish to consider both the results of the study and this perspective before seeking to change their systems.

III. Impact on the Armed Forces

(a) Initial Observations

Congress has also directed this commission to comment on:

> (B) The potential impact of mandatory judge-alone sentencing on the Armed Forces, with particular reference to consistency, uniformity, sentence appropriateness, efficiency in the sentencing process, impact on the rights of the accused, effect on the participation of members of the Armed Forces in the military justice system, impact on relationships between judge advocates and other members of the Armed Forces, and impact on the perception of the military justice system by members of the Armed Forces, the legal profession, and the general public.

In addressing these questions, two observations can be made about military punishments from a historical point of view. First, servicemembers may be convicted and consequently sentenced for offenses which are not normally considered crimes in the civilian sector. *See gener-*

ally Parker v. *Levy,* 417 U.S. 733 (1979). Second, punishments of servicemembers has been generally perceived as severe by the civilian sector. *See* White, *The Background and the Problem,* St. John's Law Review (May 1961). These historical realities dictate that the potential impact on the Armed Forces not be viewed exclusively in terms of the individual commander's need for swift and certain punishment. In addition, consideration must be given to the impact such a change would have on the morale of servicemembers and on the support of the American people for our military and its critical role in our society. *See generally* Earle, *Makers of Modern Strategy,* p. vii (1942).

At the present time, there is no large scale outcry from command, the troops or the American people against court-martial sentences by members or the military judge alone. A Naval Audit Report (T10180) submitted to a Senate Subcommittee on Manpower and Personnel during Hearings on the Military Justice Act of 1982 did state that commanding officers of Pacific Fleet units perceived as a major problem "inconsistent and inappropriate (less than adequate) sentences" generally by members. This view was not shared by the other services at these hearings or by the majority of witnesses who testified before the commission.

It must be recognized that the above complaint was made during a time of peace for the United States. At earlier times, immediately subsequent to war, the American people have complained that sentences awarded at courts-martial were excessively severe. Military Judges did not impose sentences at that time. Accordingly, the proposed change does not follow the traditional pattern for legislative change to our military justice system.

(b) Sentence Consistency, Uniformity, Appropriateness and Efficiency.

This Commission has been provided some statistics which reflect the sentences by courts-martial over recent years. In terms of consistency and uniformity, they tend to support the conclusion that there is no evidence of systematic disparity between member and judge-alone sentencing. This conclusion is also reflected in the earlier mentioned statistics from the civilian jurisdictions. However, the military statistics are not sufficiently particular to permit evaluation in similar cases.[19] Accordingly, to the extent that sentence disparity exists, this commission member accepts the rationale of the American Bar Association on this question. A sentencing authority who has knowledge and experience in similar cases more likely will impose consistent and uniform sentences. Since the proposed change will establish as the sentencing authority the military judge who has such experience and knowledge, it will enhance the consistency and uniformity of court-martial sentences. The conclusion is especially true in light of the fact that the 1968 option for judge-alone sentencing has significantly reduced the opportunity for members to participate at all in the sentencing process.

Sentence appropriateness is generally understood to depend on the characteristics of the offense and the offender. *See Spaziano* v. *Florida, supra* citing *Williams* v. *New York,* 337 U.S. 241, 247–49 (1949). No statistics have been provided to this commission which would measure the quality of member or judge sentences in these terms. However, this member of the commission agrees with the American Bar Association that the determination of an appropriate sentence turns on more than the degree of moral approbation which the offense commands. In the military context, it also requires more than evaluation of the effect of the offense on discipline within the local command. "An enlightened sentencing decision today calls for a sophisticated and informed judgment which takes into account a vast range of additional factors, from the likelihood that the defendant will commit other crimes to the types of programs and facilities which may induce a change in the pattern of activity which led to the offense. "ABA Standard, *supra* (1968); *see generally* Radine, *The Taming of the Troops,* p. 220–256 (1977).

The President has indicated his concern for these additional factors in determining an appropriate court-martial sentence. *See* R.C.M. 1001(b)(1), (2), (3), (4) and c(1)(B), Manual, *supra.* Such a decision has increased importance in the military context where the Government has already expended great amounts of time, money and other resources in training the service member. *See generally* Scowcroft, *Military Service in the United States* (1982). This member of the commission believes that a military judge experienced and knowledgeable in such matters is better qualified to make an appropriate sentence determination than command officers who are primarily concerned with local matters.[20]

The efficiency of the sentencing process will be greatly enhanced by the adoption of military judge sentencing. As the system presently exists, the member must be instructed in both their findings and sentencing duties by the judge. Article 36, UCMJ; R.C.M. 1005, Manual, *supra.* Such a requirement anticipates proper instructions

[19] Supra, n 3.

[20] The majority of all groups surveyed, except convening authorities, generally support this conclusion. The percentage who believe military judges/court members/no difference can better determine an appropriate sentence are as follows:

	A	N	MC	AF	CG	Total
CA	25/56/19	36/43/21	24/50/26	37/44/19	43/48/10	31/47/21
SJA	50/18/32	74/ 6/21	76/ 3/21	65/16/20	87/ 0/13	67/11/21
MJ	84/ 3/14	90/ 5/ 5	89/ 6/ 6	88/ 0/12	93/ 0/ 7	83/ 3/9
CMRJ	75/17/ 8	60/ 0/40	—	67/ 0/33	100/ 0/ 0	70/ 7/23
TC	54/18/27	59/19/22	59/22/20	73/20/ 7	75/17/ 8	57/19/24
DC	46/28/26	52/24/23	49/28/23	55/21/25	50/31/19	50/25/25

See Analysis of Questionnaire Data, supra, Section 3(c).

by the trial judge and proper understanding and application by the members. In view of the complicated nature of sentencing, as compared to the determination of a fact, significant time and effort must be expended by the judge in fashioning his instructions, communicating his instructions and ensuring the members proper understanding. Even then, there is no assurance that an inexperienced members can follow these instructions without error. The possibility of error and reversal on appeal generates additional consumption of judicial and military resources.

(c) Rights of the Accused

Congress had directed this commission to comment on the impact of the proposed change on the rights of accused at court-martial. The proposed change will greatly reduce, but not eliminate, sentencing by members at courts-martial. The nature of this deprivation depends to a great degree on one's estimation of the value of sentencing by members to an accused.[21] This value or interest must in turn be weighed against the benefits to the accused of sentencing by the military judge.

At the outset, it must be stated that members sentencing is not the same as sentencing by a jury of one's peers in those civilian jurisdictions which still employ this procedure. *See O'Callahan* v. *Parker,* 395 U.S. 258, 263–64 (1969). Historically, members of a court-martial have been viewed as delegates or representatives of the commander (*see* Mitchell, J. *The Court of the Connetablie,* (Yale Univ. Press 1947)); later as advisors to the commander (*see* Winthrop, *supra* at 447), and finally as a blue ribbon panel of experts in military and disciplinary matters. The personal selection by the convening authority, the absence of random selection, the requirement of superior rank or grade to the accused and lesser number of members are all attributes of a court of members which prevent such an equation with a jury of one's peers.

In reality, an enlisted person has no right to be sentenced by a jury of his peers. Although an enlisted person has the right to be sentenced by a court partially composed of enlisted members, specific limitations exist. First, the enlisted member normally may not be a member of the same unit as the accused. Article 25(c), UCMJ. Second, the enlisted member normally is senior in grade to the military accused. Article 25(d)(1), UCMJ. *O'Callahan* v. *Parker, supra* at 263 n.2. Third, the convening authority, even if requested, need not appoint more than one third of the total membership of the court as enlisted members. Article 25(c)(1), UCMJ. This last limitation is meaningful, since, with the exception of the sentence of death, life imprisonment or confinement in excess of 10 years, all other sentences shall be determined by a two-thirds of the membership of the court. Article 52(b), UCMJ.

Member sentencing does have several features which it shares with jury sentencing. First, sentence is assessed by persons who are not professional judges who may be more inclined to be sensitive or compassionate in determining punishment. Second, member sentencing is an expression of group agreement rather than a decision of a single person. Third, members are from the local community in which the crime was committed, thus establishing a more direct link between the community and the sentencing process. These advantages were not considered sufficient in most other jurisdictions to warrant a system of jury sentencing over sentencing by the trial judge. It is the opinion of this member of the commission that the same conclusion should be reached in the military justice system. If member sentencing is viewed as sentencing by experts, it is also concluded that, on the basis of experience, qualifications and knowledge, the military judge is the better and more efficient expert.

Several witnesses before this commission have suggested that the present sentencing option benefits the military accused by providing an informal mechanism to check or restrain overly severe sentences by trial judges. This argument is based on the assumption that military judges are normally inclined or readily succumb to institutional pressure to impose excessively severe sentences at courts-martial. In a similar light, other witnesses have suggested that the military accused benefits from the present sentencing option because it systematically produces excessively lenient sentences. This argument is based on the observation that military judges today impose undeservedly lenient sentences so as to avoid the accused's election of trial by members which entails greater time, expense, effort and possibility of reversal.

The historical complaint of excessively severe court-martial sentences was directed at sentences by members

[21] The majority of all groups surveyed, except defense counsel, agreed that that mandatory judge alone sentencing would *not* deprive the accused of a substantial right.

Q		A	N	MC	AF	CG	Total	
		22	17	26	25	14	21	Y
54	CA	61	70	61	59	67	65	N
		17	13	13	16	19	14	0
		33	31	18	27	0	29	Y
57	SJA	63	66	74	69	100	58	N
		4	3	8	4	0	4	0
		20	12	6	24	21	17	Y
57	MJ	80	83	94	64	78	80	N
		0	5	0	12	0	3	0
		8	30	—	17	0	17	Y
		—	—	—	—	—	—	-
56	CMRJ	92	70	—	83	100	83	N
		30	37	34	13	17	31	Y
55	TC	62	59	63	80	75	63	N
		8	4	3	7	8	6	0
		71	74	80	58	31	67	Y
57	DC	26	24	15	39	69	30	N
		3	2	5	3	0	3	0

during war time. *See* White, *supra.* The suggestion that sentences by military judges are on a broad scale excessively severe is simply not supported by any statistics provided this commission. *Cf.* Radine, *supra* at 190–92. In this light, the need for such a mechanism is highly questionable. It also must be noted that the Federal courts and most civilian jurisdictions do not require such protection from their judges. In this light, the present system undermines respect for the military judge and the confidence placed in him by Congress.

Of course it is quite possible that an individual judge may in a particular case abdicate his judicial responsibility and impose an excessively severe sentence or engage in a pattern of excessively severe sentences. *Cf.* R.C.M. 1001, Manual, *supra.* In these situations, formal mechanisms for legal review of sentence appropriateness already exist. The convening authority and the Court of Military Review are responsible and empowered to take corrective action (Articles 60 and 66, UCMJ) as well as the Judge Advocate General in certain cases, (Article 69, UCMJ) and the Secretary of each service. Article 74, UCMJ. It also must be remembered that the Judge Advocate General is the person empowered by Congress to certify these officers as military judges, and the presumption is that he will properly fulfill these responsibilities. Article 26, UCMJ.

The argument concerning the impact of an accused's decision to be sentenced by a military judge is somewhat misleading. It is true that a military judge will generally be inclined to impose a more lenient sentence on those military accused who save the Government time and expense in their prosecution. However, the proposed change does not foreclose an accused from securing a lenient sentence on this basis. Presently, the accused must elect a court of members or a military judge for both findings and sentence. The proposed change will not deprive the accused of his option to be tried by members for findings and of any benefit in sentencing he may receive as a result of this decision. Of course, in guilty plea cases such leverage in the sentencing process will be eliminated. However, it is the guilty plea itself which will produce the major savings to the Government and substantial benefit to the accused in the determination of his sentence. *Cf. Note, Jury Sentencing in Virginia, supra* at 968, 992–93.

The right to members' sentencing is no more than the right to gamble on a group of inexperienced or overly sympathetic laymen reaching a less severe sentence than a professional judge. Predictions as to sentencing by members in similar cases are further complicated by the different members in each court and their lack of knowledge of results in similar cases. In individual cases, the gamble admittedly may provide the accused with a lenient sentence. In other cases, the gamble may not pay off, and overly severe sentence may be imposed. In either case, justice, defined as an appropriate sentence, will not be served.

(d) Participation of Members of the Armed Forces in the Military Justice System

An additional question has been raised as to the impact the proposed changed will have on the participation of members of the Armed Forces in the military justice system. The proposed change eliminates the members as a sentencing authority in normal cases where a punitive discharge may be imposed as a permissible punishment. These cases involve the more serious offenses and include all general courts-martial and most special courts-martial.

The proposed change, however, does not entirely eliminate participation by members of the Armed Forces in the military justice system. They still may serve as members of a court-martial to determine findings in all cases where an accused does not request trial by judge alone or where the military judge does not approve such a request. However, in view of the significant percentage of guilty-plea cases, the opportunity for such participation in the more serious cases will be minimal. Of course, the members of the Armed Forces may still participate in findings and sentence in those special courts-martial where a bad-conduct discharge may not be imposed and in emergency situations. Again, based on statistics presented to this commission, opportunities for participation by the members of the Armed Forces in the military justice system will be rare.

At the present time, such participation in the Navy is minimal, because approximately 87 percent of all general and special courts-martial are tried by judge alone. In the Army and Air Force approximately 50 percent of all general and special courts-martials are tried by the military judge-alone, and the absence of participation will be greater felt. However, it must be remembered that under the present Uniform Code of Military Justice it is the military accused and military judge, not the members of the Armed Forces, who determine if the latter will participate at all in the military justice system. In this sense, the opportunity for participation even today cannot be considered substantial.

An additional concern over the diminished participation of the members of the Armed Forces at court-martial is the elimination of command or community input in court-martial sentences. It is true that the proposed change will significantly reduce the personal role of members of the command in imposing a sentence. It is not true, however, that such sentences will be imposed without consideration of these interests. Under the R.C.M. 1001(b)4, Manual, *supra,* the trial counsel may present to the sentencing authority evidence in aggrava-

tion including evidence of "significant adverse impact on the mission, discipline or efficiency of the command directly and immediately resulting from the accused's offense." [22] In addition, trial counsel is free to argue such matters to the sentencing authority.

An additional concern was expressed to the commission concerning the diminishing role of junior officers at courts-martial as a result of the proposed change. Since the modern era of military justice began in 1951, the role of the judge advocate or military lawyer at court-martial has increased at the expense of the non-lawyer officer. The suggestion was made that further elimination of the non-lawyer officer from the court-martial process would hamper his development as a leader and his ability in the future to make grave decisions concerning the lives and welfare of his men.

Various witnesses before this commission disagreed as to the degree to which the development of junior officers would suffer as a result of the proposed change. It must be remembered, however, that courts-martial are courts of law established to adjudicate criminal matters. *See Parisi* v. *Davidson,* 405 U.S. 34, 43 (1972). Although the development of decision-making skill is a vital requirement for an officer in the armed forces, a court-martial and its procedures cannot realistically be structured on this basis. To the extent that this need be considered critical, those courts-martial which deal with minor disciplinary offenses and punishment should satisfy this concern.

(e) Relationship Between Judge Advocates and Members of the Armed Forces

Another question to be considered by the commission concerns the impact the proposed change will have on the relationship between judge advocates and other members of the Armed Forces. It must be noted that the proposed change will make the military judge the exclusive sentencing authority in most serious cases. Now, more than ever, he will be a potential object for improper command influence as well as the subject of community dissatisfaction for what are perceived to be inappropriate sentences. Of course, not all judge advocates will be military judges, and the proposed change will only indirectly impact on the relationship of these judge advocates with members of the Armed Forces.

At the heart of this question is concern over the concentration of sentencing power in military judges rather than a shared exercise of this power with non-lawyer officers and senior enlisted members from the command. Suggestions have been made before Congress and this commission that such a transfer of sentencing authority will create unnecessary and unhealthy tension between the uniformed lawyer and members of the command. At the outset, it is important to identify the sources of friction between judge advocates or military judges and command or its members. In this way, the validity and significance of the above criticism of the proposed change can best be evaluated.

A basic source of tension between these groups is the struggle for control of the judicial process within the armed forces. It is a legislative fact that the role of command or the line officer has steadily decreased at court-martial, while the role of the judge advocate or military lawyer has increased. Some members of the armed forces have viewed this transfer of authority as a diminution of the disciplinary power of command.[23] The proposed change continues this historical trend and in some quarters will further exacerbate resentment of the military lawyer as an unwanted interloper in the disciplinary process.

The tension described above is based on a fundamental misapprehension as to the nature of a court-martial sentence. It is a criminal judgment of a court of the United States, not an expression of the will of the command or its officers in disciplinary matters. *See* Winthrop, *supra* at 444–46. While discipline may be affected by these judgments, command control of the court-martial is simply not tolerated even when members sentence. Article 37, UCMJ.

It is true that the trial judge who will impose sentence under the proposed change will be a military lawyer not attached to the local command. In this sense, the local command or its line officers will be less directly identified with the court-martial sentence. However, such a transfer of power can not reasonably be viewed as di-

[22] This manual provision, which became effective on August 1, 1984, should enhance a military judge's knowledge of the state of discipline within the command. *See Analysis of Questionnaire Data, supra,* Section 3(b) and (d).

[23] The majority of all groups surveyed agreed that mandatory judge alone sentencing would *not* deprive the command of any important powers. This question was posed in light of the fact that the accused currently has the option to reject member sentencing.

		A	N	MC	AF	CG	Total	
		25	11	14	15	9	15	Y
Q58	CA	54	72	65	65	69	66	N
		21	17	20	18	21	18	0
		10	6	12	7	12	8	Y
Q59	SJA	81	88	73	85	88	85	N
		9	6	15	8	0	7	0
		5	0	0	4	7	3	Y
Q62	MJ	90	86	100	92	93	90	N
		5	14	0	4	0	7	0
		0	0	—	33	0	7	Y
Q61	CMRJ	100	90	—	67	100	90	N
		0	10	—	0	0	3	0
		13	4	7	0	0	9	Y
Q57	TC	76	89	90	73	83	81	N
		11	7	3	27	17	10	0
		13	6	15	13	0	11	Y
Q59	DC	69	71	77	71	94	72	N
		18	23	8	16	6	17	0

minishing the power of command or as removal of command from the court-martial process.

A court-martial sentence supports command by imposing legitimate sanctions or punishments on servicemembers for violating laws of the United States enacted by Congress in accordance with the Constitution. It is these laws which require respect for the authority of command, obedience to its lawful orders and the maintenance of good order and discipline in our armed forces. While these goals may be achieved in most cases without resort to coercion, court-martial punishments are a legitimate means for this country to maintain an effective fighting force. Whether command officers or a military judge determines the sentence has no effect on the legitimacy of the punishment and, in view of our system of government, should have no effect on its acceptance by command or the military community.

A second source of tension between these two groups is the purported insensitivity of the lawyer to the requirements of good order and discipline in the armed forces. On the other hand, it has also been said that command and its officers are insensitive to the demands of the American people that justice be afforded the American servicemember. The proposed change to judge-alone sentencing is a continuation of this debate, and its adoption or rejection will not eliminate the tension between the two groups.

In this regard, several comments are warranted concerning the proposed change. A military judge is a military officer, not a civilian, and it cannot be said that he is totally insensitive to the demands of good order and discipline. In fact, many judge advocates are former line officers with command experience of some type. In addition, military judges are personally selected by the Judge Advocate General of each service, and presumably he selects individuals with some regard for these concerns. Finally, most, if not all, witnesses before this commission expressed satisfaction and great confidence in the military judges hearing cases in their command.

Another concern expressed before the commission is that the proposed change will isolate the military judge from interaction within the military community. In view of the prohibition against command influence contained in Article 37, UCMJ, such an observation possesses some truth. However, the military judge's relationship with members of the Armed Forces must be circumspect to the extent necessary to insure a fair and impartial judiciary. Of course, it must be remembered that the proposed change does not create the military judge, insulate him from command influence, or authorize him to impose a sentence at court-martial. These actions were taken by Congress in 1968, over 16 years ago. Since all the witnesses agreed that this system has worked despite such insulation, an increase in the number of cases will not greatly exacerbate this problem.

(f) Perceptions of the Members of the Armed Forces, Legal Profession and The American Public

Throughout American history Congress has expressed great concern that our system of military justice be perceived as both fair and effective. This concern has been motivated in a large part by the desire of Congress to enlist the support of the American people in the raising and maintaining of an effective armed force. It has also been tempered by the realities of military life and the requirements for successful military operations. Congress has responded to their constitutional duties by developing a military justice system that is perceived by the American public and command as giving proper deference to the rights of the individual servicemember and the legitimate interests of the Armed Forces.

The proposed change does present some significant problems in terms of perception which must be addressed. First, since the proposed change would deprive the military accused of the option of member-sentencing, it could be viewed as the elimination of an important right at court-martial. Second, since the impetus for this change originated with the complaints of certain military commanders against lenient sentences, it could be viewed as a commander's tool for ensuring severe punishments are imposed at court-martial. Third, since the number of officers imposing sentence will be reduced to one, it could be viewed as rendering the court-martial sentence more vulnerable to improper command influence. Finally, the American Bar Association in a 1974 resolution recommended a change different from the proposed change.

Each of the above perceptions conflicts with Congress' expressed intent to develop a military justice system which is perceived by the American public and command as fair and effective. However, close examination of the proposed change in light of these perceptions reveals that they are not based on reality or reason.

(1) The proposed change does not eliminate and should not be perceived as eliminating an important right of the military accused.[24] Instead, it eliminates an

[24]The responses were mixed as to whether adoption of the proposed change *would appear* to deprive an accused of a substantial right.

		A	N	MC	AF	CG	Total	
		42	38	40	44	36	40	Y
55	CA	44	51	48	38	52	47	N
		14	11	11	18	12	13	0
		48	54	26	49	0	48	Y
58	SJA	44	44	62	47	100	47	N
		8	2	12	4	0	5	0
		34	26	22	52	46	35	Y
58	MJ	66	57	72	44	54	59	N

Continued

archaic procedure once thought adequate to secure his fundamental right to an appropriate sentence. Indeed, trial by battle and trial by ordeal were early modes of procedure in our legal tradition which were undoubtedly perceived as important rights of an accused in securing justice. Yet, abolition of these archaic procedures and their replacement by more civilized and reliable procedures cannot reasonably be viewed today as a denial of an accused's right to a fair trial.

It also must be noted that the overwhelming majority of the States and the Federal courts do not recognize sentencing by jury in noncapital cases as a right of an accused in a criminal case. The American public and members of the Armed Forces who come from these states or are familiar with the Federal courts will not perceive the proposed change as affecting an important deprivation of a military accused's right to an appropriate sentence.

It is true that sentencing by members has been a tradition in our Armed Forces for over 200 years. Accordingly, members of our Armed Forces may feel they are being denied as important right afforded their predecessors at arms. However, it is a fact that thousands of men received excessively severe punishments by member courts during World War II. *See* White, *supra.* More importantly Congress in forging our modern military justice system has consistently discarded such traditions where they no longer served the present needs of command nor fostered the support of the American public.

(2) The proposed change is not and should not be perceived as an effort to subject a military accused to more severe punishments at courts-martial. The object of this sentencing reform is the establishment of a professional sentencing authority within the military community with both the expertise and experience to determine appropriate sentences. Such a sentencing procedure is widely accepted in civilian jurisdictions and was not conceived or perceived as a method to impose more severe sentences on civilians. Although some commanders feel that the peacetime sentences of members are inadequate in terms of severity, the proposed change is not so narrowly directed. It is also expected that the proposed change will eliminate excessively severe sentences during wartime, a common complaint during World War II.

		0	17	6	4	0	6	0
		36	40	—	17	50	34	Y
57	CMRJ	64	50	—	83	50	62	N
		0	10	—	0	0	4	0
		51	49	54	27	33	49	Y
56	TC	40	44	39	60	50	42	N
		9	6	7	13	17	9	0
		84	80	82	68	44	76	Y
58	DC	14	16	15	27	50	20	N
		2	4	3	5	6	40	0

(3) Another problem with the proposed change is that it could be perceived as making the court-martial system more vulnerable to improper command influence. The reduction of the number of officers who impose a sentence on a military accused will theoretically permit a convening authority to concentrate his efforts to influence the sentence on one person. Such a perception ignores a simple reality. The one officer who will sentence the accused is a professional military judge. Unlike the officer members of a court he will not be attached to the convening authority's command. He will be detailed to the case by the Judge Advocate General or a delegate in the military judiciary. He will be qualified for such duty as a professional military judge and will fully understand that Congress demands that he render an impartial sentence free of command influence. In this light, the above perception cannot be given great weight.

(4) It has also been brought to the attention of this commission that the American Bar Association in 1974 recommended that a military accused be given the option of selecting sentencing by military judge alone although he was tried by members on findings.[25] The basis of this recommendation was the belief that it was desirable that procedures akin to those in civilian courts be afforded in trial by court-martial. However, because of the desire to avoid the appearance of depriving the accused of an apparent safeguard, it was not recommended that his option of having member-sentencing be eliminated. To the contrary, a Department of Defense Task Force on Military Justice in 1972 composed of military and civilians earlier recommended sentencing by military judge alone.

The resolution of the American Bar Association was as follows:

> *Be it Resolved,* that the Uniform Code of Military Justice be amended to provide for sentencing power to be transferred to the military judge in all cases, except those involving the death sentence or where the accused prior to trial before a court-martial with members specifically requests to be sentenced by the court members.

The following report supported this resolution for the Standing Committee on Military Law:

> When first enacted in 1950, the Uniform Code provided that all sentencing in both general and special courts-martial would be done by the members of the court—usually by a two-thirds vote of the members. The Military Justice Act of 1968 created the office of "Military Judge", authorized the use of military judges in special, as well as general, courts-martial, and provided that an accused could, under certain conditions, elect to be tried by military judges alone. 10 U.S.C. section 816. Many accused

[25] This recommendation was soundly rejected by all groups surveyed except defense counsel. *See Analysis of Questionnaire Data, supra,* Section 4.

have utilized this election, so that a high percentage of trials by court-martial take place before a military judge alone. Thus, military justice has already moved a considerable distance in transferring sentencing from the "jury" to the "trial judge"—and so has come more in line with the American Bar Association's *Standards Relating to Sentencing Alternatives and Procedures* (Sept. 1968).

However, unlike his civilian counterpart, a military accused who wishes to have the difficult task of sentencing performed by the trial judge can only achieve this goal at the price of waiving trial by jury as to his guilt or innocence. Thus, current military law provides only the alternatives of (a) having the court members—i.e., the "military jury"—determine both guilt and innocence and the appropriate sentence or, (b) having the military judge adjudicate guilt and impose the sentence.

The recommendation would bring military justice more into conformity with civilian practice where sentencing is performed by a trial judge, but a jury may pass on guilt. At the same time uniformity of sentencing would be promoted, since military judges are, in general, more experienced and knowledgeable concerning rehabilitation and the other purposes of sentencing than is the average panel member of a court-martial.

Already a majority of military accused are being sentenced by military judges, since trial by military judge alone is chosen more often than not. Experience has demonstrated that the sentences imposed by military judges have been fair and impartial, as recognized both by accused and commanders. Thus, the recommendation proposes simply to carry further a trend that was begun by Congress in 1968 and has already proven successful.

Why then not go further and eliminate any right of the accused to elect to be sentenced by the court members? The Standing Committee was reluctant to take this further step, because it did not seem appropriate to deprive a military accused of any significant right which he has under present laws, *and his right to be sentenced by the court members could be viewed by some military accused as important.* They might feel, especially with respect to military offenses, that the members of the court-martial *would give greater weight to extenuating circumstances than would a military judge.* Furthermore, the majority of accused persons will be enlisted persons and therefore entitled by statute to request enlisted membership of a special or general court-martial before which they are brought to trial. 10 U.S.C. section 825(c)(1). A military judge must be a commissioned officer. 10 U.S.C. 826(b). Therefore, if the recommendation went further and removed the accused's right to elect sentencing by the court members, it might have an especially unwelcome *impact upon enlisted accused.*

The recommendation proposes that any election to be sentenced by the court members be made prior to trial, just as the accused must make certain other elections prior to assembling the court members. 10 U.S.C. sections 816(1)(B), 816(2)(C), 825(c)(1). The recommendation deals only with the statutory amendment that would be necessary to redistribute the sentencing power. However, the Standing Committee on Military Law would also contemplate that the Manual for Courts-Martial and other directives be amended to provide for a pre-sentencing report system similar to that being utilized in the Federal District Courts and many state courts.

Obviously in making special provision for sentencing by the court members—the military jury—in capital cases, the Standing Committee was not taking any position on the desirability of capital punishment, whether in military justice or elsewhere. Instead, the Committee's purpose was simply to recognize that some existing provisions of the Uniform Code do authorize capital punishment and that traditionally special provision has been made for jury participation in imposing a death sentence.

The previous discussion concerning the nature of the present "right to member sentencing" indicates that it is not an important right of the military accused. Enlisted-member participation is extremely limited in practice, restricted to those persons selected by the convening authority and, to a large extent, creates only the appearance of fairness. A military judge, although a military officer, is not a member of the command and is especially trained in concepts such as equal protection under law.

V. Conclusions

(a) Comments on Military Justice Sentencing Policy

The adoption or rejection of the proposed change depends on the sentencing policy of Congress for members of the Armed Forces. This policy should be consistent with Congress' general approach to military justice. Legislative change over the years has indicated Congress' concern with both the interests of command and the rights of the individual servicemember in military justice matters. Sensitive to the principles of our constitutional democracy, Congress has adopted a compromise solution which balances these sometimes competing interests. *See* Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights,* 62 No. Caro. L. Rev. 177 (1984). It has gradually structured a system which in its opinion promotes an effective fighting force broadly supported by the American people.

The proposed change once again requires Congress to determine the optimum balance of these interests to accomplish this goal. A significant problem facing this commission was the fact that majority of witnesses speaking for command and on behalf of the military accused favored the present system over the proposed change. Command favors the present system largely on the basis that it maintains command or military community presence in the sentencing process. The accused favors the present system on the basis that it provides him an opportunity to secure a more lenient sentence. However, both these interests are at odds with the conclusion of the overwhelming majority of civilian jurisdictions that the determination of sentence is a specialized judicial function directed at producing a sentence which is appropriate.

The critical question becomes, what is the sentencing policy of Congress for members of the armed forces in

non-capital cases? Does it desire on a systematic basis community-involved sentences, lenient sentences or appropriate sentences which consider both the offense and the offender? *The present Code and the Manual for Courts-Martial clearly indicate that the Congress and the President want court-martial sentences to be appropriate. See* Article 55, UCMJ, R.C.M. 1006(e)(3), Manual, *supra; see generally* R.C.M. 1001–1006, Manual, *supra.*

Certain elements of the present sentencing system are not consistent with widely accepted procedures for determining an appropriate sentence. They are the use of a group of laymen as the sentencing authority, the restriction on matters presented to the sentencing authority, the absence of a probation report and the predominantly *adversarial* nature of the sentencing process. In fact, the present sentencing procedures closely resembles a trial to determine guilt or innocence, a procedure recognized as inappropriate and inefficient to determine an appropriate sentence.

The court-martial system in this country has been criticized from its inception for its failure to adapt to developments in our civilian criminal justice systems. These criticisms have come from within the military community as well as from the civilian community. No change in our military justice system has ever been adopted simply because the practice exists in our civilian systems of justice. Always, Congress has sought to determine whether the existing system or the proposed change would secure or maintain a more effective armed force for the defense of our country.

Sentencing by members is a procedure which is in reality "sui generis" or unique to the armed forces. It has been the source of harsh criticism of the military justice system and no longer adequately or efficiently serves the purposes for which it was originally adopted. If it is now equated to sentencing by jury, it must be recognized that jury sentencing is not accepted by the vast majority of civilian jurisdictions as the most appropriate sentencing authority. If it is now equated to sentencing by experts, it must be recognized that the military judge has better qualifications, training and experience to make sentencing decisions.

A military accused's present option for member sentencing or judge-alone sentencing was created in 1968. It was not established in response to complaints that military judge sentencing was too severe or that a mechanism was needed to restrain his sentencing power. Instead, it was the product of legislative compromise in the course of the further development of military justice along the line of civilian practice. The proposed change is a logical step in this development, since the military judge has now gained the respect and trust of command, the accused and the American public. For the above reasons it is concluded that the proposed change to judge-alone sentencing in non-capital cases should be adopted.

(b) Specific Conclusions

(1) Congress is empowered under the Constitution to enact the proposed change and should do so if the proposed change is consistent with its sentencing policy for members of the Armed Forces.

(2) The present system of military justice provides the military accused an option to request that he be tried and sentenced by a military judge alone; otherwise he will be tried and sentenced by members.

(3) The proposed change would provide for sentencing by a military judge alone in all noncapital cases to which a military judge is detailed, regardless of whether his guilt is determined by a court of members or by a military judge alone.

(4) In terms of experience in the civilian sector, the vast majority of jurisdictions provide for sentencing by the trial judge alone.

(5) In terms of results in the civilian sector, it is generally believed that sentence appropriateness and efficiency are greatly fostered by sentencing by the trial judge without adverse impact on the rights of the accused.

(6) The primary reason for the adoption of this procedure in the civilian sector is the nature of the sentencing process which requires an expertise and experience not found in a group of laymen called together for a single occasion.

(7) In terms of impact on the Armed Forces, the proposed change will foster greater appropriateness and efficiency in sentencing without any significant adverse impact on the rights of the military accused.

(8) The proposed change will limit, but not eliminate, participation by members of the Armed Forces in the military justice system and it will not significantly exacerbate relationships between judges advocates and other members of the armed forces.

(9) The proposed change will enhance the perception of the military justice system by members of the Armed Forces, the legal profession and the general public.

(10) The proposed change is consistent with the sentencing policy of Congress to secure appropriate sentences by courts-martial.

VI. Recommendations

After careful consideration of the proposed change, it is recommended that it be adopted. The fact that most civilian jurisdictions with which the American public and the American servicemember have experience have adopted sentencing by judge-alone was an important consideration. A far more significant consideration was the conclusion that the reasons for which these civilian jurisdictions adopted this sentencing procedure were in a large part equally applicable to the sentencing policy of Congress in the military justice system.

It is recommended that certain sections of Senate Bill 2521, 97th Congress, 2d Session, a Bill to Amend to Chapter 47 of Title 10, United States Code (Uniform Code of Military Justice) designed to accomplish this change be enacted. It states:

(d)(2) Section 816 (article 16) is amended—

(2) by striking out clause (3) and inserting in lieu thereof the following:

"(3) summary courts-martial, consisting of one commissioned officer.

However, except in those cases of a general court-martial in which the findings announced include a finding of guilty of an offense for which that court-martial may adjudge the death penalty and those cases in which a military judge has not been detailed to the court, a court-martial shall consist of only a military judge after findings are announced."

(f) Section 826(a) (article 26(a) is amended by striking out the period at the end thereof and inserting in lieu thereof the following: "and except in those cases of a general court-martial in which the findings announced include a finding of guilty of an offense for which that court-martial may adjudge the death penalty, shall determine and announce the sentence of the court-martial to which he has been detailed."

(p) Section 851 (article 51) is amended—

(1) in subsection (a), by inserting "(if members are required to determine the sentence" after "on the sentence."

(2) in subsection (d), by striking out "a military judge only" and inserting in lieu thereof "only a military judge pursuant to an approved request by the accused under clause (1)(B) or (2)(C) of section 816 of this title (article 16):; and

(3) by adding at the end thereof the following new subsection: (e) Subsections (a), (b), (c), and (d) do not apply to the proceedings of a court-martial composed of only a military judge after the announcement of findings pursuant to the last sentence of section 816 of the title (article 16). During such proceedings, the military judge shall determine all questions of law and fact arising during those proceedings and shall adjudge an appropriate sentence."

If the above recommendation is accepted by Congress, it is also recommended that Congress direct the President pursuant to Article 36, UCMJ, to promulgate sentencing procedures which would permit full sentencing information to be presented the trial judge. *See* Fed.R.Crim.P. 32(c); *see also Williams* v. *New York,* 337 U.S. 241 (1949); ABA Standard 18-5, Sentencing Alternatives and Procedures (1979).

VII. Rejoinder to the Majority Report

A clear majority of this commission opposes the proposed change to mandatory judge-alone sentencing in all noncapital cases to which a military judge has been detailed. Many of the concerns of the majority have been addressed earlier in this report. However, some direct comment is warranted as to the more important areas of disagreement.

A significant factor in the majority's decision is its conclusion that the present option to be sentenced by members is an important statutory right which is being exercised by a substantial number of military accused from all services. In part, it supports this conclusion by the citation of statistics which evidence the frequency of trial by members; from 9% to 40% depending on the service. It must be noted, however, that under the present system an accused must be sentenced by members if he elects to have members determine his guilt or innocence. Consequently, these statistics to some degree may simply reflect the importance of the present option with respect to findings.[26] Furthermore, the proposed change does not eliminate this findings option. Accordingly, these statistics do not convincingly establish the importance of member sentencing to an accused nor do they so persuasively support rejection of the proposed change.

A second significant factor in the majority's decision to oppose the proposed change is that it would remove commanders one step further from the disciplinary system. The majority relies on testimony from senior military commanders that the separation of command officers from active participation in the court-martial process tends to dilute command responsibility for good order and discipline, deprive command of immediate reenforcement of its authority and disrupt unit cohesion. Several points must be made in this regard.

First, the above testimony more appropriately supports a conclusion that officers from the local command should sentence the accused *at all courts-martial.* However, Congress rejected such a system in 1968 when it created the military judge and authorized him to impose sentence at courts-martial if requested by an accused.

[26] *See Analysis of Questionnaire Data, supra,* Section 3(s).

Percentage of defense counsel who say decisions to request trial by military judge alone are based primarily upon *findings/sentence/no difference* considerations:

	A	N	MC	AF	CG	Total
DC	10/62/28	21/57/2	21/57/28	11/65/25	25/56/19	14/60/25

Moreover, there was little, if any, support for a return to mandatory member sentencing from the senior military commanders who testified before the commission.

Second, "the removal of command" rationale does not provide substantial support for retention of present sentencing option. To avoid on a systematic basis the perceived detriments to commands interests which were mentioned above, command officers' participation in the sentencing process should be on a regular basis or at least be controlled by command. The more irregular their participation and the more it is controlled by the accused, the less impact it will have in securing these command objectives. Under the present system, command officers participate in the clear minority of cases tried by courts-martial and can be effectively removed prior to trial on election by the accused. Accordingly, the present option on a systematic basis does not substantially promote the interests of command mentioned above.

Third, the "removal of command" argument does not dictate rejection of the proposed change. There was little, if any, testimony presented to commission which indicated dissatisfaction with the sentences imposed by military judges or a broad rejection of their validity by the military community. The command removal argument instead is largely a statement of preference which is based on broader perceptions adverse to the command which may be drawn by the military community from the proposed change. These perceptions, as indicated earlier in this report, are unjustified and can be cured by education of the military community as to the nature and purpose of the proposed change.

The proposed change should be adopted.

Minority Report: The Court-Martial Should Have the Power to Suspend Sentences

S. S. Honigman

Scope of Study

The Commission was directed to study and provide recommendations concerning "whether military judges and the Court of Military Review should have the power to suspend sentences." This issue necessarily includes the questions of whether a court-martial consisting of members empowered to adjudge a sentence should have the power to suspend that sentence in whole or in part, and which official or entity should be empowered to vacate a suspension if the suspension is adjudged by the military judge or court-martial members.

Recommendations

1. The military judge should be empowered to suspend, in whole or in part, a sentence adjudged by him.
2. Where a sentence is adjudged by the members of a court-martial, the members should be empowered to suspend, in whole or in part, a sentence adjudged by them.
3. Permissible conditions for the suspension of a sentence should include continued good behavior and adequate performance of military duties, satisfactory participation and progress in programs of therapy or counselling, restitution of the proceeds of the crime, and specified service of a military or community nature.
4. Consideration by the appropriate entities should be given to whether the Manual for Courts-Martial or Military Rules of Evidence should be amended to permit or require the submission of additional evidence to the court-martial to assist in the formation of an informed decision regarding the suspension of a sentence.
5. The court-martial convening authority should retain his current power to suspend a sentence in whole or in part.
6. The power to vacate the suspension of a sentence should continue to reside in the officer exercising court-martial jurisdiction over the probationer in accordance with the procedures currently in effect.
7. The Courts of Military Review should not be empowered to suspend a sentence.

Rationale

(a) *Military Judges*

The Uniform Code of Military Justice now recognizes that complete or partial suspension constitutes a proper and useful element in the process of framing an appropriate sentence. To accord due regard to the nature of the offense, the individual offender, military exigencies requiring the return of the offender to duty, such sentencing objectives as retribution, deterrence, rehabilitation and the need to express social condemnation of the offense and clemency, a suspension may be warranted. Where those sentencing factors must be weighed in the first instance by the military judge who adjudges the sentence, it follows that the suspension power should be available to the sentencing authority. In the words of Brigadier General Richard G. Moore, USMC (Ret.), the power to suspend is a "proper tool for sentencing that should be given to the military judge." (Moore Test., at 199)

At the present time, that power is not available. Instead, the military judge is limited to recommending that a suspension be granted by the court-martial convening

authority. Accordingly, many witnesses with judicial experience testified that the absence of the power to suspend a sentence could, and in some cases does, prevent them from adjudging what they determine to be the appropriate sentence. The judicial dilemma created by the judge's inability to suspend a sentence was described as follows by Captain Owen L. Cedarburg, JAGC, USN (Ret.), current Chief Judge of the Coast Guard Court of Military Review:

> "On a number of occasions . . . I have sat on a case where I would not say the punitive discharge or the amount of confinement or forfeitures was inappropriate, but I thought the potential for rehabilitation was demonstrated in the record. Trial judges should have one more tool available to them in fashioning a sentence appropriate to the offense and the offender . . ." (Cedarburg Test. at 281)

Similarly, Brigadier General Moore spoke of judges' "internal agony of saying to themselves a discharge is appropriate in this case but not an executed discharge . . ." (Moore Test. at 209) Commander Kevin J. Berry, USCG, a general court-martial judge, stated that:

> "I've had occasions where my sentence would have been different had I been able to suspend a portion . . . I think that there are occasions where not only the ability to suspend but the ability to condition a suspension is essential in formulating a proper sentence for that case." (Berry Test. at 327–328)

To the same effect was the testimony of Captain Deroucher, JAGC, USN, the former commander of the Navy's second largest trial facility:

> "It is obvious that there are going to be a number of cases that come before any military judge where his honest appraisal of the overall situation is that the sentence ought to include a suspended portion." (Deroucher Test. at 300)

Under the current system, the military judge who believes that "the sentence ought to include a suspended portion" is limited to recommending such a suspension to the convening authority. However, as the testimony showed, the degree to which such recommendations are adopted varies widely from commander to commander * and military judges are reluctant to assume that a recommendation will actually result in a suspension. In consequence, witnesses testified that the practical effect of their inability to suspend led them to adjudge skewed sentences which they viewed as unduly harsh or unduly lenient. **

Thus, Captain Deroucher testified that his view "is that [the military judge's] only proper option is . . . not to award that portion of the sentence which he would otherwise suspend if he had the power." (Deroucher Test. at 300) Commander Berry similarly declared that "because I cannot count on the convening authority following [my recommendation], in fact I can anticipate they won't," his remedy is to refuse to adjudge those elements of the sentence which he does not believe should be unsuspended. As defined by Chief Judge Cedarburg, where the suspension power is not available the alternative "may very well be for the [judge] not to award a punitive discharge." (Cedarburg Test. at 291) On the other hand, Brigadier General Moore testified that the proper solution for the judge would be to impose the sentence which would be excessive if executed, recommended suspension, "and sit back and hope." (Moore Test. at 209)

I do not believe that the military judge should be required to "sit back and hope" that an appropriate sentence will result from another's review of the case. To the contrary, in the current system which relies upon a highly trained, professional and experienced judiciary, the military judge should be able to call upon the complete spectrum of sentencing tools to fashion a sentence which he believes to be the most appropriate one possible in light of the proceedings conducted before him. That ability takes on additional significance in light of the Commission's decision (in which I join) to recommend that the jurisdiction of a special court-martial be increased to include a sentence of one year in confinement.

This conclusion is bolstered by the fact that of the individuals who might exercise the power to suspend, the military judge is in a position to do so on the basis of more than the cold record of trial. Because he has presided over the trial or plea and proceedings in extenuation and mitigation, he has a unique position, proximity and perspective from which to evaluate the accused and the evidence regarding the merits of a suspension. *

* *Compare,* Galvin Test. at 178; Butterworth Test. at 295; *with* Dunn Test. at 245.

** Chief Judge Cedarburg also noted that in an effort to frame a strong, persuasive recommendation for suspension, military judges have gone so far as to impeach their own sentences, leading to appellate reversals of those sentences. (Cedarburg Test. at 289)

* While a number of witnesses asserted that the commander has the fullest store of information about the accused, including long-term familiarity with his military performance and possible personal problems preceding the filing of charges, as well as an opportunity to consult informally with senior non-commissioned officers or the accused's family members, such information would seem to be available to the junior commander of the accused's immediate unit, not the more remote officer exercising general or special court-martial authority. For that reason, it should be as available to the military judge through testimony as it is to the convening authority through informal channels. By the same token, the convening authority's reliance in reaching his decision to grant or deny a suspension upon intangible factors or intuitive decision-making developed in the course of his experience as a commander should be mirrored by the military judge's development of similar intuitions through his experience in imposing sentences. Finally, if the military judge grants a suspension in a case where the convening authority would not suspend, the probationer's subsequent conduct should quickly disclose whether or not the suspension was provident. If the probationer is not capable of abiding by the terms of the suspension, his misconduct should soon provide good cause for a principled vacation of the suspension by the convening authority.

I have reached this conclusion despite the opinion of several witnesses that it is the commander who can best evaluate the impact of a suspension (and the return to duty of the probationer) upon the mission effectiveness, discipline and morale of the probationer's military unit. ** There can be no question that the commander's perspective in view of his responsibility for the fulfillment of the military mission is of paramount importance. However, the commander's opinion and the underlying considerations which bear upon matters relating to the command can and should be effectively presented to the sentencing authority through the commander's advocate, the trial counsel, at the time that counsel presents his argument concerning the sentence to the court.

A number of witnesses warned the Commission of the danger of a system in which the decision of the military judge to suspend a sentence would lead to conflicts with a commander who viewed that suspension as improvident. I do not believe that unacceptable conflicts would occur if military judges were given the power to suspend. In the first place, some "conflict" between the commander and the courts is inherent in the system as it is now constituted. Whenever a BCD special or a general court-martial does not adjudge a punitive discharge, its decision to return the accused to duty could be viewed as in "conflict" with the commander's judgment that such a discharge was appropriate. (If the commander did not seek the imposition of a punitive discharge, he presumably would not have referred the charges to a tribunal empowered to impose one.) In addition, conflicts currently exist where the military judge or court members recommend suspension but the convening authority does not follow that recommendation. Indeed, those conflicts may impact adversely upon the morale of the command if they are interpreted as indicating a lack of regard by the commander for the outcome of the judicial process. Moreover, as noted above the commander would retain the ability, through the trial counsel, to make his views concerning suspension known to the court. I am confident that those views would be given due weight by the military judge.

Furthermore, as indicated more fully below, my recommendations would not deprive the commander of his own ability to suspend a sentence. Thus, in those instances where considerations of military exigency or clemency dictate to the commander that suspension is warranted, he would be able to ensure the outcome that he deems appropriate. * In recognition of this fact, Commodore Butterworth stated that he could "live with" a system in which both the commander and the military judge had the power to suspend.

Because the avoidance of unnecessary conflicts between commanders and military judges is an important objective, I do not advocate a proposed middle-ground procedure whereby the military judge would be empowered to suspend a sentence, but the convening authority in turn would have the power to disapprove the suspension for good cause stated upon the record, with his decision in turn subject to review for abuse of discretion. Under such a system strains between the command and the judiciary could be unreasonably magnified. (*Cf.*, Galvin Test. at 182) It is possible to imagine a scenario in which a commander's action overruling a suspension by the military judge would itself be promptly overruled upon subsequent judicial review.

In sum, I believe that as long as the commander retains three essential prerogatives—to vacate a suspension for cause in light of the probationer's subsequent misconduct; to suspend a sentence himself for reasons of military exigency or clemency; and, through counsel, to acquaint the court with his arguments against suspension—his legitimate interests will not be impaired if the power to suspend is also extended to the military judge.

Nor do I believe that such an extension of the power to suspend will materially impact upon the commander's support for the UCMJ and military judges. Instead, I am confident that military judges can be relied upon to recognize the need to exercise appropriate restraint in reaching the decision to suspend (*see* Cedarburg Test. at 281), and in the conditions of suspension that they will impose. (*See* Berry Test. at 327–328)

Finally, it is appropriate to note that granting military judges the power to suspend should not be regarded as a step toward a general reduction in the quantum of punishment adjudged by courts-martial. To the contrary, as suggested by Captain Deroucher and Commander Berry, the net result may be "somewhat harsher sentences with portions suspended" (Berry Test. at 328–329) and "longer sentences, more discharges being adjudged with that increase being suspended." (Deroucher Test. at 300) Of course, the imposition of those additional elements of punishment would ultimately depend upon the probationer's performance during the term of the suspension.

(b) Court-Martial Members

While it has been argued that the suspension power would be appropriate for the military judge but not for court members, such a distinction has only superficial merit. The same considerations which militate in favor of allocating the power to suspend to the military judge apply where the sentencing authority resides in the members of the court-martial. In those cases where court

** *See, e.g.,* Edwards Test. at 348; Coverdale Test. at 310; Sennewald Test. at 269; Oaks Test. at 230, 233–234.

* Several witnesses stressed the importance of the principle articulated by then-General Eisenhower that a commander should have the power to return a soldier to duty to perform a vital military function despite the sentence of the court-martial. *See* Edwards Test. at 348–349. Hodgson Test. at 164.

members are entrusted with the responsibility for adjudging a sentence, there is no reason to suppose that they will be unable to employ the additional power to suspend circumspectly and appropriately. Moreover, a two-tier system in which military judges but not court members could take suspension action favorable to the accused might be subject to constitutional attack as providing an impermissible incentive to the accused to waive his right to a jury trial.

(c) Conditions

I do not anticipate that empowering courts-martial to suspend sentences would require the creation of military probation departments or probation reports or otherwise lead to excessive consumption of military resources. The recommended conditions for suspension lend themselves to supervision through the probationer's usual chain of command or through the director of a counselling or therapeutic program. With respect to continued good behavior or performance of military duties, the probationer's "probation officer" will be his senior NCO (*see, e.g.,* Berry Test. at 334), while his failure to comply with the requirements of an alcohol or drug-abuse program or to make restitution can readily be reported to his commander.

(d) Evidentiary Concerns

Judges and commanders alike testified that under the current Military Rules of Evidence the court was unlikely to receive certain evidence which would assist it in developing a fully informed opinion as to the propriety of suspending a given sentence. Among such matters noted were prior non-judicial punishment, medical or chemical-related conditions and the like. I share those witnesses' concern that the decision to suspend be based upon a full development of the pertinent facts. However, this issue should probably not be addressed by statute. Nor was the record sufficiently developed concerning the particular procedural changes that may be required. Accordingly, I recommend that the appropriate entities responsible for the Manual For Courts-Martial and the Military Rules of Evidence be tasked with formulating the necessary amendments thereto in order to effectuate an informed exercise of the suspension power by military judges and court members.

(e) The Convening Authority

As recognized above, considerations of clemency or military exigencies relating to the performance of the military mission may properly lead the convening authority to suspend a sentence where that suspension is not accomplished by the military judge or court members. For that reason, the convening authority should retain his current power and prerogative to suspend a sentence in whole or in part, and to impose conditions upon such suspension.

(f) The Courts of Military Review

Because the Courts of Military Review are limited to a review of the record and because the passage of time reduces the effectiveness of an appellate suspension as an aid toward rehabilitation, the Courts of Military Review should not be empowered to suspend a sentence.

(g) Vacation of Suspension

In recognition of the convening authority's responsibility for mission effectiveness, discipline and morale, he (as opposed to a military judge) should be the appropriate authority to exercise the power to vacate a suspension. In that regard, the current procedures for vacation of suspension appear to be adequate.

STEVEN S.
HONIGMAN

What Should Be the Elements of a Fair and Equitable Retirement System for the Judges of the United States Court of Military Appeals? *

In considering this question, the Commission examined the elements of existing retirement systems of United States courts. Additionally, the Commission reflected upon what should be the elements of a retirement system which would be fair objectively; which would be equitable in comparison to other important Federal courts; and which, at least, would not be a negative factor to a candidate for appointment to the bench of the Court of Military Appeals.

Existing Retirement Systems

Article III Courts

There are three circumstances under which a judge or Justice on an Article III court may leave regular active service on the bench and continue to receive a lifetime salary: (1) He may resign his office at age 70 with at least 10 years' service in office and receive a lifetime salary equal to that he was receiving when he resigned. 28 U.S.C. § 371(a). (2) He may retain his office but retire from regular active service, either at age 70 with at least 10 years' service in office or at age 65 with at least 15 years' service in office, in which event the judge continues to receive the salary of the office. 28 U.S.C. § 371(b). (Thus, a retired judge continues to be eligible for any increases provided by Congress for the office from which he is retired, *see* Reviser's Note, 28 U.S.C.

* Position Paper prepared for the Commission by Working Group member, Robert Mueller.

§ 371). (3) He may retire from regular active duty if he becomes permanently disabled from performing his duties: if he has served 10 years, he continues to receive the salary of his office; if he has served less than 10 years, he receives one-half the salary of the office. 28 U.S.C. § 372(a).

Also, there is a rather complex system of annuities for survivors of certain judicial officials of the United States, among them judges and Justices of Article III courts (and including, as well, judges of United States District Courts for the Districts of the Canal Zone, Guam, and the Virgin Islands). 28 U.S.C. § 376. Chief among the system's provisions is that for computing the amount of annuity, found in 28 U.S.C. § 376(1)(1). Thereunder, the annuity of a widow or widower of a judicial official shall be in an amount equal to the sum of 1¼% of the average annual salary, including retirement salary, during the three years in which such salary was the highest, multiplied by the total of: (1) the number of years of creditable service as a judge or Justice of the United States or of the District Court of the Canal Zone, Guam, or the Virgin Islands; as a Director of the Administrative Office of the United States Courts; as a Director of the Federal Judicial Center; or as an administrative assistant to the Chief Justice of the United States; plus, (2) the number of creditable years as a Senator, Representative, Delegate, or Resident Commissioner in Congress prior to assuming the responsibilities in the first category; plus, (3) the number of creditable years in honorable service on active duty in the Army, Navy, Air Force, Marine Corps, or Coast Guard which are not counted for retirement or retired pay from such service; plus, (4) the number of years, up to fifteen, of creditable service as an "employee", as defined in 5 U.S.C. § 8331 (including, through 5 U.S.C. § 2105, individuals appointed in the civil service by the President or a Member of Congress), prior to assuming the responsibilities in the first category. The annuity shall also include ¾% of such average annual salary, multiplied by the number of years of any prior creditable service in any of these categories not applied under the above formula. Notwithstanding, the annuity shall not exceed 40% of such average annual salary of the three years during which the salary was the highest.

Article I Courts

Judges in Territories and Possessions. Judges of the United States District Courts in United States Territories and Possessions are appointed to terms of 8 years. There are three situations in which such a judge is entitled to receive retirement pay.

First, the judge may resign his office at age 70 if he has at least 10 years' service on that bench or at age 65 if he has at least 15 years' service and receive a lifetime salary equal to that which he received when he resigned office. He is entitled to cost-of-living increases under 5 U.S.C. § 8340, provided that the salary or the amount payable to him shall not exceed 95% of the salary of a U.S. District Judge in regular active service. 28 U.S.C. § 373.

Second, if the judge is removed for disability or is not reappointed by the President, he is entitled at age 65 (or whenever he leaves office if then older than 65) to a lifetime salary equal to his salary when he left office, if his judicial service aggregated at least 16 years. If he has less than 16 years' service but at least 10 years, then he is entitled to the portion of his full salary at the time he left office which is in proportion to the ratio that the number of years served is to 16. 28 U.S.C. § 373.

Third, by omission in the statute of any provision applying to a judge who fails of reappointment and has less than 10 years' service, apparently he may claim only whatever is his entitlement as a Civil Service employee.

United States Tax Court. Judges of the United States Tax Court are appointed to 15-year terms. 26 U.S.C. § 7443(e). Such a judge is paid the same salary as is a U.S. District Judge. 26 U.S.C. § 7443(c)(1).

A judge of the Tax Court may elect either to remain under the Civil Service retirement system or to go under the court's retirement system established by statute. If he elects the latter, there are four circumstances under which he may retire and receive a lifetime salary: (1) He must retire at age 70. 26 U.S.C. § 7447(b)(1). (2) He may retire at age 65 with at least 15 years' service. 26 U.S.C. § 7447(b)(2). (3) He may retire, regardless of age, if he is not reappointed at the expiration of his term, provided he has served as a Tax Court judge for at least 15 years and provided he has advised the President of his willingness to accept reappointment. 26 U.S.C. § 7447(b)(3). (4) He must retire if he becomes permanently disabled from performing his duties. 26 U.S.C. § 7447(b)(4).

The retired pay of a judge retiring under any of the first three options is determined by the following proportion: his retired pay is to his full pay as his number of years is to 10, provided that retire pay cannot exceed full pay. 26 U.S.C. § 7447(d)(1). The statute, in referring to the full pay in the proportion, uses the phrase "during any period," so apparently the retired pay increases if the full active pay increases. A judge who retires under the fourth, disability, option receives full pay if he has served on the court for at least 10 years, and half pay if he has served less than 10 years. 26 U.S.C. § 7447(d)(2).

A rather complex system of annuities to widows and dependent children of Tax Court judges is established in 26 U.S.C. § 7448. The principal provision of this system is subsection (m), which sets out the computation of annuities of the surviving spouse. Essentially, it tracks the formula relating to Article III judges and Justices. The

annuity shall be in the amount equal to the sum of (1) 1¼% of the average annual salary received by the judge for judicial service or any other allowable service during the period of 3 consecutive years in which that salary was highest, multiplied by: the sum of the years of judicial service; the years of prior allowable service as a Senator, Representative, Delegate, or Resident Commissioner in Congress; the years of prior allowable service as a member of the Armed Forces, not exceeding 15; and, the years of prior allowable service as a congressional employee; and (2) ¾% of such average annual salary multiplied by any other prior allowable service. Notwithstanding, the annuity shall not exceed 40% of such average annual salary.

United States Claims Court. Judges of the United States Claims Court are appointed for a term of 15 years and receive a salary as determined under the Federal Salary Act of 1967. 28 U.S.C. § 172. When Congress created this Court in the 1982 reorganization under the United States Court of Appeals for the Federal Circuit (an Article III court), it did not include in the statute any retirement provisions, because it intended in the near future to address all retirement systems of Article I courts. Consequently, judges of the Claims Court may claim only whatever is their entitlement as a Civil Service employee.

United States Court of Military Appeals. Judges of the United States Court of Military Appeals are appointed for terms of 15 years and are paid the same salary as are judges of the U.S. Courts of Appeals. 10 U.S.C. § 867(a)(1).

When a judge of the Court of Military Appeals retires, his pension is computed under 5 U.S.C. § 8339(a), the provision setting forth the retirement formula for Civil Service employees—except that the judge's years on the court, as well as any years as a Member of Congress, as a congressional employee, and in military service (up to 5 years), are figured at the rate of 2½% of his average pay for those years. 5 U.S.C. § 8339(d)(6). Combining these provisions, then, the retirement annuity for a judge of the Court of Military Appeals is computed using the following formula: (1) 2½% of his average pay multiplied by the number of years on the court, as a Member of Congress, as a congressional employee, and in military service (up to 5); (2) 1½% of his average pay multiplied by the number of years of total service which, when added to the first category, does not exceed 5; (3) 1¾% of his average pay multiplied by the number of years of total service that exceeds 5 but does not exceed 10; plus (4) 2% of his average pay multiplied by the number of years of total service which, when added to the first category, exceeds 10.

There is no special survivor's annuity for judges of the Court of Military Appeals, apart from provisions applying generally to Civil Service employees.

Discussion

Elsewhere in this report, the Commission has recommended that the United States Court of Military Appeals be reestablished under Article III of the Constitution of the United States. Should that recommendation be followed, the question of what should be the elements of a fair and equitable retirement system for the court would, thereby, be resolved. Accordingly, the discussion here of that question and the recommendation which follows assumes that the court remains established under Article I.

The United States Court of Military Appeals is the only court established under Article I of the Constitution which is exclusively an appellate court: The United States Tax Court performs both trial and appellate functions, and United States District Courts in U.S. Territories or Possessions and the United States Claims Court are exclusively trial courts. Indeed, possibly in recognition of this unique status, active judges of the Court of Military Appeals are paid at the same rate as are judges of U.S. Courts of Appeals—a rate higher than that applicable to judges of any other Article I court. The commission views this as a factor of some importance in favor of affording the Court of Military Appeals a system of retirement favorable in comparison to other Article I courts.

It appears that the Article I court with the most favorable retirement system is the Tax Court. That system strikes a balance between the more generous system offered Article III judges and Justices and the less generous system offered other Article I courts. Moreover, considering other factors such as term of appointment, level of salary, and level of practice referred to earlier, this balance seems to be a reasonable and objectively fair one.

Moreover, considering the nature of the litigation in the Court of Military Appeals, it appears that it is entirely appropriate for a retirement system for the judges of that court to be similar to that available to judges of the Tax Court. The Court of Military Appeals hears discretionary appeals from individual appellants convicted of crimes of the most serious nature. Some of the courts-martial records filed for review in the court involve offenses of a uniquely military nature, such as disobedience of superiors, unauthorized absence, and assault on a superior; in a military setting requiring discipline and response to authority, these violations of the Uniform Code of Military Justice are critical to the ongoing ability of the Armed Forces to accomplish its mission. Additionally, much of the court's docket is composed of cases involving crimes recognized in civilian jurisdictions as

serious threats to the peace and security of the community, such as robbery, rape, and murder. The Commission notes that a high proportion of the court's petition docket involves offenses directly or indirectly related to drug abuse, and crimes of this nature, of course, affects both the ability of the military to respond and the peace and security of the military living community.

Additionally, the Court of Military Appeals answers questions certified to it by the various Judge Advocates General in cases in which the decisions of Courts of Military Review raise questions of great and sweeping importance to the practice of law by military attorneys and, frequently, to the day-to-day operation of the Armed Forces.

In short, the Court of Military Appeals is a court whose judges have particular impact on the practical ability of the United States defense apparatus to perform as needed and as anticipated. The importance and prestige of this court apparently was anticipated when the Congress established the Court of Military Appeals in 1951 and set the pay level for the judges equal to that of judges of the U.S. Courts of Appeals. Accordingly, it is fully appropriate for the retirement system for these judges to reflect this importance and prestige. While the system recommended is not parallel to that available to Courts of Appeals judges—and thus would preserve the distinct position of Article III courts in the Federal judicial scheme—it does, and should, approach that level. Recent legislation providing for direct discretionary review in the Supreme Court of the United States of cases reviewed by the Court of Military Appeals further reflects the importance of the Court of Military Appeals to the military's criminal justice system and to the entire country.

For these reasons, the Commission respectfully recommends that, if the Court of Military Appeals is not reestablished under Article III of the Constitution of the United States, the retirement system for the judges of that court be changed to parallel that available to judges of the United States Tax Court.

Retirement for U. S. Court of Military Appeals Judges

Colonel Kenneth A. Raby

Captain Edward M. Byrne and Colonel Charles H. Mitchell concur in this paper.

All members of the Commission agreed that the current retirement system for judges of the United States Court of Military Appeals (COMA) was inequitable when compared with that of other Federal judges, and would be a negative factor for inducing top qualified candidates to compete for future appointments to the Court.

The other Commission members support the Court's reconstitution as an Article III court, which would vest the judges of COMA with a retirement system similar to that of other Article III judges. In the alternative, the other Commission members favor a retirement system for the judges of COMA which parallels that of judges of the U.S. Tax Court.

The undersigned for reasons elsewhere discussed believe COMA should remain an Article I court. Moreover, we believe the Court's retirement system should not merely mirror that of the Tax Court, but should be tailored to meet certain specific personnel objectives. These objectives include (a) attracting a number of top quality candidates to compete for any available appointment to the Count; (b) providing a reasonable level of retirement compensation for a judge who completes an initial 15 year term of office to insure his or her judicial independence and freedom from having to obtain reappointment in order to obtain substantial retirement benefits; (c) providing an incentive, while preserving judicial independence, for a judge of the Court to seek reappointment beyond the initial 15 year term of office and to serve in that new term for at least two years before retiring; (d) providing reasonable financial security for physically disabled judges and for widows and widowers of deceased active service judges, and; providing a system where the retirement compensation, if any, of any retirement eligible COMA judge who in the future is relieved from duty by the President, due to malfeasance or misfeasance of office, may be subject to final Congressional determination.

Considering the above objectives, the undersigned recommend consideration of the following retirement concept for COMA judges:

1. Mandatory retirement at age 70. Minimum retirement age of 65, except in the event of retirement for 100% physical disability.
2. If the judge is of mandatory retirement age and has 10 years or more, but less than 15 years, of active judicial service on the Court, retirement compensation shall be calculated at 75% of his or her average annual salary based on his or her three highest salary years on the Court.
3. If the judge is of minimum retirement age or older, and has at least 15 years, but not more than 17 years, of active judicial service on the Court, retirement compensation shall be calculated at 80% of his or her average annual salary based on his or her three highest salary years on the Count.

4. If the judge is of minimum retirement age, or older, and has over 17 years of active judicial service on the Court, retirement compensation shall be calculated at 100% of his or her three highest salary years on the Court.
5. In the event an active judge who is not otherwise eligible for judicial retirement is retired by the President for permanent physical or mental disability which prevents him or her from effectively performing the duties of office, said judge shall, if or upon reaching minimum retirement age (age 65 or older) be entitled to retirement compensation calculated at 75% of his or her salary, as that salary is calculated on the effective date of the judges retirement. If, however, at the time of the judge's retirement for reason of physical or mental disability, it is determined by the President that the judge is 100% physically or mentally disabled, the judge shall be immediately entitled to receive retirement compensation based on 100% of his or her average annual salary, regardless of the judge's age, length of active judicial service or eligibility for any other form of judicial retirement. Average annual salary shall be based on the judge's three highest salary years on the Court. But, if the judge has served less than three years, average annual salary shall be the same as the annual salary received by the judge on the date of his or her retirement for disability. The Department of Defense shall publish the formula to be used in determined 100% disability.
6. In the event a judge is removed from office by the President for malfeasance or misfeasance of office, he or she shall be ineligible to receive retirement pay based on his or her active judicial service, regardless of eligibility status, unless legislation is enacted within 365 days from the date of the judge's removal authorizing such retirement benefits in whole or in part.
7. The annuity of a widow or widower of an active service judge of the Court, who has served at least 3 but not more than 15 years of active judicial service, shall be in an amount equal to 40% of the annual average salary of the judge based on his or her three highest salary years on the Court.
8. The annuity of a widow or widower of an active service judge, who has served over 15 years in an active judicial status, shall be in an amount of 45% of the average annual salary of the judge, based on his or her three highest salary years on the Court.
9. Retired judges of the Court thereafter should be entitled to cost of living increases. Such increases could be based on formulae patterned after 5 U.S.C. § 8340. Further, COMA judges should be given the option (as are Tax Court judges) to elect to remain under the Civil Service Retirement System, which a few might do if they had a substantial period of prior military or Federal service.

It is believed that the above concept is reasonable and equitable. It should effectively accomplish the purposes above discussed.

Article III Status of COMA

Colonel Kenneth A. Raby

I cannot support the majority in their recommendation for Article III status for the United States Court of Military Appeals (COMA) because:

a. I do not believe we can ensure, even by careful legislative drafting, that COMA will not expand the current scope of its jurisdiction if it obtains Article III status.

b. The Commission has not had time to exhaustively study the impact of such a jurisdictional expansion, or to examine the effect that such an expansion would have on the structure of the Courts of Military Review. For example, if COMA should expand its jurisdictional claim over administrative or nonjudicial personnel actions involving servicemembers, would it also claim new fact finding powers, would it operate solely to resolve issues of law, or would it remand such cases to subordinate courts for resolution of controverted issues of fact? What resource costs could result from such an expansion? Who would bear the burden of such costs? How would such action impact on long-term combat readiness?

c. There is no guarantee that the judiciary would award the functions of COMA the proper priority. Thus, in my view, it could not be guaranteed to the satisfaction of the Department of Defense that as an Article III court, COMA would receive an adequate staff and budget to accomplish its important judicial review functions. Moreover, as an Article III court, COMA judges could be assigned to perform certain other judicial duties within the Article III court system that could interfere with their judicial role in the military justice system.

KENNETH A. RABY
Colonel, JAGC
Commission
Member

XIII. PAPERS ON MULTIPLE ISSUES

Individual Statement of Steven S. Honigman

My recommendations and reasoning concerning the matters within the Commission's Charter are fully set forth in the Commission's report or minority position papers. I am in wholehearted agreement with the Commission's positive view of the military justice system and its practitioners. This statement will identify several additional matters which were the subject of testimony before the Commission and which merit the reader's attention.

Significantly, the testimony does not support a concern that the procedural and substantive rights incorporated in the military justice system are disproportionately weighted in favor of the accused or unreasonably inhibit the proper functioning of the command. To the contrary, commanders who appeared before the Commission expressed satisfaction that the system allows them to achieve their legitimate objectives regarding order, discipline and the military mission.

For example, Lieutenant General Jack Galvin testified:

> "I think it [military justice] is responsive to commanders' needs. I think it is also responsive to the needs of the soldier. I think it's responsive to the needs of the accused. I think it's responsive to the needs of the complaining witness or the complainant. I think it's entirely responsive. I think it's a very good system." (Galvin Test. at 179)
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> * * * * *
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> "I think the current Code of Military Justice is a very fine code. It allows me every last drop of authority that I should have. I have all the disciplinary tools that I need." (Galvin Test. at 186)

Similarly, Major General Robert C. Oaks stated:

> "I am very comfortable with our system of protecting the rights of individuals and with assuring that those rights are protected in a way so that people perceive that their rights are protected while still having sufficient power to enforce the rules of discipline that are necessary for good order in the military. So I'm really quite satisfied with the system that we have." (Oaks Test. at 238)

To the same effect was the testimony of Lieutenant General Robert F. Coverdale (pp. 309–310) and Col. William W. Crouch (p. 221).

However, the testimony disclosed three areas in which further improvement of the system appears to be advisable.

The first relates to nonjudicial punishment under Article 15. Many commanders suggested that the role of nonjudicial punishment as a disciplinary measure would be enhanced if the extent of the authorized punishment were increased, provided that the increase were coupled with a reduction in the recording or use of Article 15 proceedings as a predicate for future punishments. *See, e.g.,* the testimony of Brigadier General Donald W. Hansen (pp. 108–109; 112–114); Brigadier General Raymond W. Edwards (p. 356); and Lieutenant General Walter F. Ulmer, Jr. (p. 259). Such a change would be consistent with the Commission's preference for disposing of offenses at the lowest adjudicatory level which underlies its recommendation for expanding the confinement jurisdiction of the special court-martial. By the same token, an offender who receives increased punishment under Article 15 would avoid the stigma of a court-martial conviction by a summary court.

Second, a number of witnesses commented that at certain commands the selection of members for service on courts-martial excludes the most capable officers from such service and, instead, officers of recognized lesser

quality or value to the command are chosen. This situation was identified by Colonel Donald Strickland as follows:

> "[I]t has been my experience from the Air Force that court members unfortunately usually are not the best and the brightest officers on the base. My particular experience has been primarily in tactical air command, where it is very rarely and often impossible to get a fighter pilot to sit on a court. They are exempted." (Strickland Test. at 135)

Vice Admiral Robert Dunn agreed that, "Our tendency is to assign as court members those who as you suggest really don't have much else to do anyhow, and they don't have much else to do because they don't have the confidence in doing that job well." (Dunn Test. at 244).

To the extent that the ablest potential jurors are excluded from service upon courts-martial, the military justice system will suffer. With respect to the fairness of verdicts and the appropriateness of sentences, the system will and should benefit from the contribution of its most capable members. Admiral Dunn suggested that fashioning the remedy to this problem is a subject for the leadership of the services rather than the legislature. (Dunn Test. at 244) He is correct that the services should do everything possible to prevent the exclusion of the "best and brightest" officers from courts-martial panels. However, in my view the existence of this practice argues in favor of instituting a form of random selection of court-martial members, subject to rules designed to ensure that the panel will reflect an appropriate mix of rank, age and service arm, and will exclude potential jurors who are junior in rank to the accused or who have a history of disciplinary infractions.

Third, as Captain Byrne points out, the testimony demonstrates the need for consideration of appropriate means to guarantee that civilians providing essential technical support for the military services will not abandon their posts in times of emergency or war.

Finally, I believe that it is appropriate to underscore the importance of perceptions about the military justice system. As Generals Lindsay and Oaks pointed out, the soldier's perception that military justice is fair is a vital element in his or her willingness to submit to military discipline:

> "Col. RABY. Is the perception . . . of soldiers . . . concerning the military justice system important in the overall morale?
>
> LtG LINDSAY. Absolutely." (Lindsay Test. at 224)
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> * * * * *
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> "Mg. OAKS. "You know, we talk about discipline. I've said this before, people have to perceive it as a fair system . . . So you have to say that this is a very positive thing from a discipline point of view and not just from a human rights point of view. From a discipline point of view, and I really worry about any step that is going to undermine that perception." (Oaks Test. at 234–235.)

In reviewing the recommendations of the Commission, and any revisions to the Uniform Code of Military Justice system which may be proposed in the future, Congress should closely consider whether those changes will materially reduce or enhance the soldier's and the civilian public's perception of the fairness of the military justice system.

Minority Report: Department of Defense, Military Justice Study Commission, Military Justice Act of 1983

Authoring Commission Members
Colonel Charles H. MITCHELL, U.S. Marine Corps
Captain E. M. BYRNE, JAGC, U.S. Navy

1. General

Before setting forth our views on the chartered issues confronting the Commission we deem it expedient to state certain propositions which either are or ought to be apparent to any objective student of military law. We state these propositions in an effort to assure that the Commission report and our views of the issues will be accurately perceived.

Well established relationships between the Armed Forces vis-a-vis the Executive or the Congress or the Judiciary (which are clearly delineated by our Founding Fathers in the United States Constitution), which could be described as "horizontal" in nature, are not addressed. "Vertical" matters, that is, those issues that are germane to the functioning of the armed forces as an organization, are the focus of our comments and propositions.

a. Military Necessity

A military code must be based upon military needs as well as upon the fundamental principles of society's jurisprudence. No analysis of a military legal system can be complete or valuable, therefore, without a healthy regard for the spiritual and physical environment within which such a system must operate. Our Armed Forces exist to defend the interests of our country through the use of lethal force. The necessary organization of thousands to millions of individuals into an effective, coordinated and intelligent fighting force endowed with a powerful fighting spirit patently demands a degree of regimentation not easily tolerable in a free society, where individuals enjoy maximum liberty and independent thought and action. In the thirty five years since the enactment of the UCMJ, the speed and lethality of warfare have significantly increased the importance of regimentation to the military society. The need for a soldier's instant obedience to orders has never been greater. Lethal capacity and bulk of weaponry and supply do not carry a guarantee of battlefield success in an era of relative comparability of military merit. Rather, speed of ob-

servation, thought, decision, maneuver and execution, firmly dependant on the obedience of the individual soldier, predominate. In this regard every part of an organization, whether fundamentally operational or administrative or support, must be capable of the same speed as the whole.

Our civil law, in sequential priority, aims to protect society and the state itself from the antisocial behavior of individuals or groups; to protect the rights of individuals and minor groups from their less law abiding neighbors and from unfair restrictions or punitive actions on the part of the state itself; and to define and control mechanisms for the orderly and equitable retention and transfer of property rights and the care and expenditure of common resources. Military law, in parallel with the character of the military society which it must serve, reorders the priority of the foregoing elements. Military law first concerns the safeguarding of the state from its enemies and then concerns itself with the care and expenditure of state property, including military resources. The protection of individual rights, while very important, must have third priority.

While it is essential that the *principles* (as compared to bureaucracy, procedural gloss and judicial specificity) of jurisprudence applicable to the civilian society be reflected in the military law, the wholesale infusion of civilian law adds nothing to the proper subordination of the military establishment to the civilian sovereign which is well anchored through the military chain of command to the President as well as to the Congress. But the tensions caused by necessarily conflicting priorities, emanating from a parallel but external medium, can and will eventually extinguish primordial forces essential to military function. Among these forces are unity of command, simplicity, rigidity (the existence of authority in commanders at all levels), flexibility (in application of authority to circumstance) and the ubiquitous law of diminishing returns. This is so whether the infusion occurs radically or in small innocuous steps involving matters individually impacting lightly on military merit but cumulatively having marked impact on morale, discipline and other aspects of military merit. While some, in idyllic cerebration, believe it expedient that the infusion of civilian law must extinguish or subordinate military necessity, it should be reverently noted that there is a great gulf between plans and reality—between war as it is imagined and war as it actually occurs. The principle of unity of command has for most armies through history been a cardinal principle of war the violation of which incurs cumulative penalties. The commander must hold adequate authority as well as bear full responsibility for the performance of every individual and unit within the organization commanded. The adoption of proposals which accomplish the divorcement of such authority and responsibility regardless of the lofty character of the ideals which drive them ultimately threaten the survivability of the nation as well as the lofty ideals themselves.

There are also pragmatic reasons for caution in civilianizing military law. Not the least of sorrows of military commanders is the amazing facility and speed with which military organizations, given the least opportunity, will grow roots. The most inclined of all to grow them are the administrative and supporting services. The ever-complicating and burdensome civilian legal machinery has such a facility for bureaucracy and immobilization (amply demonstrated in its own civilian environment) that it is not capable of being implemented in all its glory as far forward in the battle area as the need for legal services does and will exist.

Finally, military forces, because of their purpose, are, in matters of discipline far more concerned with truth than civilian society, which can afford more due process concepts and resultant absolution, on technical grounds, from wrongdoing. It does little good to bow to the majesty of legal procedural gloss if, when all is done, the organization is still manned by drug addicts and incapable of battle or is still manned by lawless men who, on the battlefield, rape, rob and pillage.

The view, apparently vested with popular support both within and without the Department of Defense, which sees the wholesale assimilation of civilian criminal law by the military society, whether in one large dose or by piecemeal efforts and without regard to the environment in which the assimilated law is to function, constitutes a royal invitation to a command performance in a disaster. So too the search for the perfect smoke . . . the impossible task of satisfying the unquenchable thirst of perceived and ubiquitous, though not always identified, critics who perceive evil in everything and everyone bearing the title of military.

b. The perspectives of Military and Civilian Lawyers

Following are generalities which we believe tend to affect the perspectives of military and civilian lawyers who come into contact with military justice matters.

(1) The Military Lawyer's Perspective. The military lawyer assumes the difficult burden of serving two masters and often confuses the priorities of service. This burden and confusion is further complicated by the previously mentioned divergent characters of each master. The military lawyer is primarily, and in first order, a lawyer educated in the civilian law schools by civilian professors and taught the principles, procedures, rules, doctrines, ethics, expectations and ideals of the civilian law derived from the purposes and priorities of civilian society. Whether the military lawyer enters law school as a civilian first, or military service first and then law

school to return to military service, that lawyer emerges endowed with an essentially civilian perspective and is steeped in the values, traditions, ideals and expectations of the civilian law. Acceptance by the civilian bar as a practitioner of at least equal stature and importance is of great personal import to the military lawyer. These realities understandably generate a great reverence toward civilian legal ideals, principles, procedures, and priorities.

The profession of arms also has its principles, procedures, rules, doctrines and ethics which are derived from its purpose and the derivative priorities. The military lawyer's opportunity to learn and accept the essentials of military society depends on the individual's attitude, training and the opportunity for professional (military) intercourse. An attitude which permits socialization to occur is as critical to the lawyer as it is to anyone who seeks a military career. Not all who wear military uniforms, however, are automatically "professional" soldiers in the true cultural sense. An American lawyer is a schooled skeptic steeped in a long tradition of distrust of authoritarianism and regimentation. The American lawyer is generally a rationalist or legal realist and does not easily assimilate the apparent illogic which often attends leadership and command of people engaged in the apparently senseless brutality of war. The opportunities for the military lawyer to be adequately socialized in the profession of arms varies greatly among the services. The best opportunities for the requisite training, experience and intercourse exist in the Coast Guard and the Marine Corps, where lawyers are trained in the same way as line officers, are given assignments out of legal duties and are in most respects treated as line officers. The cloistering of lawyers into JAG units in the Army, Navy and Air Force (and to a much lesser degree in the Coast Guard and Marine Corps) with different and separate structures, promotion, training and work environment significantly impedes the opportunity for adequate socialization of uniformed lawyers into military society. [This critical socialization has minimal or no chance to occur if the lawyer contemplating a military code has never served in the armed forces or has limited past experience only in a cloistered specialist military organization or has only some distant, occasional or brief military service in the dim past]. In this regard, the questionnaires revealed a less than rousing confidence in lawyers by the commanders. We were struck by the disparity in lawyer performance and role attitudes between commanders and military lawyers, manifest in the questionnaire responses, where lawyers viewed themselves and their commanders' impressions of them and their work much more positively than the commanders did in fact. While background questions in the surveys were helpful in determining the potential for the military socialization of the surveyed lawyers, we still had to account for the more likely probability of minimal socialization and military understanding.

(2) The Civilian Lawyer's Perspective. The civilian lawyer views the military legal system from the perspective determined by background, professional orientation and training.

Unless involved in a court-martial or intending to become a lawyer in the Armed Forces or to start a military legal practice, there is little likelihood that a civilian lawyer will become thoroughly familiar with the military judicial system either philosophically or pragmatically. Even if possessed of a personal incentive to learn about the military justice system, the civilian lawyer, like the military lawyer, emerges from law school with an essentially civilian perspective and steeped in the values and traditions of civilian law. Because they are not socialized at all into the profession of arms, their understanding and emphasis is, has been and always will be, in terms associated with the civilian law (including terminology and concepts) directly derived from their civilian experience. For them, no other approach is likely, for it takes years to thoroughly understand the military justice system and how it must function within the military environment if our Armed Forces are to militarily prevail under all the circumstances in which the application of military force may be necessary.

Consequently, from the perspective of the civilian lawyer the military legal system will remain an unsatisfactory, inferior judicial system (as will its legal practitioners) unless it becomes precisely parallel with the familiar judicial system—the civilian legal system—and applies the same law. When the civilian lawyer does become concerned with the military justice system, or changes thereto, the focus will likely be upon making the system more understandable, to become more like that which is most familiar—the civilian legal system. Time understandably involves financial consideration to most civilian lawyers, and the pressure for the military legal system to accommodate their situation as a group is enormous. Further, because they have most likely never been socialized into the military environment, civilian lawyers often see even less merit, and often reflect even less understanding, in the serious consideration of military legal issues in the context of the military environment and of the necessity to pay significant deference to military necessity.

We believe this is why the United States Court of Military Appeals, focusing upon the vertical relationships (those existing between the commanders and the troops) of the Department of Defense, was deliberately assigned by Congress a limited role within the military justice system and why, *within the military system* itself, Congress initially crafted a delicate balance between its

responsibilities and those of the Executive and the Judiciary. It is also why the United States Supreme Court has not been hesitant to decide cases involving the scope of the military code in terms of Congressional power to impose the code on classes of persons (a "horizontal issue") but has been most reluctant to become involved in the relationship of command to the troops.

Because the Court of Military Appeals is composed of civilian lawyers and jurists, however, it too reflects a largely civilian law orientation, and when the Court has been activist in nature it has been so in pursuit of an ideal, to "civilianize" or "judicialize" the military judicial system, to create what they perceive to be a more "perfect" system. Because the emphasis is "civilian", the legal brethren will consider any such move as "improvement." *See* Tabs A, B, and C. Scrutiny may, however, disclose subtle but adverse affects of such an altered system upon the ability of the armed forces to fulfill their missions.

(3) Summary. We recognize that we express our views as generalities and we fully realize that there are individuals with the requisite objectivity and fortitude to rise above their training and experience in dealing with matters of military law. Nonetheless, the foregoing comments underscore the need for us to be careful in evaluating the opinions of the many lawyers, military and civilian, who through testimony, letter, questionnaire or otherwise addressed the chartered issues of the Commission. These submissions largely reflect a civilian legal perspective. This perspective being spring-loaded by legal doctrine and education, the ubiquitous tendency of specialists to predominate the tenents of their speciality over all other considerations and the need of a great many military lawyers to seek acceptance on an equal basis from the lawyers of the civilian bar. The lawyer, institutionally situated to make the law, is a specialist with unique opportunities to predominate the profession's specialists doctrines. These forces tend to result in the undermining or rejection of military necessity as justification for departing from established civilian legal doctrine, procedures, rules and ethics in military society and tend to mandate the infusion of a civilian legal system which in its own environment appears to be burgeoning from the weight of its own bureaucratic complexity and immobilization.

c. End Game

Any realistic assessment of the current trends in military justice leads to the conclusion that the system is undergoing a metamorphosis, in small bites of legislation, in changes to the *Manual for Courts-Martial* and, especially in recent years, by fiat from the Court of Military Appeals, sometimes exceeding the limited role assigned to it by Congress. The chartered proposals of the Commission constitute another stage of piecemeal movement. It is no endorsement of merit that the military legal community has in great measure cooperated in and, in some cases, proposed changes to the system which incorporate the civilian process. In 1982 the military justice system was given a direct link to the Supreme Court, a change which may prove to be more profound than its legislative history suggests. The Commission now considers Article III status for the Court of Military Appeals and more civilian oriented trappings and authority for military judges. In terms of the previous discussion, the changes are profound and, if enacted into law will complete the divorcement of the commander from authority over the troops for whom he holds the responsibility. The legal community will be possessed, on the other hand, with authority over the troops but with scant thirst for the responsibility of the commanders. One cannot intelligently consider legislation of this type without a healthy regard for the perceived end game—the system ultimately to be realized. What is its form, its procedure and its substantive law? Is it really better for the military than the current code and all alternatives? Who is engineering the new order and what are the motivations behind the movement? Some see the new order as the civilian criminal system while others see a hybrid form. If the end-game is, in fact, a better military code for the military society, then the new order should be brought about quickly.

We do not attempt to analyze, approve or discredit an evolution which in full measure and impact has never been studied, especially by the military community. We do, however, quarrel with adoption of any of this Commission's more fundamental chartered proposals until an extensive review of the military's disciplinary needs and the suitability thereto of the UCMJ and other models has been undertaken, first by the military establishment (including line officer involvement) and then by others. Such a review of military justice has not been undertaken in thirty-five years, notwithstanding light years of progress in weapons, strategy, tactics, equipment and mobility. Furthermore, we are now confronted with recurring guerrilla and counter-insurgency warfare, wars fought via terrorism, potentially great domestic disturbances and the potential for huge scale engagements on relatively short notice both abroad and on our own shores. We are now in an era of relative parity. Speed of observation, decision, maneuver and execution rigidly dependant on obedience of the soldier (and engaged civilians) and the capacity of the whole of the Armed Forces to move with great speed of mind and foot. The Code which was predicated primarily upon War II experience may well be an anachronism. The discipline of our troops and the defense of the nation should not rest upon a system predicated on situations which no longer

exist. We look with great skepticism upon any military function not capable of thought and movement at the same speed as the operating forces.

2. Methodology of Study

The Commission's task was hampered by the relatively short period of time it was given to complete work. By the time administrative lead time permitted the rubber to get to the road, the Commission had just over seven months to complete work. Given the amount of field comment and civilian input to be gathered and the lead time required to obtain these bodies of opinion, this part time Commission unfortunately had to take live testimony of witnesses before the field input was received and studied and before much of the court-martial statistical information was available or any research on Article III was done. It would have been helpful to have had this information before questioning witnesses in order to flesh out some of the responses to the questionnaires sent to the field.

The foregoing complications do not, however, undermine the Commission's conclusions on most of the Congressionally mandated issues. The Department of Defense mandated issue of Article III status for the Court of Military Appeals (COMA) and the Congressionally mandated issue of an adequate COMA retirement were not, however, fully studied and discussed by the Commission. Field input was not solicited from either commanders or staff judge advocates on the potential impact of Article III status for the Court of Military Appeals or on their perceptions of a fair and equitable retirement system for the highest military tribunal. Only one witness had prepared comments on the subject of Article III or retirement. Only one superficial paper was written by one assigned commission member on Article III, an issue which is ripe with matters of constitutional and military theory. One paper was prepared by the Court of Military Appeals on retirement. Little time was afforded to the discussion of either issue.

While time constraints did not adversely effect the conclusions reached on most issues we believe the conclusions of the majority regarding COMA retirement and COMA Article III status were fatally affected. We believe the conclusions reached on these issues by the majority are based upon pure personal opinion with which we choose to disagree, first, because of the absence of empirical study and, secondly, on their relative merit.

3. Military Judge Sentencing

We fundamentally agree with the majority on this issue. Questionnaire responses of defense counsel (whom we view to be largely indicating opinions which represent the greatest advantage to them and their prospective clients) and of commanders as well as the testimonies of almost all commanders appearing before the commission are conclusive that the option of an accused to elect military jduge or court member trial is an important enough right that it should be retained. If the commanders who must fight the war and furnish the members and the defendants to whom it belongs view this option as worth providing, then who are we to otherwise decide? Statistically there does not appear to be an obvious significant difference between the sentences imposed by members and military judges. We also see military judge sentencing as increasing the demand for a civilian-utilized presentencing report system with its significant impact on manpower strength and utilization and unit administration.

We note that the testifying commanders and the commanders responding to the questionnaire cumulatively expressed the desirability of more command involvement in military discipline, viewing involvement of the command in the decision-making as being an important aspect of maintaining discipline within their organizations. There appears to be a recognition that there is a point in gravity beyond which a formal judicial process will have to reign supreme. We sense that the commanders believe that command has been judicialized too far out of the disciplinary system and that a more appropriate balance needs to be struck. Some witnesses suggested an increase in nonjudicial punishment authority. Others desire more participation on courts-martial. The study of these sentiments is beyond the scope of the Commission. We recommend, however, that the Department of Defense, in conjunction with a review of the UCMJ consider a disciplinary system which involves the following features:

a. NJP authority for commanders graduated, by level of command vice the grade of the commander, up to 60 days confinement and associated punishments.

b. A field court, involving officers and ⅓ staff noncommissioned officers, proceeding much like NJP and authorized to try petty crimes and all disciplinary-type offenses and capable of imposing up to six months confinement, but no punitive separation.

c. A general court-martial with all the trappings of a criminal trial designed to try all major offenses and those cases in which punitive separation is a factor.

We also note that unlawful command influence is an intense fear in some circles. Unlawful command influence, while having sinister implications, in reality is terminology which covers a multitude of situations including the inadvertent mentioning of Department level policy in trial counsel's argument or a law officer asking a convening authority how the latter views an issue the law officer is to rule upon and situations in which court members are aware of a commander's view on punishment of certain cases or a commander actually trying to

subvert the trial process. In any judicial system, military or civilian, there will be abuses by those few who seek to impose their will on the system. The most effective deterrent to such abuse is more effective training and appropriate enforcement action against those responsible. It matters little how great or perfect the systemic change, those who remain bent on subverting any judicial process will find a way to do so. This reality cannot, however, legitimately be used to indict a class of persons or to generate a fear with which an irrelevant or meritless change can be sold, regardless of merit. Military judge sentencing is neither a guarantee of no command influence (especially in view of the terminology having chameleon character) nor an improvement in its reduction and consequently cannot be so justified. There being no gain from this proposal, we see no need to eliminate what remains of command involvement and advantage to the accused in sentencing just because judges impose sentence in most civilian jurisdictions.

4. Suspension Power for Military Trial and Court of Military Review Judges

We agree with the majority report on this issue. Judges have no inherent power to suspend sentences. This power derives from legislative authority. It so derives because this power is a clemency power and not one related to the legality of the sentences. Those military judges who expressed feelings that they needed suspension authority in order to impose a legally appropriate sentence misunderstand the focus of the suspension power. We view the decision to gamble on the rehabilitation of a military accused by suspending all or a portion of the sentence as being so entertwined with all other adverse and semi-adverse command personnel actions and so interjected with command and a commander's insights that giving such authority to any other entity is inappropriate. Furthermore, it is not possible as a practical matter to provide the military judge with all essential knowledge, for facts alone do not incorporate the insights of the command and the commander, which are largely intangible. We view with great concern any system which would require a commander to appear at trial in every case to explain those insights. While such a procedure might be feasible in the services which seldom use the court-martial process, it would be a crushing burden to the heavy users of the system, especially in time of conflict.

We also view with great concern the exercise of suspension power by military judges who would of necessity have to issue orders to commanders in respect to the execution and monitoring of the conditions of probation. Conflict is inevitable in such a system where the commander with the responsibility for the probationer and the command authority is being issued orders by someone outside the chain of command, who may well be subordinate in grade, and who has no responsibility for the probationer but who is possessed of legal authority to impose and monitor conditions of probation. However suited and attractive this sort of system may be to a civilian society not graced by someone inherently responsible for an individual criminal offender, it is manifestly unsuited to a regimented military order. Furthermore, the conferring of this power will in short order breed the demand for a complete probation system, staffed with probation officers and replete with the administration inherent in any civilian probation system at a time when the Military Reform Caucus and others are raising serious questions regarding the tooth-to-tail ratio of the American Armed Forces.

Courts of Military Review are even less suited to the exercise of the power, being too remote in time and place from both command and accused.

5. Tenure

We agree with the majority of the commission on this issue. Like suspension power for military judges those who support the affirmative of this issue manifest an almost total fascination with civilian institutions. Military officers are tenured in the first place. In the history of military justice there has been almost no sinister-type command influence brought to bear upon military judges or law officers. Even if command influence was a problem, the commanders who addressed this issue made clear that a tenure provision would not cure the problem. Thus, to satisfy a civilian tenant of judgeship we are asked to accept reduced flexibility in personnel assignments, additional administrative effort necessary to managing another separate occupational subspeciality, and to confess the prevalence of a problem which does not exist.

We note that tenure of civilian judges is considered necessary to insure the impartiality of the judiciary by insulating a judge's livelihood, salary, retirement and status from the effects of adverse public and political reaction to unpopular or undesirable decisions. Status, pay, retirement and promotion of officer military judges are determined by law and by Department and service regulations. The billet of military judge is also ensconced in Department level regulations and control and is too remotely controlled to afford any commander a realistic opportunity to affect the assignment or tour of a military judge.

We note a civilianesque misperception apparent in testimony before the Commission and in the questionnaire responses. Military services do not "attract" military judges, they "assign" officers to military judge billets. In this respect tenure support premised on attracting more qualified military judges is mislaid. Military professionals

will perform a duty to the best of their abilities regardless of whether they volunteered or were ordered to that duty. Those who won't are in the Armed Forces for the wrong reasons and should be eliminated.

We note another misperception apparent from testimony. Many lawyers connected with military justice believe that enlisted military personnel have such a fixated interest in military justice that a tenure concept is important to their perceptions of fairness in the system. Not only did Lt. Gen. Ulmer disagree with that perception but it is unrealistic to believe that even an accused being tried by a uniformed military judge (apparent in spite of wearing judicial robes) who refers to his superiors as "sir", who salutes military superiors, who is referred to as "sir" by those subordinate and who is saluted by them is going to have any thought about whether the military judge is tenured much less that he is an institution unaffected by the accused's superiors. On the other hand it is easy to understand why a lawyer, military or civilian, would believe that tenure was important to a military judge's image. It is the ideal in the civilian system.

We also note in connection with this issue the apparent lack of esteem in which military trial and appellant judges hold their assignments. Though it seems that they view these billets as carrying no *special* significance in terms of career enhancement, it may signify a more serious problem. This matter should be studied by the respective services.

6. One Year Special Court-Martial

We agree with the majority of the Commission on this issue. The six month limitation was imposed largely because of the absence of lawyers in the system. Now we have judges, trial and defense counsel and an extensive review process. U.S. magistrates often have less or no more experience than special court-martial military judges and can impose up to one year of confinement in a summary proceeding. There is evidence that some general courts-martial would fall back and be covered by the more powerful special court-martial. We believe that in practice perhaps 40–60% of general courts-martial will fall back because the forum decision will be made initially at a lower command level, and because the commander's general perception of the punishment value of a case (often revealed by the sentence agreed in pretrial agreements) will control its disposition more than the theoretical maximum permissible sentence. We do not view this suggested change as fundamental to the trend toward civilization of the military justice system and it does not have an adverse impact on military operations.

7. Technical Aspects of Giving Article III Status to COMA

The United States Court of Military Appeals (COMA) is an Article I court. Article 67(a)(1), UCMJ. Congress created COMA pursuant to its power to "make Rules for the Government and Regulation of the land and naval forces." Article I, Section 8, U.S. Constitution. The presidential authority as Commander-in-Chief of the Armed Forces (Article III, Section 2, U.S. Constitution) was recognized by Congress in various provisions of the UCMJ but especially in Article 36 of the UCMJ which authorizes the President to "prescribe" rules of procedure and evidence. The *Manual for Courts-Martial* has been, and is, the principal presidential directive carrying out this mandate.

Article III courts derive their authority from Article III of the U.S. Constitution pertaining to the judicial power of the United States. It states that this judicial power "shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." Most other Article I courts derive their authority from the "necessary and proper" clause of the U.S. Constitution. Article I, Section 8, U.S. Constitution.

Congress, in enacting the UCMJ, limited COMA review to only the more serious cases and only to questions of law. *See* Articles 66 and 67, UCMJ. The COMA is a legislative court with one leg—an administrative one—in the Department of Defense. A legislative court, it is required to report annually to Congress and its judges receive 15-year terms of office upon appointment by the President. *See* Article 67, UCMJ. COMA is legislatively included in the membership of the Code Committee. Article 66(g), UCMJ.

To become an Article III Court, the COMA must become completely separate from the other two branches of the Government.

As an Article III Court, COMA would not be required to be responsive to Congress. It could no longer be required to report to Congress pursuant to Article 67 of the UCMJ. COMA judges could not be required to be members of the Code Committee.

Certification of cases to COMA by JAG would, most likely, not be possible because Article III courts may not be required to give advisory opinions. *Muskrat* v. *United States,* 219 U.S. 346 (1911). COMA has refused to give advisory opinions, but nonetheless, the status of this provision in the UCMJ would be in doubt.

Article III status for COMA would mean that COMA judges could sit on federal circuit courts and—most importantly—federal circuit judges could sit on the COMA, even though they may be wholly inexperienced in matters involving military relationships.

If COMA is made an Article III court, the judges would be able to remain on the Court for life—no matter how enfeebled of mind or body they become. They would retire with the benefits of an expensive re-

tirement program (which would be inaugurated during a time of unusual concern about fiscal responsibility).

COMA judges could only be impeached by Congress for high crimes and misdemeanors.

Article 67(a) of the UCMJ states that the "President shall designate from time to time one of the judges to act as chief judge." He "shall have precedence and preside at any session which he attends." If the COMA becomes an Article III Court, the President could not make this appointment "from time to time."

As judges appointed under Article III, the judges of COMA would be protected against reduction in their salaries during their term of office. Article III, Section 1, U.S. Constitution. However, they have virtually the same protection now, since Article 67(a)(1) provides that COMA judges are "entitled to the same salary and travel allowances as are, and from time to time may be provided for judges of the United States Court of Appeals." Congress could, of course, amend the current law, if it desired to make economies.

COMA would not be required to defer to Congress when that branch of government enacts a law that expresses its decision as to the proper balance between individual rights and military necessity COMA, as an Article I court, already has asserted it has "unfettered power to decide constitutional issues—even those concerning the validity of the Uniform Code." *United States* v. *Matthews,* 16 MJ 354, 366 (CMA 1983).

By expanding its interpretation of the extraordinary writs powers COMA judicially conferred upon itself, COMA already has concluded it has authority to intervene outside the scope of Article 67 of the UCMJ. For example, a majority of the judges in a recent COMA decision implicitly intimated that, in an appropriate case, they have authority to direct a convening authority to reverse his disapproval of an appeal of nonjudicial punishment. *Jones* v. *Commander,* 18 MJ 198 (CMA 1984). *See also, McPhail* v. *United States,* 1 MJ 457 (CMA 1976); *United States* v. *Bevilaequa,* 18 USCMA 10, 39 CMR 10 (1968); *Gale* v. *United States,* 17 USCMA 40, 37 CMR 304 (1967); *United States* v. *Frischholz,* 16 USCMA 150, 36 CMR 306 (1966) (expressing COMA's view of its expansive authority).

There is authority for the assertion that Article III courts can not be restricted in the exercise of their jurisdiction where Constitutional issues are involved. *See* Wright, Miller, and Cooper, *Federal Practice and Procedure,* § 3526 (1975); *Crowell* v. *Benson,* 285 U.S. 22 (1932); Douglas, J., concurring in *Parisi* v. *Davidson,* 405 U.S. 34, 48 (1972); and *Gov't Ins. Co.* v. *LeBleu,* 272 F. Supp. 421 (1967). Consequently, in view of the court's past propensities, even if Congress *did* legislatively state the COMA's jurisdiction was restricted to the confines of Article 67, UCMJ, such a restriction would have absolutely no effect if the COMA decided to intervene on a constitutional issue involving nonjudicial punishment, etc. With Article III status, COMA would also gain further authority to enforce its edicts, by injunction or otherwise, upon lower courts in the military justice system and anyone else in the military service—including military commanders.

Further, whenever COMA believed, as an Article III court, that there was a constitutional issue involved, it could independently reevaluate *every fact* relevant to that issue, even though their present jurisdiction is limited to certain cases and then *only* to questions of law. *Compare Crowell* v. *Benson,* 285 U.S. 22 (1932) with Article 67, UCMJ.

We do not believe it is Constitutional for Congress to make COMA an Article III court. The Founding Fathers carved out military law from the judicial power. Article I, Section 8, U.S. Constitution. In the Fifth Amendment they specifically exempted the military from the grand jury requirement. Obviously, the Founding Fathers contemplated that the military system would not be part of the judiciary. *Cf.,* Wright, Miller, and Cooper, *Federal Practice and Procedure,* § 3528 (1975). Further, "*judicial hesitancy* when faced with matters touching on military affairs is hardly surprising in view of the doctrine of *separation of powers* and the responsibility for national defense which the Constitution . . . places upon the *Congress* and the *President.*" (Emphasis supplied). *Hammond* v. *Lenfeat,* 398 F.2d 705, 710 (2d Cir. 1968). The Supreme Court has noted:

> "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973).

8. Why Congress Should not Make COMA an Article III Court

a. COMA Would Accelerate Its Assertions of Jurisdiction Beyond the Limitations in any Statute

The Court of Military Appeals has already become the most dominant force within the military justice system. It has done so by judicial expansion of its limited role assigned by Congress by Article 67 of the UCMJ. The COMA, as a permanent institution, understandably takes advantage of every inroad to pursue its goal of increased authority and prestige. Article III status will enable COMA to pursue its goal of further dominance on a more direct route. Such pervasive dominance has not been revealed or even argued to be of any benefit to the armed forces.

As previously noted, it is Congress whom the Constitution specifically authorized to make rules for the government and regulation of the land and naval forces.

The UCMJ met part of that Congressional responsibility. In enacting the specific provisions of the UCMJ, Congress balanced the rights of the individual against military necessity. On the issues *which it has addressed* Congress is the only arm of government that should mediate between military necessity claims versus the principles of individual autonomy current in civilian society. Its judgments must be respected by the courts. *Middendorf* v. *Henry,* 425 U.S. 25 (1976). *Cf., Gilligan* v. *Morgan,* 413 U.S. 1, 10 (1973); *Rostker* v. *Goldberg,* 453 U.S. 57, 69 (1981).

The Commission voted for Article III status for COMA but with a proviso that its jurisdiction would be severely restricted by Congress. One of its proponents on the Commission assured the majority, prior to voting, that Congress could create an Article III COMA that could not review nonjudicial punishments or other areas outside its assigned jurisdiction. Following that assurance, the six members of the Commission voted in favor of Article III status for COMA with limited jurisdiction.

But, as we have already noted, we do not believe Congress can create an Article III Court in such a way that the Court could not go beyond that specific authority and exercise its inherent jurisdiction where constitutional issues are involved.

Indeed, COMA, as an Article I court, has already implicitly asserted jurisdiction in areas that are not within its present legislative charter. *See e.g., Jones* v. *Commander,* 18 MJ 198 (CMA 1984); *Dobzynski* v. *Green,* 16 MJ 84 (CMA 1983); J. Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing The Military Justice System,* 76 Mil. L. Rev. 43, 94–122 (Spring 1977).

There is every rational reason to assume this activity would be accelerated if COMA were an Article III court.

Acceleration of COMA activism could include COMA judges or military judges under orders from COMA becoming involved in the operations and administration of the armed forces in the same way federal judges have become involved in the operation of civilian institutions. Further, COMA could, with impunity, by judicial opinions, overrule, on Constitutional grounds, laws enacted by Congress which have created a special balance between the rights of the individual and the needs of the military. Commanders could be ordered by COMA to do certain acts which may eventually impede military readiness or their ability to prosecute a war.

Further, assuming *arguendo* that it is constitutional for Congress to implicitly transfer its Article I responsibility to balance individual rights versus military necessity, Congress should not do so. Some COMA judges have, for significant periods of time in COMA's history, viewed themselves as civilian judges rather than as members of a specialized court acting *within* a unique balance between the Executive, Judicial and Legislative Branches. *Cf.,* J. Cooke, *The United States Court of Military Appeals, 1975–1977: Judicializing The Military Justice System,* 76 Mil. L. Rev. 43 (Spring, 1977); testimony of the Joint Chiefs of Staff in the 1979 Hearings before the Senate Subcommittee on Manpower and Personnel of the Committee on Armed Services, 96th Congress, 1st Sess. (S 201–16). As civilian judges, they have an obligation to defer to Congress when it acts pursuant to its Article I, § 8 authority. *Middendorf* v. *Henry,* 425 US 25, 43 (1976). This they have not always done in the past. *Eg., Id.*

b. The Appellate Process Would Not Be Improved

Although the Commission was unable to obtain statistics regarding the processing of cases from the COMA representative on the Commission's Working Group, we know that the COMA has been very ponderous in its decision-making process at times in the past.

Article III status for COMA will vastly increase the possibility that the appellate process will become even slower in the future.

As an Article III court, some COMA judges will have no incentive to expeditiously process their cases, as they cannot be removed from office for "neglect of duty," as is now possible under Article 67 of the UCMJ.

Further, with a responsibility to make an independent determination of all questions of fact relating to an enforcement of constitutional rights, COMA could well bog down in factual evaluations which are presently the responsibility of the courts of military review. *See* Article 66(c), UCMJ and *Crowell* v. *Benson,* 285 US 22 (1932).

Also, the opportunity of the President to appoint a new chief judge "from time to time" enables the Chief Executive to improve the management of the COMA and prevent unacceptable delays in the processing of cases, by using this minimal and reasonable intrusion into the affairs of the COMA, if necessary.

We do not believe a five-judge COMA will really improve the speed of the appellate process, as the workload of the present three-judge court is not excessive and is declining. Such increased strength may, in fact, cause additional delay. Furthermore, as an Article I court COMA has not been unable to attract judges possessed of adequate technical civilian qualifications. Status as a small and obscure Article III court will not improve the quality of COMA judges or the stability or speed of COMA.

Delays in the appellate processing of cases in the military justice system are very detrimental to good order

and discipline and are very unfair to both the Government *and* the accused. Article III status for COMA will increase the delays in the appellate processing of cases by COMA.

c. COMA Judges Must Be Removable upon More Grounds and Under a More Reliable Process Than Impeachment

If COMA became an Article III court, its judges could not be removed for neglect of duty; malfeasance in office; or mental or physical disability. Article 67, UCMJ.

Impeachment is a very limited sanction. Congress is loath to tear itself away from urgent national business, consequently only flagrant misconduct by federal judges is even considered. The practical certainty is that impeachment by Congress for misconduct on the part of federal judges is unlikely even in cases of flagrant misconduct and is a standing invitation for judges to abuse their authority with impunity and without fear of removal. *See* R. Berger, *"Chilling Judicial Independence": A Scarecrow,* 64 Cornell L. Rev. 822, 824–25 (1979). The comments to Section 1.22 of the ABA Standards Relating to Court Organization state that experience "has clearly indicated that the traditional devices of impeachment, address, and recall are ineffective, except in cases so unusual as to amount to state scandal."

Even the present standards (neglect of duty, malfeasance in office, mental or physical disability) are inadequate bases for removal. It is strongly recommended that "misconduct" also be grounds for removal of COMA judges. This is a ground for removal of judges recommended by the American Bar Association. Section 1.22, ABA Standards Relating to Court Organization. *See also* Standard 7.4 of the Report of the National Advisory Commission on Criminal Justice Standards and Goals (1973).

The Armed Forces relies upon leadership principles as a foundation for an effective, efficient, Armed Force. These pinnacle appellate judges, who are interpreting military law, must themselves be moral and law-abiding to ensure the integrity of the decision-making process. *See also* Commentary, Section 1.22, ABA Standards Relating to Court Organization.

d. COMA Judges Must Continue To Be Appointed for a Term of Years—Not for Life

Article III judges are appointed for life. A term of years requirement for COMA judges is vital because, as civilians, they may have had no military experience nor knowledge of military law. (Such a situation is contrary to recommended ABA standards for selection of appellate judges to specialized courts. *See* Commentary, Section 1.20, ABA Standards Relating to Court Organization.)

In situations which Congress has not addressed in the UCMJ, COMA judges must be able to evaluate the competing interests of individual rights versus the requirements of high morale, good order, discipline, effectiveness, and efficiency in the military.

In making this evaluation, these judges must first determine whether the practice in question is useful or essential to the proper functions of the Armed Forces. This is impossible without a clear idea of what those functions are and how well will the armed forces be able to achieve their legitimate purposes if they may no longer use the practice. This requires a basic knowledge of the demands an effective military organization must make on its members, the resistance to those demands caused by the serviceman's personality, the range of legal and psychological techniques available to overcome that resistance, and the relative efficacy of different methods as applied to individuals whose attitudes have been formed by civilian society. It requires an in-depth knowledge of the state of mind that must be instilled in servicemen and women in peacetime to ensure superiority in the event of war. Knowledge of formal and informal alternatives for redress available within the system (which are very comprehensive) is also vital to possess. Further, in the balance must be the assumption that there are social norms peculiar to the military and that these are known to all military personnel. Assumptions that must be made are that the successful performance of the military's mission depends on effective response to command and that more pervasive regulation of the individual is necessary than is required in civilian society to ensure a proper response.

Even though an "outstanding" choice by civilian standards, a COMA judge may well be inadequate to properly perform this balancing test.

Reliance on "on-the-job" training, counsel's arguments, and in-chambers legal advice, have not been successful in remedying this problem. *See e.g.,* the testimony of the Joint Chiefs of Staff in the 1979 Hearings Before the Senate Subcommittee on Manpower and Personnel of the Committee on Armed Services, 96th Congress, 1st Sess. (S 201–16).

If COMA judges are appointed for life, they may not be removed no matter how sick in body or enfeebled in mind they become in later years or what standards of personal behavior they may eventually subscribe to in their later years. They will be setting standards for a society of men and women whose age averages-out to the early-twenties level and whose situation the judges may never have experienced in their whole lives.

The Court, at times in the past, has exceeded its mandate and has demonstrated a lack of knowledge of the impact of its decisions upon the military society. *See* the testimony of the Joint Chiefs of Staff in the 1979 Hear-

ings Before the Senate Subcommittee on Manpower and Personnel of the Committee on Armed Services, 96th Congress, 1st Sess. (S 201–16). This was with 15 year, or shorter, terms with reappointment required by the President.

Judicial error in a balancing test has much more devastating implications when applied to the Armed Forces than when applied to civilian society. If it turns out that a civilian court made an error where a balancing test was applied that affected civilian society, the incorrect, undesirable, or unjust consequences will surface, demonstrate the error, and the particular doctrine will eventually be modified. However, if there is judicial error in a series of incorrect rulings applying a balancing test which, because of their cumulative effect, substantially impair the effectiveness of military discipline, there will be no way to know that the rulings were in error until the reality of military performance in wartime is reflected in a substantial military defeat.

It is clear that the modern trend is away from life-tenured situations for judges. *See* Section 1.20, ABA Standards Relating to Court Organization. The reason is simple—while a term of years ensures the "principle" of judicial independence (*Cf., Id.*) it also provides some form of eventual *accountability* to the society which that court is serving. A lack of judicial accountability can be the greatest threat to judicial independence. *In re Ross,* 428 A.2d 858, 861 (Me. 1981). The present term of 15 years for COMA judges greatly exceeds one alternative recommended by the ABA and is 2½ times the term of years recommended in Standard 7.2 of the Report of the National Advisory Commission on Criminal Justice Standards and Goals (1973).

e. Conclusion

COMA must remain a legislative court, deciding strictly legal issues, and participating in a unique balance of power between the President and Congress. Congress, by its own act of making COMA an Article III Court, will have extinguished, as a practical matter, its role in the military justice system as the primary arbiter of the balance between individual rights and military necessity. The interests primarily at stake—the very security of our nation—requires that we field an Armed Force that can prevail in wartime. An Article III COMA may severely impair the preparedness of our Armed Forces.

The independence of every citizen—their freedom from external coercion in their affairs—is the foundation on which rests all of the other Constitutional values. But, if the nation cannot defend itself against its adversaries, this independence will, sooner or later, be a poignant memory of a by-gone era.

9. The Problem and a Proposal

a. The Civilian Perspective

COMA judges come from civilian life. The first three COMA judges had significant prior military experience. Since that time, some COMA judges have had no significant prior military experience and no in-depth knowledge of the military justice system.

Because they are civilians and perceive they receive their personal status from favorable comparisons they receive with Article III judges, some COMA judges feel "inferior." *See e.g.,* Chief Judge Quinn's testimony, *Joint Hearings on S 745–62 and 2906–07 Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary and a Special Subcomm. on Armed Services,* 89th Cong., 2d Sess., 282 (1966).

A combination of an intense desire for further personal status and/or a lack of knowledge of the society and/or the military justice system encouraged the COMA to require the military justice system to "move over" towards the area where the Court was more comfortable and from which its individual COMA judges received their status: civilianization. But, because some COMA judges have viewed themselves simply as civilian judges sitting on a specialized court, they have *remained* civilian judges. And civilian judges are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the [civilian] judiciary is trained to deal." E. Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. Rev. 181, 187 (1962). *See Burns* v. *Wilson,* 346 U.S. 137, 140 (1953).

b. The Present Situation

There has been a marked decrease in courts-martial in the past year. The quality of the armed forces recruit has never been better. Economic factors and a wave of substantial respect for the military are the principal reasons for the better quality recruit. The Court of Military Appeals opinions in the past few years also have facilitated the armed forces recovery from what was clearly a very low point in military readiness.

With fewer disciplinary problems than previously, a military justice system still geared to a higher number of cases, time to devote to the good men and women in the command, and recent judicial decisions that have met many of the complaints about the court's decisions enumerated by the Joint Chiefs of Staff in 1979, it is to be anticipated that military commanders would state before the Commission that, except in evidence gathering areas, they were *presently* satisfied with the military justice system, in general. But from 1975 to 1980, when the armed forces were struggling to make the all-volunteer

concept work and courts-martial were increasing in number, the COMA was a major contributor to a *decline* in good order, discipline, morale, effectiveness, and efficiency in the armed forces. *See* testimony of the Joint Chiefs of Staff in 1979 Hearings Before the Senate Subcommittee on Manpower and Personnel of the Committee on Armed Services, 96th Congress, 1st Sess. (S 201–16).

c. The Future

Further, every projection indicates that the present favorable circumstances will not last, as there will be fewer individuals from which the armed forces will be able to seek recruits to an all-volunteer force in the future. When recruiting again results in less-qualified volunteers than presently, and we return to a situation approximating the 1975–1980 era, it will be vital that the disciplinary system in the armed forces be able to quickly, efficiently, and fairly respond to an increasing number of disciplinary situations. *If* this is not done, commanders will also lose the good men and women who will otherwise, as before, be placed in the situation of living in close quarters with individuals whose actions are inimical to a disciplined armed force. It is precisely *then* that the armed services require COMA judges that understand military society and military law. But it is *precisely* in this type of situation where the COMA has been found wanting in the past and could be wanting in the future.

With difficult, undisciplined, low caliber recruits comes dissent, and at this point the civilian orientation of the COMA begins to become manifest. Further, at this point, the political justification for enhancement of its power and authority vis-a-vis Congress and the President, in accordance with its institutional bias and interests, is very strong. Consequently, the potential for COMA acting in a way that creates further disorders in an already overburdened system is manifest.

The projected result will be that *again* as between 1975–1980, discipline will decline when commanders are struggling to improve it and the services will lose more of the good men and women who are the foundation blocks of a disciplined armed force.

Unless a significant change is made, some individuals will continue to be appointed to the COMA with no prior military service and/or practical knowledge of how law applies within the military society. Consequently, they will lack the personal knowledge to properly evaluate the special competing interests within the military justice system. The "institutional bias" of COMA will continue to reflect a view that encompasses Article III status for COMA and an expanded role for COMA—because that is wherein their very natural self-interest and personal esteem rests. This esteem is indeed the cornerstone of the majority's vote on this issue. Self-interest will continue to be reflected when the armed forces vital interests can least afford such a self-serving approach to opinions. As a result, "civilianization" of the military will proceed, with some delays in the process, and with studied lipservice paid to military necessity considerations along the way.

d. A Proposal for an Improved COMA

There is no assurance that selection of COMA judges in the future can preclude this type of situation under the present statutory scheme.

But, since 1951, a large number of individuals have been part of the military justice system and know it intimately. They have prosecuted and defended cases, advised commanders on disciplinary matters, and served as military trial and appellate judges. They understand military society, what is actually happening in the system, the various roles of the participants and the pressures and motivations of participants within the system as few judges on the COMA have ever understood them. They participate at more levels of their disciplinary system on a routine basis than do civilian lawyers in their systems. They would know how to balance individual rights and military necessity and understand far better than civilians when merit is present in assertions of either character. Yet, unlike civilian lawyers and judges, they cannot aspire to selection to the highest court in the system they know best and for which many are eminently qualified to sit.

They are the military lawyers, who merely because they are not from civilian life, are precluded from appointment to the COMA. *See* Article 67, UCMJ.

The questionnaires have developed the fact that as military lawyers become more familiar with the military justice system, they foresee that they will eventually reach a plateau, at the 0–6 court of military review level, that is well beneath the level of personal achievement their civilian counterparts have the capacity to attain. The courts of military review are the highest judiciary posts to which they can aspire—yet these are the individuals who know the society and military law the best. Those individuals still retain their civilian law background, as they have graduated from civilian law schools, remained in civilian bar associations, and utilize civilian law as the model for much of their decision-making. In civilian society, these are the individuals that would be looked to first in order to find the most qualified individuals to sit on a specialized court like the COMA.

In most cases, the presence of military lawyers on the COMA would make little difference, but in the vital balancing decisions between individual rights and military necessity, they would, at least, have the advantage in un-

derstanding the practical merits on both sides of the issue.

At least two of five judges on the COMA must be active duty military lawyers. Under such circumstances, a five member COMA should be considered and this is why we voted to expand COMA membership.

The entire military justice system would benefit in every way. More and better military counsel would aspire to stay in the armed forces and become trial judges and appellate judges (and aspire to longer tours as such), especially if, as a prerequisite to selection, each selectee would have to have so served. Competition for assignment to the trial/appellate judiciary would be increased. The system would have even better counsel, trial judges and appellate judges in the system—on a continuing basis—for more of the most brilliant and hard-working military lawyers will aspire to a military career in military justice. The costs associated with increasing the stability of the court by increasing its membership to five judges would be minimized.

Civilian control of the military, although a lively ghost, is *not* a legitimate issue. The COMA was only authorized to rule on legal issues involving servicemen who had received relatively serious penalties—not to be an instrument of control of military forces—a role no court should seek in our balance of powers between the executive, legislative and judicial branches of the government. Civilian control is exercised through the Congress and the Executive Branches of Government in our country. *Rostker* v. *Goldberg,* 453 US 57, 65 (1981); *Gilligan* v. *Morgan,* 413 US 1, 10 (1973).

Flag or general officer billets for chief judges of the trial judiciaries or the courts of military review would *not* be a meaningful alternative. The prestige, responsibility, and scope of authority of the system's highest court is where the 0–8 billets must rest, for it is there where they can do the most good for the military justice system.

The new certiorari provisions, in which a *civilian* United States Supreme Court will review COMA decisions, will provide a completely civilian review of those few decisions for which there is any question of a properly struck congressional balance between individual rights and military necessity.

Specifically we propose that two military officer lawyers, at least one of which is from a ground service, be authorized as judges for the Court of Military Appeals. That candidates be nominated by the respective services to the Secretary of Defense with selection by the President, and that the judges so selected serve five year terms. Thereafter, retirement would be mandatory. As a predicate for selection, the selectees must have served as a military judge and as a judge on the court of military review of the appropriate service. In order to preclude potential incompatible office problems as the result of such appointments, 10 U.S. Code § 973 should be amended to account for military officer membership on the Court of Military Appeals.

10. COMA Retirement

Subject to our proposal to change COMA to a civilian-military court, we agree with the retirement program proposals of Colonel Raby (see his minority report). That proposal provides a simple, fair and equitable retirement for the civilian judges and provides a certain degree of accountability by requiring a reappointment before becoming entitled to the enhanced level of compensation.

Attachments to minority report by Colonel Mitchell and Captain Byrne

April 12, 1984

Colonel Thomas L. Hemingway
Chairman, Military Justice Act of 1983 Study Commission
1900 Half Street, S.W. (AF/JAJM)
Washington, D.C. 20324

Dear Colonel Hemingway:

Congratulations on your selection to chair the Study Commission. Your group has an opportunity to play a major role in enhancing the quality of military justice.

Last week, I spoke on developments in military justice to the 10th Interservice Seminar at Maxwell, AFB. In this speech I had an occasion to discuss the importance of the Commission and suggest some possible avenues of interest. In the hope that these remarks might be of some assistance in your task, I am enclosing copies of the relevant portions of my speech.

With every good wish for success in this your challenging endeavor, I am

Sincerely,

Robinson O. Everett
Chief Judge

Excerpts from Speech Given at Maxwell Air Force Base, April 3, 1984

The Commission has been appointed by Secretary Weinberger and will consist of nine members, of whom three are "persons from private life who are recognized authorities on military justice or criminal law". One of these is Professor Saltzburg, a highly regarded professor at the University of Virginia Law School, who has authored books on criminal law, criminal procedure, and the Military Rules of Evidence. Incidentally, he spoke at our Homer Ferguson Conference last year and is scheduled to appear again this year. Another member is Professor Kenneth Ripple of Notre Dame, who at one time served on Chief Justice Burger's staff at the Supreme Court and is a highly regarded student of the decisions of that Court. I believe he also is a Naval reserve judge advocate. The third public member, Steve Honigman, has chaired the Committee on Military Justice of the Bar of the City of New York and in the late 1970's was at one time a commissioner of the Navy Court of Military Review. On various occasions he has testified before the Armed Service Committees.

The commission is to prepare a report by, I believe, September 1; and this report will go to the Committees on Armed Services of the Senate and House and to the Code Committee established under Article 67(g). Incidentally, as part of the Military Justice Act of 1983, Congress expanded the Code Committee by adding two public members, who recently have been appointed by Secretary Weinberger. One of them is A. Kenneth Pye, former Chancellor at Duke University and a highly regarded authority on criminal law and procedure. Some of you have probably have heard him on past occasions at our Homer Ferguson Conference. The other member, Mary Ellen Hanley, is a partner in a large Seattle law firm; and at one time chaired the American Bar Association Committee on Legal Assistance to Military Person-

nel. She herself was a Marine and is the widow of a Navy officer.

The Commission is required to include in its report findings and comments on a number of subtopics related to the subjects which the commission has been asked to study. Although the Commission does not have the same broad charter as did the Morgan Committee, which drafted the Uniform Code, its recommendations could have a profound impact on military justice. To cite one example, if the commission recommends that all sentencing be done by judge alone and if that recommendation is accepted by Congress, then the trial of a large number of cases will be affected.

I have suggested that an effort be made to obtain empirical data that will bear on some of these proposals to be considered by the Commission. For example, what sort of variation is there between the sentence that a military judge would impose and the sentence that court members impose in various types of cases? To what extent would waivers of trial by members be forthcoming if it were possible to have a jury trial and nonetheless have the judge do the sentencing? In what percentage of the cases would the judge suspend a discharge if he had the power to do so? What have been the average tours of duty of military judges at the trial and appellate level, and what has been the extent and the circumstances of deviations from that average? In how many cases would the charges be referred to a special court, rather than a general court, if the special court could impose confinement of one year?

Surveys of various groups might also be helpful. For example, among military judges, to what extent is there concern about the absence of any statutes or regulations providing tenure? Among trial and defense counsel, what are the anticipated effects on average sentences and on plea bargaining of an increase in the special court-martial's confinement powers?

I have suggested to the Judge Advocates Generals and others that such information be collected, and I will certainly make the suggestion to the Commission. However, unless some of the data collection begins soon, it cannot be completed in time to be of great assistance to the Commission, which will hold its first meeting later this month.

* * *

Since Congress now has chosen to authorize petitions for review on writ of certiorari, I have recommended that it consider going further and transforming our Court into an Article III court. By so doing, it would eliminate any possible recurrence of an issue that was raised in the *Matthews* case about our jurisdiction to declare a Federal statute unconstitutional. I am pleased that the House Armed Services Committee in its report on the Military Justice Act of 1983, suggested that "in the context of considering the impact of various changes on appellate jurisdiction, the Commission established by Section 9 of the Amendment should study and report on the question of whether the Court of Military Appeals should be an Article III court."

I would also suggest that, if our Court were reestablished under Article III, its jurisdiction might be expanded to allow consideration of certain other matters—such as administrative discharges—which are military related. Indeed, we might be redesignated as the Court of Appeals for the Military Circuit and given jurisdiction over a variety of matters concerned with the armed forces. In this way, there would be created an Article III court of specialized jurisdiction very akin to the recently created Court of Appeals for the Federal Circuit. One advantage of the specialized court—which has been pointed out by Dean Erwin Griswold and others—is that it eliminates the possibility of conflict among the circuits with respect to certain issues and thereby reduces the occasion to grant certiorari because of such conflict. In other words, the conflict does not arise if the particular type of case is considered only by a single court of appeals.

Remarks of the Honorable Chief Judge Albert B. Fletcher, Jr. United States Court of Military Appeals

(Military Justice Seminar, Washington State Bar Association, October 28, 1978, Seattle, Washington)

Ladies and gentlemen, there is no more dynamic law today than military law. This is not true because of the United States Court of Military Appeals, or the several judge advocates general, the services' military courts or the Department of Defense. The reason is simple, lawyers like yourselves have discovered or possibly rediscovered military law—the input from imaginative practitioners outside of a largely closed justice system has and will continue to provide the ideas and concepts necessary to give life to that monolith, the military justice system.

To advance legal principles to meet the need of any changing society one must have certain tools. First and foremost is an intimate knowledge of the particular law applicable to that society. You are here at this seminar to hone your knowledge of military law, to bring your knowledge to date is not enough, you must acquire an understanding for the reason behind a certain legal precedent. I would admonish you now, that as to certain legal concepts in the military justice system, military necessity is not a hollow phrase.

Second, you must have the implements which allow you to find the law past and present. Under the direction of the now sitting judges of the United States Court of Military Appeals, military justice caselaw is now pub-

lished in West's Military Justice Reporter and has been blended into the Shepard's Citator System. This change in reporting cases provides instruments with which civilian practitioners are familiar.

Let me turn for a moment to the historical setting for the present uniform code of military justice. It, of course, goes back to the Articles of War which predate the Revolutionary War when we adopted virtually intact the military laws of England. From 1775 to just prior to the Korean War, Military justice could be classified as the command discipline era. Then the period from 1950 when the UCMJ was adopted until 1968 when it was amended, it could be labeled as the paper justice era. From 1968 to 1975, I would call the Command-Judicial Era. I submit to you that we already are in the Fourth Era, the Independent Judges Era.

Not any one of the four eras are exclusive, they are mutual to each other, command discipline is as necessary today as it was during any one of the conflicts prior to 1950. From the untrained lay person to the independent federal military trial judge of today runs a single theme—a balance between the needs for command discipline and the requirements for an independent military justice system. Why not still the Articles of War in October 1978? One cogent reason, the society, you, that the military community serves, demanded more justice for those who volunteer or are conscripted into a military force. For too long, many in the military thought they were separate and distinct from the primary society. They are a segment of the whole, designated to fulfill a particularly unique function for that total society. The civilian society's interest in justice for those in the military requires that society to be ever on the alert, that the total society's concepts of justice are not thwarted by a single part.

You, the participants here today, because of your legal training and interest in military justice must be the watch dogs for the total population of these United States.

The last few years have demonstrated a concern, not only by the Court of Military Appeals, but also by the American Bar Association's Standing Committee on Military Law, for an entirely new series of issues and problems confronting the system. For the first time in the history of the American military, officers are being promoted to battalion and brigade commander who have never tried or defended a soldier or sailor in a court-martial. In addition, many of the legal duties, which once were relatively routine and simple and some might suggest even arbitrary, have given way to a good criminal justice system. It provides more safeguards for the defendant than any other system.

It also provides speedier trials than will be found in most other courts in this country. I say it's a good system and not an excellent one because there are still problems. The time has once again come for a serious look at the structure of the military justice system.

As a former trial judge of 11 years, my concerns obviously tend to focus upon the role of the judge in the military justice system. In this regard, I think military trial judges should be given habeas corpus authority by statute. It is the touchstone of our democracy that every individual has a right to ask a judge to determine whether he is being properly detained by the state. Every judge in this country, except a military judge, has such authority. I perceive no compelling military reason for depriving judges of this authority.

Second, I believe trial judges and court of military review judges need some form of tenure to make them truly independent from the command structure and the judge advocates general.

For appearances sake, the time has also come to randomly select juries in the military. As a practical matter, I suspect that most commanders today have little idea who serves on court-martial juries. They delegate at least the initial selection to some administrative staff person and then approve his selections. With random selection, I believe the commander has to be afforded some leeway to withdraw certain officers and enlisted members from eligibility either for military necessity or because of specified statutory disqualifications such as prior court-martial convictions. Again, the danger lies in giving any one person unfettered discretion. Since there is no reason for the unfettered discretion, why retain it and its associated risks?

There is also a pressing need to get commanders out of the day-to-day military justice legal operation of special courts and general courts-martial. Commanders have more important obligations to be concerned with than picking judges and juries and supervising what has got to be one of the biggest papermill operations in the country. I am referring, of course, to the outmoded method used to create a court each time a person is tried rather than having courts with continuing jurisdiction. This process requires that an order be cut appointing judge, jury, and lawyers for each case that is tried. It is not unusual to see a half dozen such orders in a given case because of changes in judges, jurors, or attorneys.

As I mentioned earlier, the younger commanders are not equipped today to handle military justice matters at the special or general court-martial level. It has become a very technical and sophisticated criminal justice system which is better administered by lawyers than by laymen.

Finally. I believe there is an urgent need to preserve the independence of the civilian tribunal on which I sit and which is charged with overseeing the military justice system. Since I joined the court, I have been exposed to lobbying as well as subtle and not-so-subtle

command pressure at many levels within the Defense Department . . . Not by military commanders, incidentally.

I believe the judicial conference of the United States and The American Bar Association will be particularly alarmed at the treatment of the court by the presently constituted Department of Defense. An independent judicial body can do no less than to stand and be counted.

You might ask, are these actions intended to force a judicial response either through modification of our decisions or in some other way. Two years ago, my answer would have been an unqualified "No". Quite frankly, my response at this point would be a question mark.

What's the solution? I believe the military justice system needs supervision by an Article III Court. I think the time has come in the evolution of the military justice system to make The Court of Military Appeals an Article III Court with the right of certiorari to the Supreme Court of the United States.

Congress should designate this Article III Court as a circuit court by number. The jurisdiction of such a circuit court should not be limited to matters of military justice only. But should include jurisdiction to any matter involving the military including but not limited to contracts. Ecology problems particular to the military, claims and others.

Why not a present existing circuit court, because there is a necessity for expertise in military language, military problems and military necessity as a fact and not as an argued fiction.

I also believe the time is ripe to transform the 4 Courts of Military Review into a single Article I Court which could be administratively supported by and co-located with our court. There should be a single trial judiciary for all services. Both of these Article One Courts The Court of Review and the Trial Court to be administered by other than the Executive Branch of the government.

Ladies and gentlemen, I thank you for the opportunity to join you for what promises to be the first of many C.L.E. programs on military justice offered by state bar associations. I would be happy to try to answer any questions you may have.

"The Continuing Jurisdiction Trial Court"

(Remarks of Chief Judge A. B. Fletcher, Jr., delivered to the Military Judicial Seminar in Monterey, California, on December 6, 1975)

Every seminar for military legal personnel that I have attended has included a session devoted to recent decisions of the Court of Military Appeals and where the Court is going. Gentlemen, I would suggest to you that your initial decision as a trial judge as to any matter reviewable by the U.S. Court of Military Appeals places us on the map and on a specific road. I suggest further that by close reading of the present Court's decisions, both the written word and what is left unsaid, gives direction more than ever before.

There are four areas of which I can speak for the total Court without dissent.

First, we will be a court of law with our decisions built upon the foundation of legal concepts. We will not promulgate a potpourri of factual decisions. You should read us primarily for the law announced. Don't interpret the law by placing undue leverage on the facts. Second, we will exercise the all writs power given us by the United States Code. Third, we expect lawyers to act within the Code of Professional Responsibility, and we will enforce the Code. And finally, we, the Court, believe that the judges in the military, as well as ourselves, are subject to the Canons of Judicial Ethics not unsimilar to those proposed by the American Bar Association.

I have stated the unanimous thinking of the Court. I would now move to an area where the concepts expressed are unanimous, but the implementation is subject to debate by the individual judges. This is not to say that we differ in direction, but only in how to get there. I am speaking of changes in the Uniform Code of Military Justice. The total Court believes that now is the time for a look at the entire Code both to survey the overall direction of military justice to meet the needs of our dynamic military society and to select, by priority of necessity, reforms to be presented to Congress for consideration. At present, this is not happening.

Let me briefly outline for you the status of Code changes today. The Judge Advocates General, through their able Joint Services Committee, have a legislative package on changes to the Code ready in form to be considered by the Congress. A majority of the judges of the U.S. Court of Military Appeals do not support these changes. The judges have submitted for consideration by the Judge Advocates General and their joint committee which now includes a member of the Court's staff, areas that should be scrutinized for possible changes. The Judge Advocates General and the Judges of the Court are communicating through the Code Committee to an extent that finds no precedence in the history of the Court. I believe this is for the betterment of military justice.

From this background, I would like to go to a specific suggestion made by me for a change in the Uniform Code of Military Justice. I call it the continuing jurisdiction trial court to replace the present on-call trial court. What exactly do I mean when I speak of continuing jurisdiction of the trial bench. First, let me make it clear that I do not believe today that any trial judge in the military has any statutory authority to act until a court-martial is convened. I would advise you not to look at

the majority opinions in the writ cases where we ordered the trial judge to hold a hearing on pretrial restraint as authority to exceed the Code. We merely called on the trial judge to meet the standard of a neutral and detached magistrate.

I am impelled by the stated purpose of the military society we serve to conclude that the commander's primary responsibility lies in fielding a force to carry out his stated objective. Only he and his superiors can decide who is necessary to accomplish this mission. No judicial system or officer thereof should or can be allowed to deter this objective. Similarly, the commander's role must not be cluttered with judicial decision-making for he has more important determinations. By these statements, I do not mean to relieve the commander of the authority conveyed to him in trust by the Code under the section concerned with non-judicial punishment. This is a provision affecting discipline.

To this judge, when we say that commanders are acting in a judicial capacity, we are prolonging fiction. On trips to the field, I have discovered that what we really are talking about is judicial action taken by the staff judge advocate, said action later being approved by a command person. In this vein, let me add that the judgment of a trial court should be set aside only by an appellate tribunal consisting of judges trained in the law.

Let me return to the concept of a continuing jurisdiction trial bench. A judicial system should not create its society. In truth, the society brings into being a forum for justice to underprop that society's aim and purpose. The design for a continuing jurisdiction trial court cannot at any stage of the proceedings place any person in the military outside the jurisdiction of the command. Caveat, the O'Callahan decision of the Supreme Court. There are three areas in the present Uniform Code of Military Justice that provide these safeguards, and they must remain intact. First, the command function must be paramount at the time of initial apprehension, initial arrest, or initial confinement. Second, the command must have an opportunity after an Article 32 investigation to determine its needs without judicial interference. If the commander's need for an individual servicemember exceeds the merit for trial, he could foreclose further judicial proceedings. His acting time would require a specific limit. Third, when the findings are completed including a hearing on a motion for a new trial heard by the same judge that heard the case, then the command structure may suspend the execution of any sentence except the death penalty. At all other times and for all other purposes, commencing immediately subsequent to apprehension, the accused would be under the jurisdiction of the trial court. This places the responsibility solely upon the trial judge. Note, I say responsibility. This does not mean that he must do it all himself. I would not propose a specific plan mandatory for each branch of the service. Their uniqueness may require some differences.

Some of the responsibilities of the proposed trial court are such matters as a Gerstein v. Pugh hearing, a probable cause hearing to determine whether a person should be detained and, if so, to additionally resolve what form of detention is appropriate. This must be decided by a neutral and detached magistrate. Note, I did not say the trial judge. Let me stop here for a moment to laud the Judge Advocate General of the U.S. Army for his foresight in promulgating a new Chapter 16 to AR 27-10, the Military Magistrates Program under a supervising military judge. This is a giant step forward.

Under my concept, the judge also would be responsible for calling, but not necessarily presiding over, an Article 32-type hearing. The judge also would be responsible for a random selection of a court, i.e., a jury to try the accused. A valid excuse of a member to fulfill his military obligations would be binding upon the trial court. The trial bench also would have the responsibility for issuing subpoenas for witnesses. There are other judicial functions necessary for a continuing jurisdiction trial bench, and many would require individual adaptation to a particular branch of the service.

Let me turn to areas generally considered judicial that I presently do not favor bringing within the ambit of the proposed trial bench. I will recount only three; there are others.

The trial bench need not have sole authority to hold probable cause hearings and issue search warrants. The area of inspection, vis-a-vis, search is unique in the military. Commanders must be given great leeway in the area of inspections. In the search situation, however, the command must girder itself in the law if it wishes to proceed in the judicial process. Judicial process will provide judicial review. If I were speaking to staff judge advocates, I would remind them that bad practice in the search area gives rise to factual situations that lead appellate courts to extend or to create exclusionary rules. But since I am talking to trial judges, I will remind you that you have the first swing at the question, and if you miss, you, not the staff judge advocate, will be reversed.

Let me turn to the sentencing process. I personally do not favor jury sentencing. One of my reasons being that it gives rise to an inequality of sentences for a particular crime. I recognize that it is and has been an accepted system in this country. We in the military judicial system do have one advantage over other systems. We have Article 66 which vests the Court of Military Review with power to review the appropriateness of adjudged sentences. This is a plus.

Under my concept, the trial bench would not have jurisdiction over any civil matters, i.e., habeas corpus, mandamus, injunctions, or prohibition. The Court could

not order command to cease to function or order action in any area outside the judicial process. The writ of coram nobis, however, is essential to correct in-house injustices and must be available at all levels.

Let me comment in one sentence as to the contempt powers of the trial judge. The trial bench must have the power to punish for contempt committed in the presence of the Court in judicial proceedings.

In a broad spectrum, that is it—a continuing jurisdiction trial court. An independent court of this nature coupled with an independent prosecutorial section and an independent defense section, I believe, would provide our society with a trial forum second to none which meets the society's need for justice at the trial level. More importantly, I believe it leaves those in command with the tools needed to carry out their mission without burdening them with judicial responsibilities for which they have neither the time nor the appropriate training.

Separate Statement of Professor Kenneth F. Ripple

Introduction

For those of us who have worked with the military justice system for some time, there is indeed a special satisfaction in participating in the work of a commission whose mandate is not to investigate abuses in military justice but, rather, to recommend changes designed to fine-tune an already robust system which regularly produces justice. Indeed, this sort of precise tailoring is possible only because the system has already achieved an advanced state of theoretical and practical maturity.

On the other hand, while the present excellent state of the military justice system has relieved the Commission of the unpleasant task of discovering and describing abuses, it has placed upon us another and, in some ways, more exacting task. Our mandate is—as it ought to be—to formulate the *best* possible solutions to each of the areas which Congress has directed us to study. Oftentimes, this process of "fine-tuning" requires, in my view, something other than a simple affirmative or negative recommendation. Rather, it sometimes requires a significantly more delicate synthesis of the competing proposals. This perspective is especially important in the case of military justice. Even the most "technical" adjustment requires that a balance be struck between the rights of the accused and the need for good order and discipline in the Armed Forces; each change must also reflect a proper working relationship between the command structure and the judge advocate.

It is also important to note that several of the issues before the Commission are interrelated and, therefore, the cumulative effect of the Commission's recommendations may well have a significant impact on the future development of a crucial institution of the military justice system—its judiciary. The full impact of this interrelationship must be carefully assessed. It could set directions for years to come.

Because I believe that, in several instances, the best solution to the issue presented is one which does not choose absolutely between competing policy concerns but rather harmonizes them and because I am concerned that the cumulative impact of the Commission's recommendations may have an unforeseen impact on the military judiciary, I have decided to write separately.

Against this background, I now turn to the particular issues which the Commission has been asked to study. Several impact directly on the status of the military judges:

A Guaranteed Term of Office for Military Judges

If the mandate of this Commission were limited to identifying major abuses in the administration of military justice, this proposal would deserve little attention. Neither the testimony of the witnesses before the Commission nor the data collected in the extensive surveys indicates that command influence over military judges is a major problem at the present time in the administration of military justice.

However, the mandate of this Commission is not so narrowly drawn. We are to advise the Code Committee and the Congress as to whether specified proposed changes, including the suggestion of a guaranteed term for military judges, would effect an overall *improvement* in the administration of military justice. Using this standard, one must conclude that the present arrangement, while workable and regularly productive of substantial justice, does indeed leave room for improvement.

While the information compiled by the Commission does not reveal a substantial number of instances of interference with a military judge's decision, the record does reveal that both military judges and convening authorities recognize the potential for such abuse. If Congress places exclusive sentencing authority in the military judge, there is an additional likelihood that the possibility of command influence will increase since the military judge will be the sole focal point for dissatisfaction with sentences. Given this situation, it is incumbent on the Commission and the Congress to explore whether a meaningful improvement can be devised which is compatible with both the concerns of justice and the needs of the military to meet exigent circumstances.

The testimony of the witnesses before the Commission made it abundantly clear that it will indeed be difficult to mold a meaningful guaranteed term of office which does not interfere with the countervailing concerns of military life. Reassignment of military judges in times of military crisis or even in times of significant stress on overall manpower is indeed a most important concern.

A military judge with significant training in other crucial areas ought to be—indeed must be—available to use those skills for the Country's good in times of great need. Moreover, since most military judges are career judge advocates, it makes little sense to make assignment as a military judge an absolute barrier to an opportunity for career advancement which will be beneficial both to the individual judge advocate and to the Country. In short, assignment flexibility is a legitimate concern for both the Armed Forces and the individual military judge.

This need for flexibility certainly cannot coexist with a rigid guarantee of a term in office. Guaranteed appointments for long periods of time or without provision for exceptions would deprive the Armed Forces of needed flexibility and lock the individual military judge into a career pattern which could be frustrating and demoralizing. Indeed, these concerns counsel against any blanket *statutory* guarantee of term of office.

There is, however, a middle ground. Congress could, by statute, require that the Secretary of every military department: 1—provide by regulation for a fixed period of assignment of a military judge; 2—specify the circumstances under which a military judge could be prematurely removed; 3—require that any such "short tour" be approved by the Secretary or his designate. Such a system would permit the Armed Forces to reassign military judges to other duties for the good of the service. However, the requirement of a written explanation and approval at the secretarial level would also assure that the decision was based on permissible grounds and subject to scrutiny at a level above the parochialism of command influence.

Many of the witnesses appearing before the Commission stated that such a system was indeed workable. Indeed, one witness suggested that, if such a system were implemented, the secretarial delegation of approval authority ought not be delegated to anyone within the military chain of command. It was pointed out that even the Judge Advocate General has a command relationship with the military judge and is, in fact, capable of exerting significant influence over the military judge's career. Indeed, many of the convening authorities appearing before the Commission who noted the possibility of command influence were senior to the Judge Advocate General.

One other matter must be addressed. To avoid significant litigation of the Secretary's decision, the statute ought to specify that his decision is final and not subject to further judicial review.

In short, the flexibility of regulatory control will assure the military judge, members of the Armed Forces, and the American public generally of the professional independence of the military judiciary. It will also preserve for the Armed Forces the flexibility of assignment needed for immediate military preparedness and long range career development.

I am authorized to state that Mr. Honigman and Mr. Sterritt concur with the foregoing proposal.

Sentencing by Military Judge

While even the most experienced trial jurist in the civilian community will describe the sentencing process as the aspect of the criminal trial which taxes his or her judicial abilities to the limit, the military justice system, under the Commission's recommendation, will continue to permit this function to be exercised, at least in the first instance, by the court-martial members, if the accused desires. This arrangement is justified mainly on the desirability of preserving for the accused a traditional option and to ensure that the sentence reflects the values of the local military community. Neither of these is supportable as a matter of public policy. Society has an overwhelming interest in a professionally imposed sentence tailored as far as possible to meet the several goals of any modern penal sentence. It simply cannot leave the task to amateurs. Indeed, this is especially true in the military where the deterence effect of a sentence may have a direct affect on the maintenance of the discipline of a combat unit. A military commander can ill afford to watch the standards of conduct required of American Forces diluted because the local "military community" is willing to wink at the delicts of one of its own. In short, when the benefit of preserving a *perceived* right for the accused is weighed against the real possibility of either an inappropriate sentence or of "jury nullification," the appropriate course is clear.

Court-Martial Power to Suspend Sentences

There seems to be little reason to deprive the initial sentencing authority of all ability to use this vital and integral tool of the sentencing process. A sentencing authority—whether judge or court-martial—ought to be permitted to impose what it believes to be a just sentence. Such a judgment often includes a suspended sentence.

On the other hand, in the military context, the legitimate role of the convening authority in the suspension decision must also be recognized. Indeed, that officer will normally be in possession of more information than the court-martial panel or the military judge on the issue of rehabilitation. A statutory arrangement which permits suspension by the court-martial, subject to approval by the convening authority, while also retaining full authority in the convening authority to *initiate* a suspension, is quite feasible.

The prospect of occasional tension between the court-martial members or military judge and the convening authority in this matter hardly seems a sufficient reason to

decline such an improvement. Initial sentencing authorities can today create such "tension" by recommending a suspension. The foregoing proposal would simply present the convening authority with an affirmative—albeit tentative—decision rather than a mere recommendation. It would, however, require that the convening authority review more carefully the action of the tribunal and thus improve the overall quality of the sentencing process.

Expansion of the Sentencing Power of the Special Court Martial to One Year Confinement At Hard Labor

Throughout the deliberations of the Commission, the arguments in favor of this change have remained noticeably unfocused. For some, the primary argument seems to be a desire to mirror the civilian distinction between felonies and misdemeanors. For others, the chief benefit appears to be the supposed cost reduction which would result if serious crimes, now tried at general court-martial with all the procedural guarantees associated such a proceeding, were tried at a special court-martial. It is also argued that increasing the potential confinement to which an accused could be subject will provide alternatives to a punitive discharge in sentencing. It is even argued that such an increase in potential punishment will result in greater protection of the military accused who otherwise would be tried at general court-martial where the punishment limitations are substantially greater.

These arguments, taken separately or cumulatively, cannot support this proposal. The need for symmetry with the traditional felony-misdemeanor civilian distinction is, quite bluntly, the exaltation of form over substance, especially when, in the civilian community, that distinction appears far more blurred than it once was.

The second argument, resting on administrative convenience and cost-saving, is disturbing. The "savings" would be derived by the exclusion of some of the most valued parts of the military justice system, such as the Article 32 investigation. For years, military justice practitioners have pointed with justifiable pride to the careful pretrial screening process which ensures that only cases where trial on the merits is justified result in trial. Indeed, the cost saving may be illusory. Referral of more serious crimes directly to a special court-martial without the benefit of an Article 32 investigation may well result in increased expense and the loss of valuable judicial and member time since far more non-meritorious cases, ultimately resulting in acquittal, may be referred to trial.

The argument that this proposal will result in increased sentencing flexibility is also seriously flawed. It is indeed a rare case in which a sentence to hard labor in excess of six months could be awarded appropriately but in which a punitive discharge would not be appropriate. Nor is this enhanced punishment scheme a needed protection against unrealistically high sentences by general court-martial. The appellate review of sentences in the military system—perhaps the most sophisticated in the United States—is a sufficient guarantee against such excesses.

It is quite clear that the various military services differ substantially in their treatment of absence offenses. Some treat such matters administratively; others handle them through the court-martial process. For the latter, enhancement of special court-martial punishment will permit the government to obtain a significantly greater period of confinement prior to punitive separation than is now available. However, there is a substantial question as to whether this enhanced punishment potential is in fact a sufficiently substantial deterent factor to justify the increased costs to the Government.

The argument that this change will afford the accused greater protection is also of dubious merit. The proposed change will benefit some accused whose cases would normally be referred to general courts-martial under the present system. Their exposure to longer periods of confinement will be limited to one year. The responses to the commission's survey indicate that the majority of convening authorities believe this will occur in a small percentage of cases. *See Analysis of Questionnaire Data-Increase the Jurisdictional Maximum Punishment of Special Court-Martial to One Year,* Section 4(c) (1984). The price of this benefit however is substantial. The far greater number of accused whose cases would normally be referred to special courts-martial will now be exposed to an additional six months confinement depending on the offenses charged. *See Analysis of Questionnaire Data, supra,* Section 3. This increased exposure has not been justified by an evidence presented to this Commission which concerns the state of discipline in our armed forces. To benefit the smaller number and the more culpable offender at the expense of the greater number and less culpable offender is neither reasonable nor sound policy for the administration of justice. This problem is exacerbated by the fact that a court of members, albeit instructed by a military judge, can impose these sentences.

Finally, it must also be noted that this proposal is linked to several of the other issues under study by the Commission. For instance, if Congress decides to place sentencing power exclusively in the hands of the military judge but does not provide for a guaranteed term of office for that judge, this enhanced sentence will be imposed by a relatively inexperienced and junior judge advocate who may be far more susceptible to command pressures.

I am authorized to state that Mr. Sterritt concurs in this analysis.

Article III Status for the United States Court of Military Appeals

The proposal for Article III status for the United States Court of Military Appeals is one whose time has come. This Court is a *national* court with power to affect the liberty, and sometimes the life, of Americans in uniform. Matters of far lesser importance have been committed by Congress to tribunals with Article III protections.

The traditional arguments against such an arrangement usually stress the uniqueness of military justice and exhibit an almost emotional fear that such a high degree of judicial independence will dilute that uniqueness and permit judicial intrusion into military affairs.

Article III status for the judges of the United States Court of Military Appeals will undoubtedly lead to more contact between these judges and their counterparts on the courts of appeals for the various circuits. However, it requires a quantum leap to conclude that such contact will lead to a dilution of the military justice system. Indeed, most comparative law experiences strengthen—not weaken—the participating systems.

The major source of reluctance to this proposal appears to come from those who believe that Article III status will somehow permit the Court to interfere with military operations. However, the mere conferral of Article III status on a tribunal's judges hardly dilutes Congress' authority to place whatever restrictions on the Court's jurisdiction which appear appropriate. The Supreme Court of the United States has demonstrated that it is quite prepared to give whatever support is needed to the proposition that the Congress and the President—not the courts—are constitutionally responsible for the conduct of military affairs.

Epilogue: The Military Judiciary: Institutional Erosion

A disturbing prognosis for the future of the military trial judiciary emerges from this Commission's work. The testimony and surveys make it clear that career judge advocates hardly view such duty as career enhancing. Indeed, their collective judgment appears justified. Moreover, when viewed as a totality, the recommendations of a majority of this Commission can hardly be viewed as a vote of confidence. The military trial judge is denied even the most modest guarantee of judicial independence as well as one of the most fundamental tools of modern sentencing practice—the power to suspend. Indeed, the unique capacity of the professional military judge to undertake sole responsibility for this most delicate task remains unrecognized.

In short, the military trial judge as an institution in American military justice is alive but not well—or at least not very robust. Perhaps the delicate task of engrafting this role on the system is simply incomplete. However, when these symptoms are still manifest after a decade and a half, the situation bears careful monitoring by the Congress.

KENNETH F. RIPPLE
December 6, 1984
University of Notre Dame
Notre Dame, Indiana

XIV. ADDITIONAL RECOMMENDATION TO THE DEPARTMENT OF DEFENSE

It is strongly recommended that the Department of Defense initiate an appropriate study of the following issue, to include a study of whether any modification should be made to the Uniform Code of Military Justice in support thereof:

> What must the United States do to ensure that all civilian technical representatives and Department of Defense civilian employees, who operate or maintain vital military operational equipment or vital military communications equipment, remain at their posts in time of war or national emergency?

Commission members Captain Byrne, Colonel Raby, Mr. Honigman, Professor Saltzburg and Colonel Mitchell agree. Time constraints did not permit the acquisition of the signatures of the concurring members.

CHAPTER 2

Transcript of Commission Hearings

STATEMENT OF MR. EUGENE R. FIDELL

Given to the Military Justice Act of 1983 Advisory Commission on 8 June 1984 at Washington, D.C.

Col. HEMINGWAY. If you would please state your full name and the capacity in which you appear here today.

Mr. FIDELL. My name is Eugene Fidell. I'm an attorney in private practice in Washington. I'm a partner in the firm of Boasberg, Klores, Feldesman & Tucker, and I'm here today on behalf of the American Civil Liberties Union.

If I can append a footnote at this point, let me say that I have also received in my capacity as Chairman of the Committee on Military and Veterans Rights of the District of Columbia Bar, the Commission's request for comments. The D. C. Bar Committee will be meeting next week at the ABA office here in town to prepare a response which I would hope we would be able to get to the Commission in a timely fashion, although due to certain constraints that the Bar has imposed on the expression of public positions, that can be a time consuming process.

I'm very gratified to be here today on behalf of the American Civil Liberties Union because the ACLU was actively involved in the development of the legislation that Congress passed last year, and a number of the issues that the Commission has been asked to address were issues that we identified in our testimony. In offering this statement, I would like to address two types of questions; the first, specifically the questions set forth in the Commission's inquiry and, second, some additional areas of concern that I think the Commission should take note of. Mindful of the constraints imposed by the legislation and the Commission's charter, nonetheless, some of these might be areas that the Commission might wish to note in its report and might wish to refer to the Joint-Service Committee, and might wish to identify for the Code Committee, or might wish simply to comment on. In this regard, I would point out that Senator Jepsen, when he introduced the legislation that ultimately became the Military Justice Act of 1983, said that it was time for a basic look at the Code and the arrange-

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The Military Justice Act of 1983, Advisory Commission, December 1984.

This report was prepared by the direction of the Military Justice Act of 1983 Advisory Commission, to be transmitted to the Armed Services Committees of the Senate and House of Representatives and the Code Committee.

ments governing military justice in general, and it's in that spirit that the second portion of my remarks will be offered.

Basically, the position of the ACLU regarding the questions that the Commission has addressed to us is stated in the testimony and responses to questions that we furnished to the Senate Armed Services Committee while the '83 act was under consideration.

In looking at the questions posed by the Commission, I've gone back over the presentation that we made at that time. It was a presentation that was not lightly arrived at, and we would respectfully invite the Commission's attention to the detailed testimony that I presented, as well as the responses to questions which were equally attentively prepared.

First, with respect to sentencing by the military judge, the ACLU's position is stated on Pages 200 and 219 to 220 of the Senate hearings and, in essence, our position is that we would oppose any change in current law because many members of the armed services do believe that sentencing by the jury, if the accused so chooses, including the option for enlisted members, is an important safeguard. We recognize that this is a departure from civilian federal practice, and the fact is, of course, that the ACLU's position is to prefer use of the civilian model to the extent practicable; we think this is consonant with Article 36. Nonetheless, having carefully reviewed the matter and sought the advice of a variety of ACLU cooperating attorneys who have had experience in literally each branch of the service, we have concluded that the perception among persons subject to the code—enlisted persons which are the bulk of the affected class if you will—is that this can be an important safeguard; and in those circumstances, the American Civil Liberties Union is not disposed to say that it is more important that we get in lock step with the civilian community.

Let me also say at the outset, before I get too far along, please do not be bashful about interrupting me with questions. I'm not here to make a speech this morning; I would much rather engage in dialogue, and I won't be hurt if you interrupt me at any point.

With respect to the suspension of sentences, the response that we furnished to the Senate Armed Services Committee indicated that the power to suspend sentence should be conferred upon whoever adjudges the sentence, whether that be the military judge or the members of the court-martial.

Suspension of sentence is an integral part, in our view, of the sentencing process. Now there is a footnote that perhaps should be added. Assume with me that the law were changed so that the sentencing authority could suspend the sentence. If the sentencing authority declined to suspend the sentence, should the command or other authority be authorized to suspend the sentence? The Civil Liberties Union would have no objection to retaining the power of higher authority to suspend a sentence even if the sentencing authority, having the suspension power, declined to do so, because there may well be factors that are best known to the GCM authority and to other authorities that suggest the appropriateness of the suspension even though the trial level authorities were not disposed to do that, and even though they had the power to do that.

Col. HEMINGWAY. Let me interrupt with a question. What do you envision then as the proper basis for vacating the suspension and executing the sentence, given the fact that the members of the court, if they impose the sentence, would have no supervisory capacity over the accused's future conduct?

Mr. FIDELL. Well you'd continue to have some need for a fact-finder obviously to determine that the condition precedent to a vacation of the suspension had in fact occurred. I will confess that we have not addressed that in detail; but obviously, the alternatives are either for command to perform that function as it currently does, or for that function to be performed let's say by a judicial officer. We have not addressed that subject, however, and I can see some complications in it that literally do cut both ways. On the one hand, you don't want the vacation of suspension proceeding to become literally another trial with another jury; and as I understand civilian practice, when you vacate a suspended sentence, there is no jury involved; the jury has functioned by announcing—by imposing the sentence in the first place if you have a—or whoever imposes sentence.

Mr. HONIGMAN. In the civilian practice the jury doesn't impose the sentence in the first place.

Mr. FIDELL. Typically, right. But obviously some attention could be given, particularly—Let me say this: Particularly if you had the suspension power vested in—or suspension option vested in the sentencing authority, it would make sense to have the trial judge, let's say, have the authority to vacate. It's a judicial-type function certainly to vacate a suspension of sentence. Now on the other hand, if you had—just to play out the hypothetical we talked about before—If the suspension were a suspension imposed not by the sentencing authority, but by the command, then I could see some awkwardness intellectually in having a judge vacate a suspension that had been imposed by a command. There, you might really get in a hair-pull between command and the judiciary, and we don't want to encourage that. Obviously, you've put your finger on an important question. It's one that we have not played out completely; but I can see some concerns, and you'd have to think through the implications of going one way or the other.

Mr. HONIGMAN. If the current system of jury sentencing is retained, would you favor—

Mr. FIDELL. Mr. Honigman, if I can—Just to continue my thought before, to the extent that the suspension of a—Withdrawn. To the extent that the vacation of the suspension constitutes a judicial function, and to the extent that the drift of the '83 legislation is to withdraw by and large the judicial functions of the commander—the trend that I think that it would be hard to deny—then there ought to be some serious attention given to having the vacation power vested in the judiciary, subject to however you come out on the question of possible controversy, because a judge is vacating or refusing to vacate a suspension ordered by a commander. And if that potential for conflict is serious enough, then I would say maybe second thought, additional thought ought to be given to whether the commander ought to be able to suspend sentence, because I do feel fairly strongly that the vacation of a suspended sentence is a judicial function. I'm sorry—

Mr. HONIGMAN. I was just going to ask whether if the current system of jury sentencing were to be retained, whether the ACLU would favor conferring the suspension power upon the judge, or whether you would favor conferring that power upon the jury.

Mr. FIDELL. In this respect, let me say that without having discussed this with my client if you will, and subject to some second thoughts, I would say that a sentence could be suspended by the judge even if the jury did not suspend. Have I responded to your question?

Mr. HONIGMAN. Yes.

Mr. FIDELL. So that the judge would have a second opportunity to suspend, again, in the exercise of judicial discretion.

Col. RABY. So if I may summarize your bottom line then, subject to further, more detailed consideration, it's that whoever imposes the sentence initially should have an opportunity to suspend the same.

Mr. FIDELL. Correct.

Col. RABY. If it is a judge, the vacation power should be vested in the judge clearly, and you would tend not to—You would have no objection to a convening authority or any other higher authority having suspension powers in addition to that of a judge.

Mr. FIDELL. That's correct. I think we ought to have—

Col. RABY. You could always go for clemency.

Mr. FIDELL. Precisely right. That's the last thing we want to constrain here.

Col. RABY. Now if a jury is doing the sentencing, you would give them suspension authority, but you'd also give a judge, the trial judge, suspension authority.

Mr. FIDELL. That's exactly right, Colonel. And really, thinking about it, it's interesting the way this has played out as we've discussed it. It seems to me that if the jury suspends—If the jury declines to suspend, the judge should be able to suspend. If neither the jury nor the judge suspend, then the command should be able to suspend.

Col. RABY. Now, if the judge suspended in that scenario we've just played out—

Mr. FIDELL. Yes.

Col. RABY. —You'd put the vacation authority in the judge 'cause he was the suspension authority; but if the jury suspended, would it be opposite your views to let the command have the vacation authority?

Mr. FIDELL. I would still—It would not be consistent with our approach on this. It seems to me that essentially, vacation of a suspended sentence is a judicial function, so I would have the judge perform that function as well.

Col. RABY. Then if a commander, under our scenario, say the jury and the judge did not suspend and the commander suspended, would you still vest vacation authority in a judge—it being a judicial function—considering that the case law at this time have military courts to be courts of limited jurisdiction preaches the statute, and there's a question as to—We don't have continuous jurisdiction in other words, as you well know, Mr. Fidell. How would you play out that scenario?

Mr. FIDELL. On balance, I'd still have the judge do it and get it all centralized, get the whole vacation process centralized before a judge, regardless of who suspends.

Col. RABY. Now are you going to address the authority of courts of military review, whether they should have suspension authority, in your presentation today?

Mr. FIDELL. I'll be happy to do that. Why don't I do it right now?

Capt. BYRNE. Before you do that, can I ask you a few questions? You know the civilian practice on judge-only has dramatically changed in the past two or three decades, and now I believe there are only about perhaps seven states that have jury sentencing. Are you aware of any of those states that still have jury sentencing where the accused has an option of electing judge sentencing?

Mr. FIDELL. I cheerfully admit that I have not reviewed the state legislation in detail, so I can't answer your question.

Capt. BYRNE. Well, I don't know—I must admit that I've done some research, but it's not complete. Let's assume for the sake of argument that none of the civilian jurisdictions allow that option.

Mr. FIDELL. The option again of—

Maj. CASIDA. Missouri at least has that option.

Capt. BYRNE. All right, thank you.

Maj. CASIDA. And perhaps Texas, I'm not sure.

Capt. BYRNE. Thank you. But let's assume that the great majority of the states that still retain it, you don't

have that option; then, would you say that this is a different model from—except for a small minority of states, that this is a different model from every state situation, as well as the federal situation?

Mr. FIDELL. Well, subject to—Not having done the research, I'm not in the position to draw that conclusion. It may well be that that is the case. Let me say that having lived under, thought about, written about and practiced military law since 1968, '69, I'm not surprised to know that the military justice system might be different from the civilian system.

Capt. BYRNE. Okay. Pursuing it a little further then, can you think of any reasons why it should be different in this area?

Mr. FIDELL. With respect to the accused's option as to who might sentence him, I think one of the things you have to deal with is the perception of the system. For decades, the military justice system has been touted as at least the peer of the civilian criminal justice system and, in some respects, superior to the civilian criminal justice system. And one of the factors that distinguishes the military justice system that's regularly brought forth as evidence of this equality if not superiority is the fact that the accused has this option. It's a system that affords the individual the option to elect enlisted personnel on the jury. I mean it's part of the landscape that has been digested by the military community, and it's part of the institutional arrangements that we've lived with for many, many, many decades now. This gives rise to certain expectations, understandings, appearances, folklore perceptions, not all of which lend themselves to either cold logical analysis, or to statistical analysis. And some of these expectations, I think, are wrapped up in the question of whether the accused has the option of being sentenced by the judge, knowing who the judge is, or being sentenced by the members, possibly including enlisted members, and excluding people who are members of his own unit. I'm loathe to throw those opportunities overboard.

Capt. BYRNE. Now these decades you're talking about, you're really only talking about the past decade, aren't you?

Mr. FIDELL. In terms of having a judge do the sentencing?

Capt. BYRNE. The option.

Mr. FIDELL. Having the option? Well, as I understand the pre-1968 legislation, in a GCM, an individual could choose to be sentenced by the law officer; is that not so?

Capt. BYRNE. No.

Mr. FIDELL. Well, then we're talking about a fifteen-year period.

Capt. BYRNE. You are really talking about a fifteen-year period.

Mr. FIDELL. Yeah.

Capt. BYRNE. And the system was wouldn't you say, really changed? We've always had members sentencing and then in '69 we had an option whereas if they went by trial by military judge alone, the judge could also sentence them.

Mr. FIDELL. Well, if you want to turn back the hands of the clock, that's obviously your privilege, but I certainly don't see any point in doing that, because people have come to have an expectation; this is one of the strengths of the system that people have been repeatedly told about. Whether or not it is important as a practical matter, it is perceived to be important by the people who are most directly affected by it and we're not disposed to recommend junking it after an experiment that has shown that the system works okay. If it ain't broke, don't fix it.

Capt. BYRNE. I just wonder how does this benefit the accused?

Mr. FIDELL. Say again, please?

Capt. BYRNE. To have the option.

Mr. FIDELL. You would have to talk to any particular accused and any particular defense counsel.

Col. RABY. If I made available to you some statistics—if my statistics could prove anything—that showed the number of times judges in the last two calendar years in the Army at least—I mean that accuseds selected judge-alone sentencing, enlisted-member courts, officer sentencing, and the rates of conviction, discharge and confinement, would that help you in answering that question?

Mr. FIDELL. Not particularly, because I don't know how you put a value on an option. In any particular case, if I were advising an accused, I can't tell you what I would do even if you gave me statistics from here 'till 1989. I don't know—If you, Colonel, were going to be the judge, I'd probably go with you. On the other hand, if you gave me a court with five Gunny Sergeants, or seven Master Chief Bosun Mates, I might have second thoughts, or I might feel just the opposite about it; but I'm not going to—I'm not going to say that my client will be none the worse off without having that option, and I don't think my—

Col. RABY. I wasn't talking about an actual practicality; I was talking in terms of perception.

Mr. FIDELL. Well, the perception—

Col. RABY. Let me put it this way: If the statistics showed for example, that the court—the enlisted men went with judge alone 100% of the time, would that not be an indication that this right wasn't perhaps perceived to be too valuable? But, on the other hand, if judge alone was used only 2% of the time, and the members went with court members—bearing in mind they can also ask for enlisted court members—would that show

that the right was used more? If the right is used more, does that not support the perception?

Mr. FIDELL. Well—

Col. RABY. If enlisted men actually are asking for court members with enlisted personnel, or not asking for judge alone so we're getting court members a substantial amount, does that tend to show the right is valuable or not?

Mr. FIDELL. Well, I'm going to answer that on several levels. The first is, your question is predicated isn't it, on having sentencing done by the same body or individual as is the trier of fact; correct?

Col. RABY. Yes, that's our system right now.

Mr. FIDELL. That's our current system; that's exactly right, and so there's a looming question over whether statistics based on the current system would have any validity whatever, once you've decoupled the sentencing phase from the guilt phase. But let's look at the statistics. The statistics that were furnished to me, which cover the last fiscal year, indicate that in the United States Army there were approximately 15—well almost 1600 general courts-martial, in one-third of which the accused selected members. And for special courts, there were 2800, of which one-quarter selected trial by members. This is Block 8, Part 8 of the official form. In the United States Navy and Marine Corps, there were about 900 GCMs, and again, just about one-third chose to go with members. There were about 11,000 specials, and in 10%—more than an insignificant number—people chose to go with members. In the United States Air Force, there were 400 some odd GCMs and it looks to me about 40% of the accuseds went with members. There were almost 1300 specials and 500 went with members; that's a very substantial percentage. And in my favorite service—it's a small service, but there are those of us who love it—there were 10 GCMs, half of which were tried with members, and there were 64 specials, 49 of which were tried with members. I'm not in a position, based on those statistics which are the only data that we have, to say that the accuseds—the class of accuseds—chiefly enlisted personnel, don't want this right. They're using it day in and day out in every branch of the service.

Mr. STERRITT. May I ask a question?

Mr. FIDELL. Please.

Mr. STERRITT. Again, it's focusing on the nature of this right. Is it your position, or the ACLU's, that today this right is essentially something like forum shopping; in other words, to choose which forum you think you'll get off better? Or do you think it's something like in the more historical mode of giving the enlisted man the right to be punished by people who were on the front line or served in the same duties as he? Do you see the difference? One is sort of a military approach to the right; in other words, fellow comrades under the same conditions who commit the offense, let those people under the same conditions sentence him.

Mr. FIDELL. But the latter doesn't really apply as I see it, because Congress has provided an exception for people who choose to have enlisted personnel on their courts. The statute and the manual provide that those people cannot be members of the accused's unit.

Mr. STERRITT. So you don't seem to put much weight on the latter position?

Mr. FIDELL. No, I really don't. But I don't think you can judge an aspect of the system in total isolation. Let us be frank; let us look back at how the Code began. The Code began as part of a massive response by Congress in the postwar era to documented abuses with respect to command influence and other skewing of the criminal justice system that people in the country felt could no longer be tolerated. And so Congress constructed a fairly elaborate system to which it has added periodically over the years, added protections. This did not just spring full-blown from the head of Zeus; I mean we are talking about something that was a response to perceived and documented evils during World War II.

Col. MITCHELL. I just wondered whether or not you felt that a drive for uniformity had any significant part in the thinking of Congress in—

Mr. FIDELL. Of course, it did; of course, it did. I mean, I don't want to restate the history of the Code. There were a variety of themes; but certainly, the one I pointed to was a not-inconsiderable part of what motivated Congress in '51 and also—

Col. RABY. Excuse me, I just had one question. You've addressed several things here today. You've made some points why you believe it should be retained. One thing you've not addressed is a view of your—I'd be interested in your views as to whether or not you believe—apart from the argument you've already advanced, which I understand. Who do you believe could adjudge the most consistent sentence, the most appropriate sentence basically, a jury, a judge, or does it depend on the type of case, whether it's primarily a legal issue case, factual based case, or just what are your feelings in your experience as a civilian attorney?

Mr. FIDELL. Thank you. Let me comment on that. The information that I am aware of indicates to me that judges are literally no more uniform in their sentencing pattern than jurors; that is my understanding. Now, having said that, I am fully aware of the various mechanisms that our systems, civilian and military, have devised to encourage uniformity. One is appellate review of sentences, of course, and there's a whole body of literature on it; I don't want to get into that. But I will say very candidly that I am concerned about the extent to which even our judges might be subject to influence

with respect to sentencing patterns; for example, I recently—not so recently—I have seen within the last two years a document emanating from the Chief Trial Judge of a service that shall go nameless, commenting with greater candor and directness than I thought appropriate on the levels of sentence that were being handed out by judges. In a system where judges have no tenure, a subject to which I will return presently, anything like that strikes me as very, very disastrous, and it gives me the willies whenever I hear suggestions that juries should no longer have sentencing power.

Mr. HONIGMAN. Mr. Fidell, to the extent that your argument is that juries should retain the sentencing power, isn't the ACLU also arguing in favor of retaining the current blue-ribbon jury system in which jurors are selected by the commander on a personal—after personal evaluation of certain factors such as experience, judicial temperment and so on? How can you square a system of jury sentencing with, say, a random-selection process or a process involving more enlisted persons on the jury?

Mr. FIDELL. I'm not sure I see a strain between those two.

Mr. HONIGMAN. Why not?

Mr. FIDELL. If you can rephrase the question, I may be able to—please.

Mr. HONIGMAN. Well, we presently have a system, a blue-ribbon system, and I think the military takes great pride in having well-educated and mature juries finding facts and adjudging sentences.

Mr. FIDELL. Let me say that I don't necessarily agree with you, Mr. Honigman, that as a matter of practice, the requirement of the statute that the command select people best suited is anything more than an expression of motherhood and apple pie. In the real world, the people who get appointed to courts by and large, and I'm not saying this is always the case, a majority, a vast majority of the cases. My experience suggests that the people who get put on courts are people who are available as a practical matter.

Col. MITCHELL. Mr. Fidell, if I can get the country vote in again please, I've jotted down a few questions; I'd like to have you answer them if you could. First of all, we're in the process of getting a lot of data. Would you have any objection to answering any written questions that we might have—

Mr. FIDELL. I'd be delighted; the harder the better.

Col. MITCHELL. Now I understand from your remarks, at least I assume, that you've had some service in the Coast Guard.

Mr. FIDELL. Three years, seven months and eight days.

Col. MITCHELL. But you've never commanded troops in combat?

Mr. FIDELL. No, Sir.

Col. MITCHELL. All right, now you made a point that the jury system as it presently exists in the military, or a jury system, provides the accused with a safeguard—this option he has provides him with a certain safeguard, and you didn't identify it. I'd be interested in knowing what it is; a safeguard against what?

Mr. FIDELL. It was an option as part of a larger set of safeguards, a structure established by Congress that was perceived as an important protection and an important tool available to the accused.

Col. MITCHELL. Against what?

Mr. FIDELL. Against possible undue influence on judges; against possible undue influence on juries.

Col. MITCHELL. Do you have any data which suggests that in the armed forces there's any significant, what you called command influence problem as it relates to military judges?

Mr. FIDELL. I cited an illustration before of what I considered to be command influence being exercised with particular respect to sentencing.

Col. MITCHELL. One time, but it was done by a judge not a commander, and that may, perhaps, or may not make a distinction.

Mr. FIDELL. My client won't care.

Col. MITCHELL. Perhaps not, but I think the point we're talking about is command influence and even assuming that is, that's only one case.

Mr. FIDELL. That's true, and I think it's a mistake to try to be anecdotal about this; there's entirely too much anecdotalism going on in public affairs these days. And the subject of statistics, incidentally, is one to which I'd like to return, also later on; I know it's on the Commission's mind already, judging from the report that Captain Burd made.

I cannot see much point in telling you about the instances to which I have been exposed when I was performing legal functions in the service or other people that I'm familiar with who have been exposed to efforts, subtle and not so subtle, to influence or penalize for the performance of legal and judicial functions. To the extent that questions have arisen in the past, they're already a matter of record. If you read the footnote in the *Ledbetter* case, decided by the Court of Military Appeals several years ago, you'll see a fairly clear recognition of concern on the part of the Court of Military Appeals for this kind of problem.

Col. MITCHELL. Well, they can be concerned about it if it happens once; I don't think that's the question. The question is, is it a significant problem, and do you think that a research, for example, of the case law of the reported cases, maybe even the unreported cases to determine in what percentage of those cases there exists a real issue, or apparent issue of unlawful command influence would be helpful?

Mr. FIDELL. That's already been done.

Col. MITCHELL. Then to what extent has unlawful command influence been proved to be a problem?

Mr. FIDELL. I would say that it is a problem that rears its ugly head periodically, and I believe that the representative here from the—I'm trying to recall whether I should be looking at Colonel Raby or Colonel Hemingway for certain litigation that's currently pending in Germany. Am I looking at Colonel Hemingway fairly?

Col. HEMINGWAY. (Nodded in the affirmative)

Mr. FIDELL. This is not a museum piece that I'm talking about. Command influence is a continuing concern. Whether it exists in any particular situation, I don't want to say, and I'm not here to indict the services, or to say that, you know, it happens every seven weeks; it happens every nine hours, or anything like that. It is a concern, and one of the things we have to deal with in structuring the system of criminal justice is concerns and perceptions. It doesn't lend itself to statistical analysis because it's just not that type of a thing.

Col. MITCHELL. In other words, if I understand you right, what you want to do is eliminate to a 100% degree that which you consider to be unlawful command influence.

Mr. FIDELL. Well, although I know that's a friendly question, it's a leading question and I'll give you a direct answer to it. The answer to your question is: Absolutely right. Also, by the way, that's not the subject that I think we're here to discuss, which is whether the accused should be deprived of the opportunity Congress has afforded him since at least 1968 to choose between the judge and the jury for sentencing purposes.

Col. MITCHELL. I think the point might be valid though, because if there exists, inadvertent or otherwise, some influence which finds its way into the decision-making process of the trial, is it not more likely to occur in a case where the accused is sentenced by members, than in a case where he's sentenced by the military judge?

Mr. FIDELL. It's a little hard to compare the two because the dynamics of command influence exercised on members is somewhat different; there's a different ideology from the exercise of influence, improper or outside influence on a sitting judge. In a way, it's like apples and oranges. It may have the same effect. All I'm saying is, and I don't know that this is a foolproof way of preventing command influence or anything like that; but what I'm saying is, I am not going to sit here today and tell you Gentlemen that the American Civil Liberties Union will agree to withdrawing a right Congress has given these people since 1968. The system has not been shown to be so cumbersome or so onerous or so wasteful of resources that it should be changed.

Mr. RIPPLE. If I may just stay on this for one moment.

Mr. FIDELL. Please.

Mr. RIPPLE. Changing from command influence, really to the whole question of information which either sentencer might or might not have; how does your organization feel about the current ability of the military judge to engage in the process of sentencing, in terms of the educational level of the judges in terms of their ability to perceive the considerations which might be important in various command situations? Is the military doing an adequate job of preparing military judges to have the exclusive power to sentence?

Mr. FIDELL. I'll answer your question with a question. How good a job does the Article III system do in preparing its judges? How good a job does the state of New York do in preparing its judges for that? Seriously, this is—I don't know the answer to that question. Every judge has his first case, and there is a start-up period for any judge. You can have a judge who had the wisdom of Solomon on his first day, and you can have a judge that you sent through ten different sentencing institutes and the day he or she retires, that person is still going to be an unfair sentencer.

Mr. RIPPLE. Yes, but there certainly is an area where both your federal judiciary and your more enlightened state judiciaries are expending a good deal of effort today. Is the military, in your judgment, expending the same kind of effort in reaching comparable sophistication in what is obviously a nebulous area?

Mr. FIDELL. The answer is: My impression is that the services have not reached either the equivalent level of sophistication, or an adequate level of sophistication in training of the judiciary; and this is all wrapped up, in fact, with the military vision of the judiciary, parts of which we have to work out in terms of tenure, in terms of the billet structures, things like that. It's all part of the same set of concerns. Now, one of the things that I'd like to address further down, and by your question, Sir, you have moved from my second category of concerns—moved one of the things that I wanted to talk about in my second category of concerns, to the first category of concerns. Let me resist the temptation to bring in that part of the discussion now, and may I put you off ever so slightly, until we start to get into the matters beyond the Commission's six questions, because I'm going to return to this, but I'd like to do it perhaps, in light of the things that we talk about on all six subjects.

Mr. RIPPLE. If I may articulate then a concern which perhaps you can address?

Mr. FIDELL. Um Hmm. (Indicating a positive response)

Mr. RIPPLE. I want to keep you on track. You've talked more about perception it seems to me—

Mr. FIDELL. Yes.

Mr. RIPPLE. —and the perception of the accused's fairness, than you have of actual substantive input by a member jury in the sentencing process. Does it really make a substantive difference, either in terms as the Colonel indicated of command influence, or in terms of the data which the military jury is able to introduce into the sentencing process?

Mr. FIDELL. As far as the latter is concerned, the sentencing record would be precisely the same.

Mr. RIPPLE. But the analysis might be different.

Mr. FIDELL. Well, what the decision maker brings to the table might well be different, different sets of categories. God knows what juries consider in any case. Presumably, the judge's thought process, if he is the sentencer, should roughly approximate what he is asking the jury to do in his sentencing instructions; it ought to, and the record on which either the judge or the members will be functioning will literally be the same. It will be the record of the sentencing phase of the case.

Col. HEMINGWAY. Mr. Fidell, I appreciate the dialogue, but in view of the time limitations that we have this morning, I wonder if you could go ahead and address those other issues that you want to address before we have additional questions. I want to make certain that you have an opportunity to comment on each of the issues that you want to this morning.

Col. RABY. Could I just make one quick statement for the record of 30 seconds or less? During the dialogue, there was reference to the fact that 1968 was the date when these rights were granted, and that there was no right for the accused to make the selection of judge before that date. That's correct, but I think we also have to recognize that before '68, even though you were compelled to go with member courts, you had the right to request at least one-third of that court was enlisted members; that goes back codally to at least 1951 and I believe—

Mr. FIDELL. Oh, it's prior to that; it's the Articles of War. I don't know what the Navy—

Col. HEMINGWAY. (Addressing Mr. Fidell) If you would, please.

Mr. FIDELL. The question was asked as to our view of whether the Courts of Military Review ought to have sentencing power, and just—rather than let that question pend, let me comment briefly on it. I think the entire appellate structure has to be looked at again, and as a result I'm a little uncomfortable in giving an opinion sort of *in vacuo* as to whether the CMRs ought to have power because I'd like to see the entire structure of the appellate process modified. But if you postulate that the rest of the system will be as it is now, then I would say the CMR ought to continue to have—ought to have suspension power.

Moving right along, we strenuously oppose the increase of special court-martial sentencing power. There has been no need shown for this; and as our testimony pointed out, a jury of three should simply not be authorized to sentence a person to prison for a year. Let me add that one of the most stimulating conversations I have had on the subject of increasing the sentencing power of a special court was with the SJA of a major Army command—he and it shall go nameless—who told me that one of the concerns that he had with increasing special court powers to a year, which is what everyone has been sort of assuming would be the proposal, was that it would make it too easy for a command to avoid running a general court. It was a perspective that had not occurred to me spontaneously, but it's a perspective that I can see has considerable merit. That's really all I have to say on increasing the sentencing power.

Mr. HONIGMAN. Mr. Fidell, if the sentencing power were increased, what—or would there be any additional safeguards or changes that your organization would advocate, given the decision to increase the power to a year?

Mr. FIDELL. Well, our position would be that you'd have to replicate all of the safeguards applicable to a GCM, which means a *Moorehead* judge; which means an expanded jury; which means a verbatim record; which means guaranteed access to the Court of Military Review and the Court of Military Appeals and the Supreme Court. I mean, you're really talking about just another GCM, but it would be called a special court. I mean, that is our position on the subject; we're opposed to it.

Mr. STERRITT. What about if you have one court with a single jurisdiction over all of the offenses, with the offenses stratified according to punishment?

Mr. FIDELL. You're talking about radical surgery on the system at that point and—

Mr. STERRITT. What's radical?

Mr. FIDELL. There is much to be said for simplification of the trial and appellate structure of the court-martial system; there is much to be said for it. We have not come here with a proposal to get rid of these somewhat antiquated distinctions between summary, special and general courts; but I'm not here today in a position to make a specific proposal. Obviously, we would want very substantial protections and not want to see any dilution of the present protections, and that is the light in which we would look at any proposed change. Other countries get along, as I understand it, fairly well with a less complicated chart for their military judicial systems, trial and appellate. We could probably do the same, but I don't think frankly Congress is ready to take that one on; I don't think anybody is; ten years from now, maybe.

With respect to the term-of-office question for appellate judges, the Commission has been furnished a paper that I have written on the subject that will be published presently in the *Federal Bar News and Journal.* I don't really have anything to add to the subject beside from suggesting that this is a matter that was addressed extensively eight or nine years ago in a bill that one member of this Commission, Mr. Honigman, was the principal draftsman of, and the services functioned in detail on it. Their comments were appended to a letter from Mr. Niederlehner who, then as now, was Deputy General Counsel, and I would hope that the Commission would review those materials and also review the perspective set forth in my article which has my complete thinking on the subject. Now, since that article appeared, however, the Committee on Armed Services of the House of Representatives voted out a measure, The Department of Defense Authorization Act of 1985; and I don't know, although I wouldn't be surprised, if the Commission were already aware of the fact that on page 254 of this report there is a statement suggesting that there ought to be a flag or general billet in each service for the judiciary. This has already been done as I recall in the Army, but not in any other branch of the service. It's a nice idea, but it certainly is not an alternative to giving the protection of a term of office to people holding judicial office. Indeed, there is a sense—and I would not minimize this—There is a sense in which putting a general or flag officer on a collegial court raises a problem in terms of the clout that that individual is likely to have. There have been cases where people who were in the 0–5 grade served with 0–6s. It happens all the time; it happens on every court, in fact. A person who is concerned about his next promotion, and whose fitness reports perhaps are being reviewed by others in that part of the military legal structure—Who is to say what subtle influence that might have on that judge's independence?

Col. MITCHELL. It depends on how professional a judge he is when you get right down to it, doesn't it?

Mr. FIDELL. Well, I suppose it does, but why tempt fate?

Col. MITCHELL. Well, let me ask you this: What—I really have some trouble understanding what real significance tenure has in the armed forces. I just don't understand it.

Mr. FIDELL. I would refer you to my article.

Col. MITCHELL. I know there's a lot of theory in that, but there really isn't any practical substance as far as I can see, because you basically have the thing down. All you may perhaps create some additional litigation if somebody wants to challenge why somebody else was transferred or moved, or whatever; but, you know, given the constraints that we have now on moving people around in the military services, it seems like there existed a factor of tenure anyway, although I understand is conceptually much broader than just a certain term of office. We're sort of looking at it as a term of years or a period of time. I just don't see what advantage it has. And then, if you want to respond to that, I'll also let you respond to this one, Sir, and get that one in. But when you start throwing around the idea of flag officers in what you call a collegial court and the problems that might result from that, what would be your reaction if, to attract better people to the bench, if that is one of the things that tenure is designed to do, you transferred that general officer billet, or perhaps more than one, up to the Court of Military Appeals?

Mr. FIDELL. Well, let me take these one at a time. My views on the desirability of tenure for persons holding judicial office are fully stated in the article that I've supplied. I consider, with all respect, that it is too late in 1984 to treat the principle of judicial tenure as a debatable point.

Now, with respect to the second question, you have opened up a very large subject; the appellate equivalent if you will of the question that was just presented with regard to whether we should have a single form of court-martial. The fact of the matter is, Colonel, we have a very cumbersome appellate system. We have an extraordinarily cumbersome appellate system, and one might well wonder whether the game is worth the candle. I say that not out of any judgment on the quality of justice administered, far from it as a matter of fact; however, I periodically—I invariably read the slip opinions of the Court of Military Appeals, and I have noticed that it takes years to get from trial to final decision in that court. That is the first important factor that has to be taken into account. Delays of the kind the system has contemplated and permitted, and encourages in some ways, serve no one's interest. They don't serve the accused's interest in a speedy trial, which to my ear includes a speedy appellate review. And they certainly don't serve the services' interest; and certainly, one of the purposes of the Uniform Code, we can all agree, is to insure prompt and appropriate discipline—discipline/justice, however you want to put it; but promptness is part of it. Now, there are adjustments that—and here, allow me to speak for myself, and I disclaim authority to speak for the ACLU on this subject because we have not explored the subject in detail. So with that caveat I'll continue my comment, if that's satisfactory. We have a very top-heavy system. We have what strikes me as an extra level of review built in. The adjustment you have suggested would, however, diminish the notion of civilian review of courts-martial which is an integral part of the compromise that was struck in 1950 when passed. That aspect of the compromise I think should not lightly be thrown overboard. People felt and do feel very

strongly that there ought to be a civilian court presiding over the system. Having said that, there are valid questions to be raised as to whether or not the review function for courts-martial, the civilian review function for courts-martial, ought to be performed by a court whose only jurisdiction is the review of courts-martial. There is a valid question whether the judicial function is best served by a specialized court of criminal appellate jurisdiction. Irwin Griswold recently wrote an article in *Judicature* magazine, touting the virtues of specialized appellate courts. Query, is all I can say; I'm not so sure. I think that a judge who spends all day, every day, looking at the same types of cases is going to lose some of his edge, or her edge over the years.

Mr. RIPPLE. Couldn't that be taken care of in a far less drastic way by simply—well, maybe it's not less drastic, but if the Court of Military Appeals judges were Article III judges and eligible for assignment on another circuit?

Mr. FIDELL. Oh absolutely, and what a wonderful thing it would be if we could get judges from the District of Columbia Circuit Court of Appeals, or other circuits, or the District Court to sit periodically by designation. And to continue the thought, perhaps by way of footnote, equally true, and you don't need any statute to do this. There should be a system for inter-service assignment of CMR judges to allow for a little cross-fertilization between services. That's a change that I think I would favor, and I know the ACLU favors that one because it's in our testimony.

Mr. RIPPLE. Now we have apples, oranges and tangerines—

Mr. FIDELL. Yes, we do, and juggling like crazy.

Mr. RIPPLE. Number one, let me, if I may, separate them a bit and get your reaction.

Mr. FIDELL. Please.

Mr. RIPPLE. Number one, if you have Court of Military Appeals judges serving on civilian courts, but not necessarily the other way around, you then have a fine jurist on the Court of Military Appeals at least being exposed to other civilian courts with criminal jurisdiction; and he also, of course, will share somewhat more a professional communion with the rest of the judiciary as protection.

Mr. FIDELL. Right.

Mr. RIPPLE. It is, I submit, an entirely different question as to whether a civilian judge, with absolutely no background in military law, or without any background in the military period, necessarily ought to sit on the United States Court of Military Appeals. It is at least, I submit, a second question.

Mr. FIDELL. I agree.

Mr. RIPPLE. Thirdly, with respect to the Court of Military Review—Courts of Military Review—

Mr. FIDELL. Let me interrupt you—

Mr. RIPPLE. May I put the whole scenario out?

Mr. FIDELL. But, my agreement to your second question is qualified by the following observation: There are federal civilian judges, Article III judges, who have substantial day-to-day judicial experience in questions of military law. They sit on the federal circuit and they sit on the District Court and the Court of Appeals here. They also sit on the Claims Court, except they're Article I.

Mr. RIPPLE. Well, your Chief Judge of your federal circuit is an example, but let's put that aside for a moment, we're talking institutions here. The last step—Doesn't the Court of Military Review perform a substantially different function because it it is supposed to reflect the traditions and needs of the particular service involved? And indeed, I think the legislative history indicates that.

Mr. FIDELL. That's quite true, but let me make this observation: I think the Courts of Military Review would be well-served by allowing never to have a majority of other service judges, but by allowing on a regular basis, judges who sit in other services to come in and bring in some new ideas and literally cross-fertilize. It serves the same purpose as inter-service, inter-circuit, or inter-district designation of Court of Appeals and District Court judges. I think there is an important function served there that can be served without prejudice to the need to perpetuate those service-specific aspects of the military justice system. Now, what are those service-specific aspects of the military justice system? I am hard-pressed to identify questions of law, or questions of sentencing let's say, that truly ought to differ from service to service; that, however, is another question which I would prefer to defer because I don't think we have time to discuss it.

Mr. RIPPLE. But you did make the point that all of these questions are inter-related.

Mr. FIDELL. Yes, they are.

Mr. RIPPLE. It seems to me that one of the better arguments in favor of retaining the military-jury option at sentencing is that you do have a check on that at the appellate level and the Court of Military Review. And if that Court of Military Review does in fact reflect the traditions of that particular service and administer sentences on an even-handed basis, it appears to me then you're in better shape with saying they ought to have at least the trial input of the juries. Now, if you're going—

Mr. FIDELL. If perhaps—

Mr. RIPPLE. To take that away from me, then I'm—

Mr. FIDELL. No, I don't want to take it away from you; but you've perhaps made a better argument for my position than I did. I'm happy for the help. Let me say though, I mean, taking a slightly Olympian perspective

on this situation, I read Article 36(b) as a fairly strong congressional directive that the system ought to be homogenizing, and the fact of the matter is, it is. I read the cases, I read the CMR opinions, I read the Court of Military Appeals opinions, and after 33 years, the Court of Military Appeals has basically homogenized the system. Whether that's good or bad, I don't know. I've said in a law review article some years ago that there were aspects of the system that differed from service to service; and where that encourages esprit de corps, that's all to the good and no one can object to that, where it advances any particular purpose. But in terms of the legal issues, I'm not sure I see it. I mean, the U. S. Coast Guard happens to have, for example, a custom of the service which has the force of law that I know Captain Steinbach will remember. There's a custom that there is a duty on the part of life saving—personnel assigned to life-saving duties, that you have to go out; you don't have to come back, and that doctrine was actually applied in a decision that the Coast Guard Board of Review—

Capt. STEINBACH. I don't believe that you're correct, Sir, on the—

Mr. FIDELL. Say again?

Capt. STEINBACH. I don't believe that you are correct in your interpretation of that—

Mr. FIDELL. Well, then I'm misinformed and have been since the day I began active duty, but there is a Coast Guard Board of Review case that held a Chief Petty Officer who was in charge of the Isle of Shoals Life Station, and who failed to go out to perform a life saving mission, guilty of having violated the custom of the service. There are customs of the service; they're criminally enforceable; query about the due process aspects, you know, and the whole fraternization issues, but really, I'm hard-pressed to identify service-specific matters. They come up occasionally, but they're not something that really ought to drive the system.

Col. RABY. Now, if I could go back to one portion of your testimony on tenure, you gave the—expressed the opinion that you weren't sure whether or not it would be wise to have a flag or a general officer billet on the CMRs, on a collegial body, and then you indicated that you—you created the scenario where you had an 0-5 on the court and implied in your testimony that if he'd be concerned about his promotion, or the effect on his advancement in the military, and then you spun off that saying you indicated that that was another good reason for tenure. Now, according to the articles that I read, you interpret tenure broadly and I assume you're willing to accept tenure as a guaranteed term of service on a court—

Mr. FIDELL. Yes.

Col. RABY. —as I interpreted your article. Now, going to the bottom line and using that as a base—

Mr. FIDELL. Let me say that we don't oppose the flag and general officer proposal. There is a concern that I've expressed, but on balance, who could object to such a thing? And we know that people are going to exercise common sense and not abuse their status. But on the other hand, let us be very clear that that must not be viewed as an alternative to a term of office for others. It's great for the person who gets the flag, but we've got to keep other people's interests in mind, too.

Col. RABY. Thank you for that clarification. Now, how would tenure prevent an 0-5 who's concerned about his efficiency report, or especially if you have a judge advocate controlled promotion board, or concerned about his long term advancement, how would that pacify him? All that would do would guarantee that he'd stay in place, perhaps in purgatory, if your assumption is true, but you do have some people that are so incensed by his judicial rulings that they're going to take spiteful reprisal action against him, all you do is freeze him in place. You don't save his career, and you don't provide any meaningful safeguard; and I don't see how that is going to insure that that individual, if he is of that mind-set and weak in his professionalism, that he's going to let that steer his judicial thought process, how tenure is going to prevent that.

Mr. FIDELL. Well, let me make this observation: Tenure is not going to literally cure that problem. However, it will protect that person to some extent from other—from being treated as a basically wounded case in the officer corps. But beyond that, you put your—you've raised implicitly another concern that I think we addressed, or perhaps it's addressed in my article, and that is the problem of the involuntary judge, and I would hope that the Commission would give careful attention to this side of the problem. The UCMJ creates the only appellate structure, only judicial structure that I am familiar with that has judges who may serve against their will. I wouldn't be real happy about being tried by such a judge. I have problems with the involuntary judge.

Col. MITCHELL. Well in essence though, every judge who serves, serves involuntarily because in the military, we're all just creatures of order. We're told to go somewhere—Nobody asked me whether I wanted to come to Washington; if they had, I might have given them a colorful answer.

Mr. FIDELL. And the short answer to that observation is: Judges are different and—

Col. MITCHELL. Is there any room in the military really for that kind of difference, or are you talking really about something that ought to be civilianized entirely; something civilianized and within the military

structure, which raises all kinds of practical problems about how you take it to war.

Mr. FIDELL. The service could do it; but the fact of the matter is—

Col. MITCHELL. What service?

Mr. FIDELL. All the services. Judges are different. There has to be a recognition of that and Congress has already gone the first step. Congress has said GCM judges have got to be—have judging as their primary duty; these are the *Moorehead* judges. We've got requirements with respect to the rating system. Congress has already crossed the Rubicon in terms of special treatment, just as Congress has crossed the Rubicon in terms of special treatment for the JAGs.

Col. MITCHELL. In the next war, I want to talk to the green military judge who is ashore in a combat area when the fight starts.

Mr. FIDELL. You probably won't have enough time.

Col. MITCHELL. I've been there, and I think we'll see him there.

Col. HEMINGWAY. Mr. Fidell, so we have a chance to give the reporter a break before our next witness, I wonder if you could sum up any particular issues you haven't already addressed.

Mr. FIDELL. Sure. Let me say that the Civil Liberties Union does favor Article III status. It will enhance the quality of the pool from which the court draws its personnel, and also it's more in keeping with the notion of direct review in the Supreme Court. The Commission might well want to consider whether there ought to be a realignment of functions, including those functions performed by the Claims Court and the federal circuit. To give an illustration, I recently read the Claims Court's decision in the case of Major General Cochran, a military justice case. It's an NJP case where the Claims Court decided major issues of military law without ever citing a decision of the Court of Military Appeals.

Mr. HONIGMAN. Do you have a citation for that?

Mr. FIDELL. No.

Col. MITCHELL. Well, what about—Not too long ago, you expressed a great deal of concern over the hair that has grown on the cases that go to the Court of Military Appeals, and now you want to expand this thing and make it an Article III court, give it permanence and make it more difficult perhaps, maybe not, to get temporary appointments. At least Congress was concerned about that when they enacted the Code originally, and we're going to go out and expand its jurisdiction and add all this other work into it, and then improve upon the speed with which these cases are taken care of? I have grave doubts about that.

Mr. FIDELL. Add judges.

Col. MITCHELL. How many judges do you think it's going to take?

Mr. FIDELL. The ABA says that you need a minimum of five judges for an appellate court; the top court of a jurisdiction.

Col. MITCHELL. Realizing that they would take on all the adverse personnel actions, the NJP, presumably administrative discharges, procurement, the host of all—I have my doubts that five judges can—

Mr. FIDELL. Then fold it into the federal circuit. Treat your CMRs as the equivalent of the Claims Court and fold the appellate functions into the federal circuit. Let me quickly run through the sort of extramural points that I wanted to share with you.

COL. HEMINGWAY. What does the *Cochran* decision, in your view, stand for?

Mr. FIDELL. I cited it for the proposition that at the present time, major cases involving issues of military law are being decided by other forums that proceed in, to my eye, ignorance of the body of law that applies to what they are doing. It's crazy.

Col. MITCHELL. Is the Court of Military Appeals any better situated?

Mr. FIDELL. I'm not sure I follow you.

Col. MITCHELL. It comes from civilian life, not any prior, any previous military service; they may know nothing either.

Mr. FIDELL. There is that risk. It hasn't been a substantial one in the past, however, based on—

Col. HEMINGWAY. Gentlemen, if you could hold the questions and let him sum up so we can get to our next witness, please.

Mr. FIDELL. Okay. There are four of these sort of extramural matters I'd like to put on the table. The first is, I think that it would be in the public interest for this Commission to express its views on the question of the digesting arrangements for military judicial decisions. At the present time, the West Publishing Company insists upon using a digesting key that dumps all military points of law in the military justice topic, despite the fact that the same points ought to be under evidence, appeal and error and so on. A good illustration of this is the recent decision in *U. S. versus Roettger,* R-O-E-T-T-G-E-R, which has to do with whether a case can continue—whether a case should be abated when the accused dies prior to the expiration of the time for seeking review in the Court of Military Appeals. That case relies in large measure on civilian cases, but the headnotes will do zero good to any lawyer trying to relate that case to the similar decisions in the larger body of American Jurisprudence.

The second point is, I would encourage the Commission to look very seriously at the institutional side of the Defense Department's, the services' statistical gathering, statistical data gathering and analysis capability. I'm not talking about data like the tabulation of responses to a

show of hands type question such as the current questionnaire that's addressed. I'm talking about your basic trial and appellate analyses of the kind that the National Center for State Courts, or other—the Federal—the Administrative Office of the U. S. Courts would do. A lot of questions have occurred to me based on my review of the statistical reports that I referred to before, and that I know the Commission is aware of, and I think some members of this Commission are aware of the weaknesses in the current reporting system; for example, the Army and the Coast Guard construe BCD specials in Part I of the form differently from the Navy and the Air Force because only the Army and the Coast Guard show acquittals in that category. And there, we have one of the basic definitional questions on which the four affected entities are divided. Various services feel the need to add footnotes for one thing or another, thereby destroying the integrity and the comparability of the statistics. I won't bore you with the details, but there are a lot of problems and there are missing elements; for example, how many GCMs reviewed under Article 69 are referred to the Courts of Military Review. When I was preparing my article on access to the appellate process, which I have also furnished to the Commission and I hope you will have an opportunity to review that, I was surprised to learn that that was not a tabulated statistic, and I had to make four different calls, actually more than four as it turns out, to get that information; and in the end, it turned out that three of the services kept that statistic on a fiscal year basis and the fourth, God bless them, kept it on a calendar year basis thereby again destroying the comparability of the data. I'm just giving illustrations; there are a lot of gaps in the data gathering that the Code Committee, with all respect, should have attended to some time ago.

My third observation grows out of the second. I think, and now, Professor, if I can return to the matter on which I was indiscreet enough to put you off earlier. It's time we had a National Institute of Military Justice. This Commission is performing a fine function and so is the Joint-Service Committee on Military Justice, and so is the Code Committee, and I'm happy to say that the Code Committee before long is going to be meeting in public, as suggested by Congress. But these kinds of efforts ought to be given greater recognition and a broader range of continuing responsibilities as appropriate for a jurisdiction that has over two million people in it. In time, I would hope that we in the civilian community would be able to marshal the resources necessary to launch a project—let me call it a National Institute of Military Justice—that would work in collaboration with the armed services, perhaps combining the functions of the National Institute of Justice, the Vera Institute of Justice and the Federal Judicial Center, and perhaps the Administrative Office of the U. S. Courts, to bring to bear some of the skills in judicial administration criminalistics that are commonly understood to be essential to sound administration. I like to think that such a project would find favor in the eyes of those responsible for administration of the military justice system, and I am certain it would be viewed as a constructive force working in the public interest.

Finally, I would like to encourage the Commission to at least raise the question of a systematic review of the arrangements regarding the disposition of professional responsibility matters in the service. The Army, periodically, publishes squibs on various ethical questions that have come up. The other services, to my knowledge, have not done so, and unfortunately the only time ethical issues seem to come up is if you read the CMR and Court of Military Appeals decisions. There's a whole body of law and lore within each service concerning the professional discipline and responsibility of counsel and, for that matter, of judges. A lot of this is done off the record at a very informal level, and often that's appropriate as a matter of judgment and interpersonal relations and larger interests at stake. But I would like to suggest that this is another area in which the military justice system ought to get in step with the kinds of developments that we're seeing in the federal system, and in civilian state systems. We ought to look at this in a systematic way, see whether our structures make sense, see whether we're doing the kind of training that's necessary in professional responsibility matters, and see whether some improvements could be made.

I thank you kindly.

Col. HEMINGWAY. Thank you very much for your testimony.

STATEMENT OF MAJOR GENERAL KENNETH J. HODSON

Given to the Military Justice Act of 1983 Advisory Commission on 8 June 1984 at Washington, D.C.

Col. HEMINGWAY. Good morning, General Hodson. If you would please state your name and position for the record.

Major Gen. HODSON. Kenneth J. Hodson, Major General, U. S. Army retired, and I believe that's about all.

Col. HEMINGWAY. Sir, the floor is yours.

Major Gen. HODSON. All right. I'm honored to have been invited to appear before the Commission. I realize I'm here because in 1972 I gave a talk at the Army Judge Advocate General's School in which I made certain recommendations with respect to the administration of military justice, and a number of those recommenda-

tions are now to be considered by this Commission. The subject of that talk by the way was the Manual for Courts-Martial 1984. I was as amazed as anyone else was that they actually did come out with the Manual for Courts-Martial 1984, but I don't know that my predictive capabilities have improved since then or not.

I've been away from working contact with the administration of military justice since 1974, but I'll give the Commission whatever views I may have on the items that are on your agenda and hope they may be of some help, although by the time I outline that I know very little about what's going on lately, I've almost disqualified myself as an expert witness.

Before I proceed, I want to say that my review of the Military Justice Act of 1983 and the new Manual for Courts-Martial 1984 convinces me that the administration of military justice is in excellent condition or it will be, effective the 1st of August, and there is no urgency for any legislative action on any of the agenda items that you have before you, as I see it. I take up topic by topic your agenda.

First is sentencing by the trial judge in all except capital cases; I strongly support this proposal. First, it is consistent with the American Bar Association's Standards for the Administration of Criminal Justice. Standard 1.1 of the Standards on Sentencing states that sentencing is a judicial function, and a jury should not be required to perform it except perhaps in capital cases. I see no reason for the military to be any different. Secondly, if the judge sentences, there is less of an opportunity and less of an appearance of improper command influence. I dealt with many convening authorities and none have ever complained of the findings of a court, but many have been upset by the sentence. I hasten to add that I experienced most of these reactions prior to the Uniform Code of Military Justice; but since that time, I've had convening authorities complain to me privately about sentences imposed by courts. Incidentally, I have never had a convening authority complain about a sentence imposed by a judge. Third, and finally, I like judge sentencing because sentences adjudged by court members are adjudged pretty much in ignorance, and they thus tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery. I realize that courts will now have more information about the accused than previously, but I still feel that sentencing is a judicial function and should be performed by the judge.

To take up my second topic, the suspension of sentences by judges and Courts of Military Review, in 1972 I recommended that trial judges and the Courts of Military Review be given suspension authority. Under the Military Justice Act of 1983 and the new Manual, the convening authority basically will exercise only clemency powers. I favor now allowing him to do this which means that he, and not the trial judge, should exercise suspension authority. I've changed my views on that. I feel, however, that the Courts of Military Review should have suspension authority. The basic and fundamental reason for this is that since the court has authority to review the sentence, it should have complete authority, including the power to suspend. I'm sure that the power will be used sparingly, particularly if we have judge sentencing; but if the court feels suspension is appropriate, it should not have to process the case through nonjudicial channels in order to get this accomplished. Basically, as my article indicated, I favor keeping the appellate review of all court-martial cases within the judiciary.

The next item is empowering special courts to impose up to one year of confinement. I doubt that this is necessary or desirable. The chief advantage I suppose is that this would give our misdemeanor court the same authority and appearance as most civilian misdemeanor courts; but I feel that the military is quite different. Our first problem is to determine whether to try to rehabilitate the accused for further military service. If we decide that he can be rehabilitated for further service, we don't need more than three or four months of confinement, if that. If he serves more than that, the confinement alone will probably make him unfit for further service. If the accused is unfit for further service and is to be separated with a punitive discharge, but it is felt that because of the severity of the offense that he should serve a long term of confinement, then I think the case should go to a general court. The chief and perhaps the only practical reason for increasing the confinement power of a special court that I've heard, is to obviate the need of an Article 32 investigation. I would favor instead working toward simplification of the Article 32 investigation by converting it into a typical probable cause hearing and expanding the authority to use secondary evidence. As I don't favor expanding the confinement authority of special courts, I've not given much thought to appellate requirements. If special courts are empowered to confine for more than six months, I would think that we should apply the same procedures to a sentence in excess of six months that we now apply to a BCD special court-martial.

The next item is tenure for military judges. In my 1972 talk, I recommended that military judges be assigned to the judiciary for four years, to be served as trial or appellate judge. I also recommended that the chief judge be appointed by the President for a term of four years in the grade of Major General. With respect to trial judges, I favor continuity in office, so I continue to favor tenure for a prescribed period. However, the prescribed period could be a normal career assignment

period, say three years, or whatever it happens to be; but even in that case, there should be an escape clause such as that contained in Article 19, dealing with the absence of a trial judge in a BCD special court-martial; in other words, military exigencies. And, of course, the judge himself should have the authority to resign from the job and ask for a different assignment. Likewise, I continue to favor appointment of the chief judge by the President for a prescribed period. I tied the period to the statutory period for which The Judge Advocate General is appointed, four years, and suggested that the chief judge should likewise be appointed for four years. I would also like to see the chief judge come from the ranks of the judiciary. I don't know how it is in the other services, but in the Army I know of no general officer in the judiciary who has ever served in the judiciary before that particular assignment. At least, I think the chief judge should have served, say, one tour in the judiciary in order to qualify for appointment as chief judge. Now, I realize that tenure for the judiciary will create some career management problems as I was Chief of Career Management at one time, but I believe these problems can be solved. Frankly, in this area in the Army at least, I think we're already doing a pretty good job on tenure as I have observed it. When I made my recommendations with respect to tenure, I did so in the light of legislation which had been introduced by Senator Bayh, Senator Hatfield and Congressman Bennett, which wanted to create a separate court-martial command if you will, totally separate, and I was responding to their recommendations by feeling that the correct approach would be to build up the stature of the judiciary within the military and keep it within the military structure, so that was why I was recommending tenure at that time.

The next item is noncontroversial; that's Article III status for the U. S. Court of Military Appeals. In my 1972 talk, I recommended Article III status for the Court of Military Appeals. I make that same recommendation today, particularly in view of the fact that the Supreme Court can exercise *certiorari* jurisdiction over the Court of Military Appeals. However, there were changes in the membership of the U. S. Court of Appeals in the mid '70s after I gave my talk, and certain actions by it thereafter which caused me to have reservations about recommending Article III status. Accordingly, although I still recommend that the court be given Article III status, the statute establishing it should be very carefully drafted to insure that its jurisdiction is, in fact, very strictly limited to cases reviewed by the Courts of Military Review, and a case, in my view, should be a record of trial which was reviewed by a Court of Military Review. And now, of course, the term "case" would include review of interlocutory appeals under the new Military Justice Act. In short, I would deprive the court of any inherent power it thinks it might have to review petitions for extraordinary relief such as *habeas corpus, quo warranto, mandamus,* and so forth; but I realize that this would necessitate in my view improving the present system of appellate review to insure that appellate review of all court-martial cases is kept within the judiciary. If this is done, it should largely eliminate the need for extraordinary remedies. I would also bar the court from reviewing administrative actions of agencies of DOD such as the Board for Correction of Military Records, discharge review boards, and so forth. In short, the statute establishing the court as an Article III court should try to prevent an activist court of the type we experienced in the 1970s. Further, we should improve the selection process for judges of the court. Appointees should be cleared by the ABA, as other Article III judges are. They should possibly also be approved by the judiciary as well as the Armed Services Committee; in other words, the chief purpose of Article III status, as I view it, is to try to get a better quality of judge on the court.

With respect to the provision for retirement, if the court is an Article III court, there is no problem. I don't feel competent to express an opinion as to retirement benefits if it does not become an Article III court; I'm just not that familiar with it.

In closing, let me add that I attended a meeting of some 65 retired Army judge advocates earlier this week, and I took a straw vote of that group, which consisted of many with long military judge experience, appellate judge experience and so on; so I took a straw vote of the items which I've mentioned above. The group was generally opposed to all of the proposals. A large majority opposed Article III status for the Court of Military Appeals and a large majority opposed the proposal to give the judge sentencing power. When I say we took a straw vote, there was not time for debate on the various issues; however, several people insisted on being heard on the sentencing and they were former military judges in the Army, and they said frankly, we just don't want the responsibility of having to impose the sentence. We would prefer to pass the buck to the court members, and that seemed to be the basic reason for that reaction. That concludes my prepared statement, and I appreciate the opportunity to appear here. If there are any questions, I'll try to answer them.

Col. MITCHELL. General, I was a little bit concerned over whether or not all of the services can really eat all these independent entities that keep being created. We're under pressure now for an independent defense command and now we're going have an independent career pattern for military judges. In the Marine Corps, we're sort of—a little bit like the Coast Guard; our lawyers are

awfully closely related to our line commanders and in fact, in Vietnam, probably half the lawyers that served in Vietnam served in line billets. Of course, we're normally so closely attached to the area of conflagration that we're likely to have to become engaged in combat or command troops just for the sake of self-preservation. How much of that do you think we can really afford?

Major Gen. HODSON. Well I don't—In the first place, I'm strongly in favor of the independent trial defense service; I think it's an absolute must if we're to have any credibility. Well then, I think we ought to have an independent judiciary, of course, which we have. But with respect to the career pattern, I probably better let Tom Crean who is here this morning talk about that. But I didn't have it in mind a tenure that would make a man a judge for 30 years, because I don't think that would be good. I think he ought to return to other activities, and you can't always keep him in a career pattern as say a trial judge for even 20 years; it's very difficult to do and still maintain your regular reassignments and make sure that people get undesirable geographic areas as well as desirable geographic areas, and take care of such situations as sickness in the family and so on, so this was not a built-in-concrete type tenure that I'm talking about. But I did want a little longer tenure than the temporary judge who sits on one case and then goes back to being an assistant staff judge advocate.

Col. MITCHELL. What's really the problem that tenure is designed to cure in your mind?

Major Gen. HODSON. Hmm?

Col. MITCHELL. What is the real problem that tenure is designed to cure?

Major Gen. HODSON. Oh, the only thing that I had in mind was to try to improve the credibility if you will of the judiciary in the military by showing that the judges are professional.

Col. MITCHELL. Couldn't we do that if we strengthened the qualifications for assignment to judicial duties?

Major Gen. HODSON. What would they be?

Col. MITCHELL. You could require, for example, there be a certain amount of educational undertaking, both in military subjects as well as legal subjects, and that there be previous trial experience; that perhaps a secondary level of education requirement; certain minimal grade requirements, and so forth. I mean, you could dream up a lot of different things, but qualifications along those lines to make it more selective.

Major Gen. HODSON. Well, I think it should be selective and I think it is now probably in all services because you're putting a fellow out there with quite a bit of authority, without too much supervision; so I think your qualifications probably, are already carefully gone over. But when I say tenure, I'm talking about, I just don't want the judge who will try one or two cases and then go back to being an assistant staff JA just because you haven't got anybody else there at that time. I would prefer to have a judge with three or four years service, and it wouldn't hurt to have him have two tours as a judge, simply because you learn a little bit with each case you try; at least it was my experience that—So, if I were an accused and the judge had never tried a case before, I don't mind his on-the-job training, but I hate to have him do it on my case; so I'm just hoping to get a judge with a little more experience and, if you do, you get a little better credibility I think.

Capt. BYRNE. Would we meet your needs now if I told you that almost all our judges are sent for a set tour?

Major Gen. HODSON. I'm not surprised. As I say, I think we're in pretty good shape right now, tenure-wise, except—well, the Coast Guard has difficulty with its Trial Defense Service, I know, because of their widespread geographic range and the few numbers of people that they've got, and they probably have the same trouble with the judiciary too. But I think the rest of the services already have covered tenure pretty well.

Capt. STEINBACH. General, in that light, have you seen any possibility of a perception by the judges that if they're going to be assigned for four years in this position, it's going to be a dead end, promotion-wise and career-wise, recognizing it's probably going to be a senior 0-4, 0-5, or 0-6?

Major Gen. HODSON. Well, as I indicated in my statement, I feel that the chief judge should at least have had some experience in the judiciary prior to appointment as chief judge. I did that because my experience in the Army—and I took over as chief judge for three years and I learned a great deal that I didn't know and was unable to learn as Judge Advocate General, believe me. And I was distressed at the somewhat low morale on the part of the judges because they felt that they were in a dead end slot; there was no way out of this. And right now, well it's twelve years after 1972, and right now, as I say, in the Army at least, no chief judge has ever had experience in the judiciary. I was the first—well, I was going to say I was the first general officer who finally got a general officer slot created there by my going out there. But I just feel like we have career programs in Procurement; we have career programs in Military Justice, in International Law, but we have a very poor career program I'm saying in the judiciary because, as you say, it seems to lead to a dead end, and it's a place to go to retire. I would just like to vitalize it a little bit.

Col. MITCHELL. Just a minute ago, General, you mentioned some difficulty you had with some of the dynamics perhaps in the Court of Military Appeals in connection with your comment on Article III status. The question I'd ask is, since you're dealing basically with a

three-man court, a change in one person can have rather dramatic results in the attitude of that court. Do you think it's really a good idea to ensconce such a thing in such permanency that for all intents and purposes there's very little legislative control over it, when that entity deals with a subject being military discipline, which the commanders since time immemorial have considered to be perhaps the most essential aspect of the military force?

Major Gen. HODSON. My answer to that is rather pragmatic; and that is, that court right now is a lifetime tenure court in terms of what actually happens. In other words, Chief Judge Quinn was there for years and years and years, until he was disabled. Ferguson was there for years and years and years, until he too took senior judge status. By the time that judge is appointed, and let's say he's appointed at about the age of 50 and he's got a 15 year term, he's already up to 65 years of age, which is a normal retirement for the military. So, I don't think we're really creating any problem there because I look on that court right now as almost having lifetime tenure. They just don't have the status of an Article III court.

Col. MITCHELL. Some people have commented that, for example, Judge Everett's appointment to the Chief Judgeship was sort of a reaction to some of the decisions of his predecessor.

Major Gen. HODSON. I'm quite sure that that was the case; at least, I hope it was the case.

Col. MITCHELL. It may be that that sort of thing would be lost to the legislative or executive power if you went to an Article III status for that court.

Major Gen. HODSON. Well as I say, I can't give you any more answer than to say that it's virtually a lifetime tenure court right now.

Capt. BYRNE. But, General, they do now have to be reappointed.

Major Gen. HODSON. After 15 years, but—well, I should have done my statistics better, but I think Chief Judge Quinn probably has the longest tenure on that court, and I guess he had to be reappointed because it was a shorter term in those days. But I don't think we have any problem. I say if they are about 50 when appointed and they're 65 when their 15 years are up, that's sort of almost a lifetime right there.

Mr. HONIGMAN. General, I wonder if we went to an Article III court, what your view would be of whether the President would still retain the right to designate a new chief judge among the currently sitting Article III judges?

Major Gen. HODSON. Hmm, I really haven't given that any thought. You've caught me because I was trying to run through my mind how they designate chief judges out on the circuits; chiefly by seniority, don't they?

Mr. HONIGMAN. I believe it is by seniority.

Major Gen. HODSON. Yeah, I personally prefer someone having the authority, and the President would be a good one to designate the chief judge.

Mr. RIPPLE. If it were made an Article III court, would he have the constitutional power to appoint a chief judge?

Major Gen. HODSON. I don't know, that's why you really stumped me with that question.

Col. RABY. Well, it seems to me that might be something which Congress could put in the statute.

Major Gen. HODSON. In the statute. I think if they put it in the statute—

Mr. RIPPLE. Turning to statutory provisions if I may, General, with respect to your trial judges, if—you mentioned that there ought to be an exception for military exigency. Could you perhaps elaborate a little bit on what kind of a statutory exemption would be appropriate? For instance, what authority ought to have the power to invoke the exception and to—

Major Gen. HODSON. Oh, I think The Judge Advocate General. The way I'd put it is The Judge Advocate General coordinating with the chief judge, or the chief of the judiciary, or vice versa; but I think they ought to work together because if you're going to assign him out of the judiciary, you've got to have a place to go, so you've got to work it out with Career Management and JAG. And if you're going to assign him to the judiciary, I would prefer that he is assigned to the judiciary with the coordination of the chief judge again.

Mr. RIPPLE. Would that in fact be sufficient protection, or ought there be someone outside the military chain of command who would validate such an exception?

Major Gen. HODSON. No, I think just within that. Now, I gave you the example of the BCD special without a judge. I did that deliberately because that's really the use of a number of buzz words there, or fuzz words, and I don't know that that exigency has ever been used. Does anybody know it, where we didn't have a BCD special with a judge? I know of none. But I do think—I believe it was suggested that, of course, the illness, death, you know, that would terminate tenure, and I think voluntary resignation from the judiciary has been suggested; I think that's all right. But I do think that when we talk about combat, I do think that from time to time, it might occur that you need that judge someplace else in a real hurry, and you ought to be able to pull him out for military exigency purposes only.

Col. RABY. Major General Hodson, I've got a couple or three areas here and questions I'd like to ask you about. First, in regard to tenure, what impact do you think it would have on the rest of the officers of the various branches of service if we give an official title such

as tenure, or a guaranteed term of assignment, regardless of how we designate it, to military judges, when you consider we have people like Inspectors General; we have drug and alcohol abuse counsellors; we have Chaplains, all who must get in sensitive areas and make sensitive recommendations to command regarding people, and whose positions may be equally in jeopardy, or perceived to be in jeopardy if they depart substantially from the expected role models of the offices which they fulfill? Should they also be given guaranteed terms of office? And if not, what would be the impact, if any?

Major Gen. HODSON. Well, I didn't take that up, but I'll answer it by telling you an old war story. When I first went out to practice law in Jackson, Wyoming, in 1937, a new doctor opened his office the same year I opened my law office, and I used to hear horror stories about his surgery. We were talking—I was talking to him one night and I said, well I probably make as many mistakes, but I have to do all of mine out in the public and you do all of yours in the operating room. I considered it was unfair because I think there's a lot more—The lawyer and the judge are much more in the public eye than any of these other people. Now, I served for a time as an Inspector General, and you don't have any problem there; there's just no problem there. The Inspector General merely recommends to the commander. There's no binding recommendation; but in our case, when we make a decision, it's binding and that, of course, I think puts us in the public view a lot more. But I don't want to overdo this thing on tenure. I'm not even sure we even need a statute. I think just as you're handling the Trial Defense Services by regulation, I think this could be handled, and maybe it's already in the regulation. Tom can probably tell you, but all I want to do is encourage more than one tour in the judiciary, hopefully some kind of career ladder that might lead to being chief judge some day, and a little more professionalism by the judges, which I hope they'll get by serving three or four years.

Col. RABY. Okay, now a second question I have is on your Article III status for COMA and you favor that with very carefully drafted a—a statute setting out the jurisdiction of the court. Now, certainly, I can follow your recommendations there, except one area that I had a little bit of a question on. You indicated that one of the areas you felt COMA's authority should be curtailed is in the area of extraordinary writs. Now certainly, there have been some very questionable extraordinary writs, regarding nonjudicial punishment issues, the operation of installation stockades, peripheral matters to the military justice—or the Uniform Code of Military Justice judicial system itself. But then, on the other hand, there have been some extraordinary writs that have been granted bearing directly on military justice issues of pending cases. Now, if we strip COMA of all extraordinary writ authority, as opposed to a very limited extraordinary writ authority dealing with pending cases, that might force counsel into the civilian arena. There'd be no requirement for exhaustion of remedies. Then those federal district court judges might be ruling in the blind, whereas if we had a statute that gave COMA a very limited extraordinary writ authority clarifying that that area should be exhausted first, military courts would then, and the Court of Military Review then would get to speak in the area and sometimes lay out opinions and clarify military law better so if it did get into the federal system, we might get more expert opinions out of those federal district court judges, so I can see where we might be hurting ourselves by overlimiting the jurisdiction in the extraordinary writ area. Would you care to comment on that?

Major Gen. HODSON. Yes, I'm inclined to agree with you. If you could write that statute, or write that legislation in such a way as you have pointed out, to limit it right to military justice matters up and down the chain, I wouldn't have any objection to that along the lines that you have mentioned. I said a case ought to be a record of trial in which there has been a conviction which had been reviewed by the Court of Military Review, or your interlocutory appeals. Now, it would make sense if you could draft such legislation. I have a little problem with the difficulty of drafting it, but a lot smarter people than I am can do that, to cover the items that you mentioned and, again, I would say provided that that same issue has been considered by the Court of Military Review prior to its going to—in other words, to keep the guy from running directly to the court. I don't know whether they still allow them to do that or not.

Col. RABY. Yes, they do, unfortunately, Sir.

Col. MITCHELL. General, if I understood your original thought on this subject, speed of review process would be key to divesting COMA of all its authority?

Major Gen. HODSON. That would be part of it; speed, and also keeping the review of military justice cases, if you will, within judiciary channels. In other words, this is a bigger job than it sounds like. You would go through the Uniform Code for example, and question the Article 69 provision which enables The Judge Advocate General to review certain cases; likewise, I haven't analyzed the Manual for Courts-Martial 1984 completely, but your review of summary court cases and nonjudicial punishment cases down at the local level was not before at least accomplished by the judiciary; it was accomplished by one of the staff of the convening authority. And it strikes me that if you had say, a trial judge taking an appeal from a summary court, or from a special court, non-BCD, reviewing that instead of the staff judge advocate, that you might regularize the system

and eliminate the need for some of the extraordinary writs. To keep things in judicial channels that are judicial is what I'm—

Col. RABY. Sir, my final question to you is in the area of military judge mandatory sentencing, and I followed the basis for your recommendation succinctly, including the position of the ABA in this matter. Bearing in mind that statistics can be very misleading, as you well know, and you are certainly very aware of how we collect our military justice statistics, having been a former Judge Advocate General of the Army. During the last two calendar years, our statistics show that in the general court area, about one-third of the time, the accused elects to either have court members hear his case as to findings and to impose sentence because it runs together, as you know, or ask for court members with enlisted personnel. Traditionally and historically, the right to ask for enlisted personnel has had a very special position in the military, and I wonder, in view of the fact that the Uniform Code of Military Justice was enacted to insure basic rights to soldiers after various discrepancies were seen during World War II; and since that time, except for perhaps the increase of power in 1963—January '63—in the area of Article 15s, and even then there were safeguards for soldiers, every major provision and change of the Code for streamlining it has not been at the expense of taking away any option or major right of the soldier. If we go to judge alone sentencing, we will for the first time, it seems to me, be taking away an historic or traditional right of the soldier to enlisted courts and, certainly a right to make that option in regard to military judge sentencing, or other sentencing since 1968. What do you think about that, the perceptions to the public, the perception to the soldier?

Major Gen. HODSON. I just don't have any trouble with it, Colonel Raby, for the simple reason that about—I've forgotten how many jurisdictions have judge sentencing, but it's a very high number. It seems to me there are only four or five states where they have jury sentencing, and the jury sentencing experience in Virginia right now is under attack because they feel that juries composed of largely white people impose tougher sentences on black accuseds than they do on white accuseds. I understand that Governor Robb is holding some hearings on this. You've got Texas, where you've got elected judges who are elected for short periods and, there, the accused has the right to be sentenced by the judge or by the jury. It's very simple to know why that is, because no accused wants to be tried by a judge and sentenced by a judge during the six months before an election, because the judges invariably hand out almost maximum punishment during that last period before the election; so that's why in Texas, at least, they've given them the option of judge sentencing—or jury sentencing. I just think that the practice for years has been and is growing that way to have judge sentencing and—

Col. RABY. Excuse me, just one follow-up question. If we went to this system, is there a possibility that we, the military, could be subjected to greater attack based on the perceptions of the civilian community that our judges may then be giving warped sentences because they're concerned about promotion, they're concerned about assignments?

Major Gen. HODSON. That's always a possibility. There is no question that our judges, as well as judges in civilian jurisdictions, are subject to considerable community pressure. I think probably a lot of civilian judges are subject to even more pressure than our judges for the simple reason I don't recall any editorials in the military papers which criticized the sentence imposed by a judge, but I've seen a lot of them in civilian papers that were critical of a judge's handling of a case.

Col. RABY. That's true, but in our system right now the accused selects his forum, and there's only a couple of forums for that in civilian life—

Major Gen. HODSON. But all I'm talking about is the pressure of a community on the judge. Yes, there is bound to be pressure of the community on the trial judge and I think that's probably appropriate. The trial judge shouldn't remove himself and put himself in isolation from the community that he serves in.

Col. RABY. Thank you.

Mr. HONIGMAN. Sir, if I can continue on the subject of military judge sentencing, I wonder if you could comment on how you would feel changing the system, and going from the possibility of jury sentencing to military judge sentencing in every case, would be related to the process by which we now select juries, and the type of people who are—who now form military juries. If we're going to what is essentially a civilianized approach where the trier of fact simply tries the fact, and you have a professional jurist who is imposing the sentence, doesn't that eliminate much of the justification for a blue ribbon military jury where members are picked—handpicked by the convening authority, where two-thirds of the members of the jury by statute must be officers? Wouldn't there be less of a justification for that if the judge were the sentencing authority?

Major Gen. HODSON. I think, as I indicated in my statement, I've never heard a convening authority complain about the findings imposed by courts, but I have heard them complain about the sentences imposed by courts, so that ties right in with your suggestion that you don't need any longer a so-called blue ribbon court. Of course, I didn't cover it in my statement today, but I have recommended on several occasions a limited random selection of court members.

Mr. HONIGMAN. I see.

Major Gen. HODSON. And all of these things sort of tie together; I mean, if you do one, then you ought to consider, should we make a little change over here because you're absolutely right. The last division commander that I talked to was very very careful about the top three people that he put on his courts, to make sure that he could count on them. Well, that kind of blew my mind; that's when I started thinking about random selection.

Mr. HONIGMAN. Let me ask just two other questions about the judge and the jury sentencing. Do you think there's a justification for continuing the current system to involve the blue ribbon people now that we're talking about in the process of trying to—dealing with the interrelationship between disciplinary and justice issues? Shouldn't the people who now form juries be compelled to deal with questions of sentencing to participate in the justice aspect of military service? Isn't there something educational, some important element of participation that you would be giving up if you changed the system?

Major Gen. HODSON. Well, when I was processing the Military Justice Act of 1968, one of the big problems that I ran into in clearing it with commanders, was to permit the judge to try the case without a jury. And I remember the Chief of Staff of the Army and the Vice Chief both expressed their great concern that you would no longer have military people in the command in the courtroom to find out what was going on in the disciplinary area, and that was a very tough obstacle to overcome at that time, and I think you're talking about roughly the same thing here. It removes them even more from firsthand observation of how the military justice system works. And, of course, everyone argues that the one reason for retaining the jury system is that it lets the community see what goes on in the courtroom. Of course, I've been espousing permitting television in the courtroom so everybody could see, but not many states have bought that yet.

Mr. HONIGMAN. Let me pick up on that last comment you made about letting the jury see what goes on in the courtroom. To the extent that one function of the jury is to express the community's sentiment, not only about whether certain actions should be punishable, but what extent of punishment is appropriate, would you be losing something if you eliminate the sort of checks and balances system that we now have whereby if a military judge is adjudging sentences that the accuseds may view as disproportionately severe, then subsequent accuseds, in essence, can tell the judge something by going before a jury, and juries can tell the judge something by imposing a lesser sentence? Is that a consideration that you've addressed?

Major Gen. HODSON. Of course, that's sort of forum shopping, which is very common in civilian life and, of course, that's what the Texas provision permits. It tells a judge, I know you're going to impose the maximum punishment so I want to go with a jury. But, during the first three-quarters of his term, they're very happy to be sentenced by the judge. I don't know—I've been opposed to that Texas provision, but I realize that as a practical matter, they just about have to have it. Whether we should—I think that's not a bad compromise position; in other words, if you got the vote about fifty-fifty on judge sentencing, I'd be willing to compromise that the accused may elect whether he should be sentenced by the judge or the jury, if a case was tried with court members. I really wouldn't have too much objection to that; my main objection is the fact that they do it in Texas.

Mr. HONIGMAN. Thank you, Sir.

Major Gen. HODSON. Because when I first heard of that, I thought oh my God, how archaic can you get, but they explained it and it made sense.

Col. MITCHELL. General, I know that when—often, at least, when new proposals come along dealing with military justice, that commanders of that community seem to get kind of uptight about it. To what extent is this feeling that they have a distrust born of a feeling that lawyers, being separate from them, being separate from the generalists, that's a good way to put it, are not socialized to the peculiarities of the society in which these lawyers function, as opposed to a feeling on the part of the commanders that they want a particular result in a particular case?

Major Gen. HODSON. I don't know. I'm not sure I understand what you want me to say exactly.

Col. MITCHELL. I'm not sure I want you to say one thing or the other.

Major Gen. HODSON. Yeah, but I mean exactly, I don't quite get the point, or I'm having difficulty of getting the point.

Col. MITCHELL. Well, for example, we talk about why some commanders might resist the idea that there should be judge only sentencing. If I were a commander who felt that a lawyer, and hence the military judge, came from such a different background than me that I felt he did not understand the intangibles that the more outspoken military commanders talk about, then I wouldn't want to trust him with sentencing authority. It's not that I'd want a particular result in a particular case so that I'd want to hold on to every facet of control that I can as a commander, as much as it is a fear that this military judge really doesn't understand the society in which he's functioning. So, I guess my question to you is: Do you have a sense as to whether the commanders at large or as a group tend to oppose changes in military justice on that kind of a concept, as opposed to any desire to

achieve, by hook or by crook, a particular result in any particular case?

Major Gen. HODSON. Well, I feel that if you took a poll of commanders, you would probably find almost unanimous opposition to judge sentencing. I think I'd get somewhat the same reaction as I got from the 65 retired judge advocates; they don't want to touch that, and perhaps for some of the same reasons as the reasons you're talking about.

Col. MITCHELL. Couldn't that be corrected by training? If your lawyers were brought on active duty and given the same basic training as all other Army officers, and exposed to the same continuing education that all other Army officers are, either by correspondence courses or otherwise, and more integrated in the structure, would that tend to alleviate the problem?

Major Gen. HODSON. I don't know. You know, it's been my experience in watching judges in civilian tribunals as well as on the Court of Military Appeals, to note that judges who've made a career of being a prosecutor, when they're elected to the bench they tend to be very soft, and very tough on prosecutors. Likewise, judges who have had a career as a defense counsel, criminal defense counsel, when appointed to the court, a court, tend to be tough as hell on defense counsels and mean judges in terms of sentencing in criminal cases. So maybe that training would help him and, on the other hand, I can't help but note that say, for example, Judge Ferguson was a one-man grand jury in Michigan, which is about the wildest type of prosecutorial investigative power you can have, and we all know that he was tough on the prosecutors. It's like Judge Liebowitz said one day, he said those defense counsel aren't going to pull anything on me; I know what you do as a defense counsel.

Col. MITCHELL. If the lawyers went through that kind of experience though, do you think it would have any measurable affect on reducing this distrust that I know exists in some circles?

Major Gen. HODSON. Yes, I think it would. I mean, if his personnel file were sent in to the commander, if we've got a new military judge and he's had three years or four years with a non-legal arm—it could be combat or support arms, but I think he would feel more comfortable.

Col. MITCHELL. And the final follow-on is that if all of the armed services had been doing this for the past 15 years or so, do you think there'd be as much objection to sentencing by military judge alone as voiced at the gathering you attended?

Major Gen. HODSON. I don't know. You see, the only reason that I feel that the commanders are—might oppose judge sentencing, would be for the same reason they oppose trial by judge alone; to wit, we think the military community ought to participate in the administration of justice and see what goes on, so I think they would have that feeling. On the other hand, as I indicated, I have not found any commanders or convening authorities who complained about sentences imposed by judges. So the final result is, they seem to be satisfied with the result, but they're a little leery about starting it I guess.

Mr. HONIGMAN. Throughout the morning, we've been talking about, to some extent, the need to train judges in the non-legal but military community's needs and concerns and outlooks and so on. I hate to start a question with isn't it a fact that, but isn't part of the problem a problem of training prosecutors to be able to adequately inform the judge in each particular case and the context of that case, of what the military ramifications are? Would you agree that to some extent we should be focusing on the adequacy of the prosecutorial function in advising the sentencing authority, rather than focusing upon whether the judge has spent three years or five years in a non-legal job?

Major Gen. HODSON. I agree with you on that, and I'm extremely pleased with the new sentencing procedures that will come into effect with the new manual because, as you know, the prosecution has literally been put in a position of having his hands tied behind his back; he can't tell the judge anything unless the accused raises the point. But now, they've adopted incidentally, again, an ABA standard; our sentencing procedure is almost identical to the new ones in the manual, and I'm very happy to see that because for the first time, the prosecution will be able to tell him.

Mr. HONIGMAN. And do you believe that educating the commanders in the changes that this new procedure will make, will tend to alleviate some of the concerns that the system isn't responsive to the commanders?

Major Gen. HODSON. It might, I hadn't thought about that; but I think the commander is always concerned about getting a judge who, for some reason, decides that he's going to be very, very lenient we'll say, in drug cases. I think that's what scares the commander; he fears that. Now, you can get a judge that is just the other way around, who is death on drug cases, but hopefully, by process of selection, we won't select a judge who goes off on tangents. There are a lot of those judges in civilian jurisdictions that, as I say, you do forum shopping to try to get before the judge—

Mr. HONIGMAN. No question about it.

Mr. STERRITT. I have one question for the General. One of your concerns that you've expressed about tenure, or one of the purposes motivating you and really a suggestion, was to improve the credibility of the judges as well as I thought I understood you to say, make the position more attractive for the better, more competent, better qualified lawyers in the JAG Corps.

Assuming some provision for tenure was recommended by this Commission, would you think it would be appropriate to add a provision with respect to protecting the judge from being hurt in the overall advancement scheme of things in the JAG Corps, or in the military? I'm not saying he's inclined to do anything extra, but to prohibit him—any adverse impact being drawn from his service as a judge.

Major Gen. HODSON. Well, of course, you've got the provision already, undue command influence, which I believe was last amended to include judges.

Mr. STERRITT. Right, okay. I'm speaking about within the JAG Corps itself.

Major Gen. HODSON. I think that's enough. I really think that's all you need because that article applies not just during the trial of a case; that article applies all the time as far as I'm concerned.

Mr. STERRITT. You think it would apply to practices of advancement in the JAG Corps itself?

Major Gen. HODSON. I think—I don't think you'd need it any—more of a definition than that. You could highlight it, because that would be exactly what you're talking about—would be improper command influence by trying to persuade the judge to whatever.

Capt. STEINBACH. You've commented or briefly mentioned the process of selection of military judges. Would you give us your thoughts on possibly what that does, or should include?

Major Gen. HODSON. Selecting a military judge?

Capt. STEINBACH. Yes, Sir.

Major Gen. HODSON. Well, in the first place, we always—Well, I won't say "we always"; we'll just strike that. In the first place, I think you should have had four years, or maybe two tours in some other type of assignment. I think he should have been a prosecutor; I think he should have been a trial defense counsel, or at least an appellate counsel, and I think he ought to have at least, well let's say, eight or ten years under his belt before he's ever sent to try the first case. But that's all the practical qualifications, I think that's what we used to look for in career management, is try to find the fellow who'd occupied a number of billets and done a very good job, and indicated an interest in becoming a military judge. Those are the ones we looked for. Tom Crean here, who is going to testify, was one of my special court judges, and a very fine one even though he didn't have all that experience I'm telling you about, but he was an exception.

Capt. STEINBACH. Does the trait of judicial temperment come into this selection process; and if so, how?

Major Gen. HODSON. Yes, I think that by having two or three tours and by looking at efficiency reports, you get a pretty good feel for judicial temperment; at least, I felt that I could. I know that they pad those efficiency reports; they probably don't do that with fitness reports, but they do with efficiency reports. But you can still read between the lines and get a pretty good feel of what this fellow is like and what he's likely to do under certain circumstances.

Col. RABY. In a small corps too, General, like the Judge Advocate General's Corps is, don't you also have professional reputation, and your career manager advises you as to what the professional reputations are of the various people whom you select?

Major Gen. HODSON. That's correct. As a matter of fact, as you say, being small, when I was in career management, I not only went over the records carefully, but I might pick up the phone and call a couple of prior supervisors and say, what do you think; do you think this fellow is ready to do so-and-so; do you think he could do it, and any flaws that you know of? So, you've got a much better selection process than you do for elected judges in civilian communities.

Capt. STEINBACH. Absolutely.

Mr. RIPPLE. General, I don't know how to ask this question, except to preface it by an observation that perhaps you could react to. My perception at least, after reading the testimony of the 1983 act and the 1982 testimony, is that commanders' concerns with respect to the qualifications of military judges and what a military judge will do, harsh sentence or light sentence, is basically related to military type offenses, your AWOL, your desertion, your drug offense, your disobedience offenses. Commanders don't seem to be as worried about how the military judge is going to handle your very serious felony. I discern a difference in attitude, those they seem to be much more willing to leave to the professionals, leave to the legal people to handle as they ought to be handled. When you juxtapose that distinction on the fact that the different services use the court-martial system for different purposes, certainly the Naval services use the court-martial system a lot more for military type offenses, for instance than the Air Force does, which tends to handle more things administratively. I wonder if we're not essentially dealing here with something far more fundamental and that's what I'd like you to react to, and that is a disagreement among the services with what the court-martial system ought to be used for and what it ought not to be used for. Are we talking about a criminal justice system, or are we talking about a system of military discipline? Is there really sufficient unanimity among the services in this day and age for us to address these problems and give one answer?

Major Gen. HODSON. Well, I think you're absolutely right that the commander is more concerned with how the judge will handle a military type offense than he is with how he will handle a burglary offense. With respect to the other aspects, whether the services handle

these cases differently, that may be so. On the other hand, different commands within the Army handle cases differently likewise. Some would handle a particular incident administratively, and another commander would insist on trying it. The only answer I can give you to that is that the particular judge who's going to be sitting on the case is a member of that service so far, although I recommended cross-servicing of judges also; but he is, at present, a member of that service and apparently would be aware of the concerns of the commander.

Col. HEMINGWAY. Thank you very much for your testimony, General Hodson.

Maj. Gen. HODSON. Let me just conclude by emphasizing one thing very briefly. As to those items which are before you, I had the feeling initially and still have the feeling that these are items about which reasonable men could disagree. And secondly, I don't see any great urgency in rushing legislation through to implement any of them. Frankly, I think we're in pretty good shape right now and I complement all of you for whatever part you played in that because I think the new Manual is a great thing.

Thank you very much.

STATEMENT OF COLONEL THOMAS M. CREAN

Given to the Military Justice Act of 1983 Advisory Commission on 8 June 1984 at Washington, D.C.

Col. HEMINGWAY. If you would please, state for the record your name, rank and your function.

Col. CREAN. Good morning, Sir. I am Colonel Thomas M. Crean, the Chief of the Personnel, Plans and Training Office, Office of The Judge Advocate General, Department of the Army. My function is as the Career Manager for the Army Judge Advocate General's Corps. I have been in this tour for approximately two years as Chief. It is my second tour in the Personnel office, and I am one of only two people in the Corps who have ever served back into the Personnel office and, unfortunately for me, I have served more time in the Personnel office than anybody else in the history of the JAG Corps; whether that's a distinction or not, I don't know.

I have been asked to comment upon four questions which I will address. I don't have a formal prepared statement so, as I go through, if you have any questions concerning any of the points I make, we can stop and go through that way.

The first question I am asked to address is the length of tour for military judges. When we assign military judges within the Army, we anticipate that they will serve for a normal tour for the particular area in which they are assigned. If they are going to Europe or in CONUS, we anticipate they will serve the normal tour of three years. If, for example, they're assigned to Korea, the normal tour there is two years. So, our tenure provisions are that an individual will serve the normal tour for that particular area, the exception being, and we do have an exception in that the needs of the service control. So, in other words, if we need a military judge before the end of their normal tour for another certain position, or even a position within the judiciary, we would have no hesitation to tap that individual and assign them to that particular position. Usually, that is done with the concurrence of the individual because we do coordinate with them; the decision as to whether or not to reassign that individual before the end of the normal tour is up, rests with The Judge Advocate General.

The second question that I was asked to address is the requirement that the entire time be spent at one location. I've pretty much answered that in saying that we do anticipate they would serve at the one location, unless the needs of the service are such that we had to terminate that early.

The third question is the requirement that the judge perform only judicial functions. When we assign the judge to a judicial slot, we anticipate that that judge will perform only judicial functions, unless again the needs of the service are such that we need to tap that judge to perform another function. We have done that in the past, and usually they are done for something internal within the JAG Corps; for example, if we have an incident at a location involving judge advocates that we think should be investigated, the people that we feel that are best able to do that many times are members of the judiciary, so we will ask a judge if that judge will go to that particular area, conduct an investigation and report back to The Judge Advocate General with recommendations. So, we do ask the judges to perform other than judicial functions, unless you feel that an investigation of this nature is in the nature of a judicial function and, as such, they are performing judicial functions.

The fourth question that has been asked is mandatory promotions for all judges who are within the primary zone of consideration. This would very strongly hamper our selection criteria for promotion. We operate, at the present time, on a percentage rate of selection. We tell the promotion board that they are to select "X" number of people out of the people in the zone of consideration for promotion; for example, I'll use the promotion to 0–6. Our selection rate is 50 percent. If we were required to mandatorily promote all judges in that particular area, we would severely limit the possibility for other people to be promoted. In the last zone, I believe there were two people that were in the promotion zone for consideration for Colonel and if we did that, we would prob-

ably reduce the percentage rate of other people to less than 40 percent. So, our feeling is that the military judges will have the same possibility of promotion as other people in the zone, and they will take their chances with the others based upon their records. Both Colonel Raby, who is a member of this Commission and is an Army member, and I have both sat on promotion boards, and we both could tell you that everybody receives a fair shake on those boards, and the fact that an individual has been a judge is not a deterrent. Of many factors, that is a positive factor considered by the boards. I should point out that right now we have—

Col. RABY. Excuse me. Before you go on any further, Colonel Crean, could you explain the rating system for military judges?

Col. CREAN. The military judges are rated within the judicial structure; they are in circuits. A judge is rated by the chief judge within that circuit, senior rated by the chief trial judge or by the chief judge, so there are—The rating of judges is done strictly within the judicial channel. I should point out that today we have 43 military judges that are part of the U. S. Army Trial Judiciary. Twenty-eight of those are general court-martial judges; the others are special court-martial judges who go in that particular job for a one year—one tour; one normal tour being again two or three years. They are then—those special court judges then come out and are assigned to other judicial duties; but it gives them a training background that we would look for in later years when we want to place somebody into the general court-martial trial judiciary. Of the 28 judges presently that are performing general court-martial judges, four of them have served 10 plus years in the trial judiciary. Eight of them have served five plus years; four are serving their fourth year, and 12 have less than three years worth of service. So, the majority of them, a good majority of them, have served a substantial number of years in the trial judiciary, and we would move them from judge job to judge job in many cases.

Col. HEMINGWAY. What are the ranks of your general court-martial judges?

Col. CREAN. Lieutenant Colonels and Colonels.

Capt. STEINBACH. You mentioned a 50 percent selection rate from 0–5 to 0–6. How have military judges fared in that percentage?

Col. CREAN. I believe in the present—We just had a list that came out about two or three weeks ago. There were three judges in that particular zone, two of which had been passed over previously, and one of those that was in the zone for the first time. That individual who was in the zone for the first time was selected for promotion; the other two were again passed over.

Capt. STEINBACH. Is that 50 percent representative of what the judges are? Were there four in the zone the previous time, or have you done that kind of analysis?

Col. CREAN. I have not done that kind of an analysis. I will say that there was nobody that had been previously passed over that was selected.

Col. RABY. Could you do that type of analysis and give the board a copy of it?

Col. CREAN. Yes, Sir, sure. We can go back about two years, or three years.

Capt. STEINBACH. Would the 0–4 to 0–5—would there be an effect there, or are you saying most of your GCM judges are Lieutenant Colonels?

Col. CREAN. All of our GCM judges are either Lieutenant Colonels or Colonels.

Capt. STEINBACH. So the 0–5 to 0–6 would be the area where the value would be?

Col. CREAN. That's correct.

Capt. BYRNE. Of course, your statistics wouldn't encompass the officer's whole career because the 0–5 who comes up for promotion to 0–6 may well have had only one tour as a military judge. The remainder of his tours may well indicate how the selection board is going to go; isn't that true?

Col. CREAN. That's correct, Sir. For example, the individual who was in the primary zone this time had just went into the judiciary as a general court judge. He had served a previous tour as a special court judge prior to that, many years ago, and then had been out in our Litigation Division. He headed the Wartime Legislation Team that we had running for a year or two, and then he went into the judiciary. The other two that were in above the zone, one had served—he's on his second tour in the trial judiciary, and the other one had just moved into the trial judiciary from an SJA job; so the OERs as judges did not have any factor in their selection or nonselection.

Col. MITCHELL. If you had a mandatory selection for promotion for military judges, can you see any unusual jockeying going on at critical stages in the promotion cycle amongst officers to get themselves assigned to the judiciary so they need not worry whether they'd get selected or not, notwithstanding the quality of their prior record?

Col. CREAN. Well, I wouldn't have any problem getting judges under those circumstances. And they'd go anyplace too.

Col. MITCHELL. Let me ask you also whether you have ever been asked or required to reassign a military judge out of the normal sequence, without there having been the sort of need of the service thing you talked about earlier?

Col. CREAN. I have been asked and only under one circumstance to reassign a special court judge. I was

asked by the judiciary because they felt he may be having an alcohol problem.

Col. MITCHELL. So it was not related to the—

Col. CREAN. And it was not related to the quality of—He was in an area where the alcohol problem could have been exacerbated, and I did move him under those circumstances. That was solely within the judiciary that they wanted that done; but never for cause, or anything of that nature.

Col. MITCHELL. One last question then and this might catch you a little bit by surprise, but I'm sure you know the answer. What sort of a training cycle do Army lawyers go through when they're accessed into the Army JAG Corps? For example, do they go to the same basic officers' training school that your general line officers go to? And then, what additional schooling and so forth do they get?

Col. CREAN. Well, unfortunately, the "T" in my title of PP&TO has to do with training, so I'm responsible for the training within the JAG Corps, and having served down at our Judge Advocate General's School as a division chief, and having formulated the basic and graduate course when I was down there, I can address that issue. The individuals that come on active duty do not receive any formal training in the line as would be contemplated by second lieutenants or first lieutenants going into armor, artillery, quartermaster, or whatever. The individual comes to Fort Lee, Virginia—

Col. RABY. Excuse me. But that's in recent years, because I went through—

Col. CREAN. We're not talking about 15 or 20 years ago, the older guys. And I'm sure your question is what has happened in the last 15 years, and we're talking about the most recent people who are practicing now under the Manual. They go to Fort Lee, Virginia, for two weeks. They do receive basic instruction in certain military functions; for example, how to wear the uniform, salute, how to fire weapons, the basic organization of the Army, the basic organization of the JAG Corps. They are then sent to Charlottesville, Virginia, to the Judge Advocate General's School for 10 weeks, and the first week of that is continuation training, where they do receive further military indoctrination. And then the nine weeks remaining are done strictly as military law. When they go to their first unit of assignment, the Staff Judge Advocate or the Regional Defense Counsel that they're assigned to TDS is required to have the people go to a unit for a period of time for indoctrination, or a look-see as to what goes on in the unit, so they find out what the client does and what their organization does. And that usually encompasses two to three weeks. That is the extent of initial formal training.

Col. MITCHELL. Are your JAG people eligible for assignment to career level, intermediate level and high level operational type schools?

Col. CREAN. We do send—Our people do go to Charlottesville, back there for a year's training in the graduate course, which is military law, and we do teach them about management within the Army and a number of other functions. We do have people that attend the Command and General Staff College. We do have people that attend the Army War—

Col. RABY. If this is going on the record, could you state how long the course is at Charlottesville, for those that don't know?

Col. CREAN. One year, about a year; it's actually 10 months, but it's a year's assignment. They do attend the Command and General Staff College. They do attend the U. S. Army War College, or the Inductrial College of the Armed Forces, and we do have—Almost all of our people, starting in about Fiscal Year '86, will receive with all other Army Majors, training in the Combined Arms Staff Service School, commonly called CAS-Cubed. Right now, we train about 40 to 60 people in a fiscal year, and shortly we will have all of our JAGs, as they make Major, attend that course, as will the entire Army.

Col. RABY. They'll be attending with line officers?

Col. CREAN. That's correct.

Col. RABY. What is that course—

Col. CREAN. It's a two-month course; it's an intermediate course to teach people, as they become Majors, how to function as staff officers.

Mr. RIPPLE. As a follow-up to that, if I may, Colonel, what opportunities does the typical military judge in the Army have for continued professional training in the law, both of a general nature and more specifically, does he have any opportunity for training with the civilian judges, any continuing judicial education?

Col. CREAN. I guess the better individual to answer that question would be our Chief Trial Judge, Colonel Garner, but I do know since I pay the bill, that we do continually send people to civilian training courses, and I do know that a number of people attend the National—I don't remember what the exact name is, but it's for civilian judges in Reno, Nevada.

Mr. RIPPLE. The National Judicial Conference?

Col. CREAN. That's it exactly, and they do attend courses down there for special court judges, I think is the appropriate title of the course.

Mr. RIPPLE. If I may suggest, Mister Chairman, I think that particular information, in some detail, will be very important to the Commission and ought to be in our record in making recommendations with respect to that, and perhaps we could get that from each branch of the services.

Col. RABY. Major Casida, would you get with Colonel Crean and get that information, and include our military judge course information. And I don't know whether you can get from the school, a what do you call that, Tom? A lesson plan that sets out—

Col. CREAN. The POI, Program of Instruction.

Col. RABY. Yes, thank you.

Col. CREAN. All of our judges are required to attend the military judge course at Charlottesville, which is a three-week course, and they are not certified as judges until the completion of that course and until they graduate from that course. It is a graded course.

Mr. RIPPLE. Colonel, if I may follow up on that just so that we don't jump around from topic to topic to topic. Once certified, does that certification have to be renewed periodically, or are they in fact certified only once?

Col. CREAN. They are certified the first time as—Let me start out with a Captain or a Major to answer your question. They are certified as a special court judge after completion of that course. If, later on, they are going into the judiciary as a general court judge, they have to be recertified as a general court judge. Now, for that general court judge to go from assignment to assignment to assignment in the judiciary, they do not have to be recertified every time they're moved.

Mr. RIPPLE. Even if there's a substantial break in their service as a judge; in other words, if they have a GCM judgeship followed by two or three SJA positions, and then another general—

Col. CREAN. That's right, they do not have to be recertified; however, for the sake of the individual, we always have them attend that course at Charlottesville so that they can get current on the law and get back into it very substantially, and I'll use an example. For example, Colonel George Russell, who is leaving an assignment as a Staff Judge Advocate, is going to become the Chief Trial Judge. Colonel Russell had been a GCM trial judge, a special court trial judge, been out of it for a while, and he's attending the course at Charlottesville to get back in, current on what's going on.

Mr. RIPPLE. The reason I'm asking these questions is that one of our earlier witnesses today suggested that military judges do not have the same amount of exposure to new theories, new information with respect to the sentencing process, as is available to either federal or state judges. Federal and state judges have made contrary statements certainly, saying that they're trying to emulate the military. I think that's why we need some fairly detailed information in our record from you and from your brothers in the other services on this point.

Col. CREAN. Well, they do attend that course, and they do attend the Judicial College in Reno which gives them training in those particular areas.

Col. RABY. Do not military judges have special annual meetings, gatherings of the clan, so to speak, where they continue their legal education, not only civilian but military; and they have it in Europe, and the Air Force conducts some and we send some to Maxwell?

Col. CREAN. Well, they do that by circuits; for example, you mentioned Europe. The judges in Europe, the Army judges in particular, meet every September in Garmisch, in conjunction with a continuing legal education course for counsel. And having attended that course in the last two years, not as a participant but as an observer sitting in the back row, I can tell you that there have been Naval judges there; the Air Force judges have also attended; again, sitting down as a group and discussing many of the issues that they all face. And I know sentencing has been some of the questions that they have raised at that time. There have been circuits here in the United States that meet occasionally. It really depends upon the dynamics of the Chief Circuit Judge as to how he wants to get a conference together; some are more dynamic than others in that regard.

Mr. STERRITT. I have a question. My appreciation of the experience in the civilian community is that a judgeship is a desired, or sought after position. Your earlier statement has suggested—and I may be misinterpreting—that judgeship is not desired in the military. From your own experience, or from people who you've come across in your Personnel duties, can you explain why that problem might exist?

Col. CREAN. Well, if I left you that impression, I was mistaken because I, at the present time, have no problems getting people to go to the judiciary; in fact, I have probably more candidates than I have positions. That is particularly true at the special court level and at the general court level. As you can see, over half of them have served more than four years in the judiciary, and that is at their own desires, as opposed to us wanting to place them in something else. I had a judge that has served eight or nine years and we were reassigning him after four years at a particular location this year. I offered him a very challenging and prestigious staff judge advocate position. He says, all I want is to be a trial judge in Europe, and that's where he's going now. That's nine years in the judiciary and we said fine, and we sent him off to that particular position.

Col. RABY. Colonel Crean, I noticed in your remarks—the remarks you just made, you did not address the attitudes of the Court of Military Review judges. Would you care to address that?

Col. CREAN. I didn't make any breakdown and did not bring my sheets with me on the appellate judges.

Col. RABY. Do you have the same volunteers?

Col. CREAN. No, I do not. That's more or less a product of not wanting to come to Washington, as opposed

to not wanting to be assigned into the appellate bench. If the Court of Military Review, Army, had—was stationed in Charlottesville, Virginia, or Denver, Colorado, I would have no problems. Being stationed in a high cost area like Washington, D.C., having to commute and all that goes with it, you do have more of a problem. It is not an issue of appellate judge; it's an issue of location.

Col. RABY. Does that tie in with the costs of housing and cost of transportation and—

Col. CREAN. I think that's basically it, Colonel Raby. Now, once you get an individual in Washington, they don't want to leave. Colonel Raby could personally attest to that.

Col. HEMINGWAY. Thanks very much for your testimony, Colonel Crean.

Col. CREAN. Thank you very much, Sir.

STATEMENT OF BRIGADIER GENERAL DONALD W. HANSEN

Given to the Military Justice Act of 1983 Advisory Commission on 8 June 1984 at Washington, D.C.

Col. HEMINGWAY. Good afternoon, General Hansen. If you would please, state your name and position for the record.

Brig. Gen. HANSEN. Brigadier General Donald W. Hansen. I'm currently the Commander, U. S. Army Legal Services Agency, and Chief Judge of the Army Court of Military Review.

Col. HEMINGWAY. The floor is yours.

Brig. Gen. HANSEN. Okay, thank you very much. First, let me express my appreciation for the opportunity to come and bend your ears a little bit. I think, first of all, a caveat is necessary. I'm appearing in my personal capacity as opposed to representing The Judge Advocate General. And indeed, some of the topics that I'm particularly interested in addressing, I have little current experience in, but still some gut reaction to some of the proposals, and with your indulgence, I'm just going to dump those on you in any event, with not a great deal of either background or current experience.

I think, first of all, I should give you a framework of reference from which I'm commenting on these, and it takes really two points. First of all, I don't think the military services are ever going to 100 percent satisfy all of our critics until we have adopted the civilian system almost lock, stock and barrel; so that we ought to be careful not to respond to those few strident voices that would have us change the entire military justice system because as opposed to having a few critics, then we would have the volumes of criticism that we see every day in our American university law reviews, and I think that's a mistake.

The second principle, and it's sort of an offshoot of that, is a very basic principle I've been dedicated to over the years: If something's not broke, don't fix it. And I think any time we are prepared to make changes, we have to have a three-step analysis; the first is, we have to clearly identify that there is a break in the system somehow; secondly, we have to be sure in our minds how the proposal fixes that break, and the last principle is what does the fix do to the rest of the system. I don't think we can change parts of the system without at least assuring ourselves that we're not doing major damage to some other part of the system.

Well, with those preliminary remarks, I'd like to address essentially four topics. I'd like to talk a bit about the tenure problem; second, the increase of the BCD special to one year; third, the judge sentencing proposal; and fourth, the proposal relating to suspension power by the trial and appellate judges, because those are the ones that I feel most comfortable with.

In terms of tenure for the judges, I think this is a real illustration of the principle, if it's not broken, don't fix it. As a practical matter, at least within the Army, the tenure of our judges, both appellate and trial judges, has been a minimum of three years. We have some judges—for example, one of my circuit court judges now has 13 years in as a trial judge. He got his promotion to 0–6, he was interested in staying in the process, and has been permitted to do that. By and large, I think the protection of independence of the trial judiciary is essentially a function of The Judge Advocates General, and at least in the 22 years I've been in the service, I think our judges have been pretty well protected by the TJAGs. A good illustration is a case that took place down at Fort Bragg in which the Commander at the XVIII Airborne Corps was concerned about some decisions that had been made by one of our very senior trial judges. He sought the intervention of The Judge Advocate General to get somebody else put in that position, and the essential word that went from—at that time it was General Harvey back to XVIII Airborne Corps was, that's your judge; he tries your cases; you have no quarrel with the independence of our trial judges. And that, I think, is the way it should be. For those cases where we do have a problem with one of our trial judges—and a pretty good illustration I think, is one of our former judges over in Germany who was having some psychiatric problems, and he was simply removed from the bench. That was a function of The Judge Advocate General, and I think properly so. Those areas where the services believe they have made a bad selection in terms of trial judges, the Court of Military Appeals, in I think it was the *Ledbetter* case, set out the way you go about removing them when in fact they're not performing as they should. Now, we in the service have used both our

trial and appellate judges for a major personnel action shift, and I think it's important that we recognize that indeed, that is one of the things that happens in terms of military assignments. Those who say that tenure is a fixed thing and has to be, I think, just simply do not understand the realities of the military services in terms of personnel transfers. For example, within my tour—just within my tour—as Chief—I supervise the Chief Trial Judge because I am the Chief of the U. S. Army Judiciary and he comes under me—we have had a number of transfers out of the trial judiciary, short of what might be termed a tenure position. In the field, for example, we had a major problem with one of the Trial Defense Service Regional Counsel. He was replaced and properly so, and we took one of our sitting judges off the bench to fill that position. More close at home, we had an unexpected vacancy, one of our Staff Judge Advocates at Fort Lewis in I Corps, and it was a major problem in terms of his replacement. One of our circuit court judges was transferred, again short of what might be any tenure position. Within the court we've had the same sort of thing, again because of transfers or unexpected vacancies—the Chief of the Trial Defense Service, and one of my appellate judges was removed, short of any tenure, and was moved into that position. Now, probably, and I say "probably," because this wasn't put to a vote in the sense of asking the officer whether he wanted to move; probably all look forward to those particular jobs because obviously, they were a personal selection by The Judge Advocate General and would not be interested in saying: Stick it in your ear, Boss, I don't want that job. But we have an illustration closer to home; one of my judges currently on the appellate court, simply did not want to leave the Washington area. He was fully satisfied with staying on the court and, indeed, was doing a good job; yet, we had a vacancy in Panama requiring an officer with some international law experience and background. That particular judge, over his objections, was removed from the appellate court and sent to that position. So those sorts of things, that is the administration of personnel, is crucial to the operation of The Judge Advocate General of the Army. Our trial and appellate judges provide a very special pool of officers necessary to be utilized to plug in gaps when those gaps occur and cannot be otherwise satisfied.

Now, while I say that I think there's no need for tenure, I think there is a true gap here that needs to be fixed, and I'm not exactly sure how that can be fixed, and that's the problem of promotions of our trial judges and appellate court judges. I think by and large within the services, except for those who have found a niche and enjoy doing that sort of thing, our trial judiciary and appellate court positions are not viewed as career enhancing positions. We have a number of officers who have been passed over at the 0-6 level, and I think some sort of method for those—particularly, if it's desired to create a career branch within the judiciary—some sort of a trial judge position, chief of appellate or government—government or defense appellate positions, and on up to the appellate courts and to my position as Commander of USALSA. If we want to create that sort of a career progression, and I think there's some value to it, there has to be some assurance that those individuals are going to be promoted, as a minimum, in due course; perhaps, somewhat of the system that is present up at West Point. Those officers who are assistant professors have a due course promotion in which they are going to get promoted, assuming that all other things are equal. But I see that as the main problem with our trial judge and our appellate judge structure; the uncertainty of promotions. Now, a part of that may be because of our efficiency reporting system within the Army. Within our system, an officer's efficiency report will contain two ratings; it will contain a rating by his immediate supervisor or superior; that is, the circuit court judge; and then, normally, it will be composed of a second rating by a senior rater which, for about half of the Army's trial judiciary, is the Chief Trial Judge, Colonel Garner, who sits in my office. Now, a part of that problem is that the officer who is getting the rating is maybe a special court-martial judge stationed at Stuttgart, Germany. The trial judge does not see his performance of duty. His circuit court judge is going to have some contact, but not very much given the nature of the independence of the trial judiciary. But there is one certainty, and that is that the chief trial judge in my office is going to see very little of what that officer is doing in Stuttgart. And, if our chief trial judge is junior to any of our circuit court judges, that makes me the senior rater of that officer. Now, the only time I see what he does is when one of his cases gets busted. That's not a good way to have your officer's efficiency report written. You can do wondrous things in a hundred cases, and some of those I'll see as an appellate judge. You can do wondrous things in a hundred cases and I'll never see those, but the one I do see is the one that gets busted.

The second problem, and I think it's just an institutional problem, is it's difficult to write an efficiency for a trial judge. What can you say about him? Well, you can say that he does justice; he tries a lot of cases, and that's about the size of it. One of Colonel Garner's and my particular projects for the past two and a half years is to upgrade the quality of efficiency reports for our trial judges. We put out illustrations of things that they do. We include a list of what we think are local activities; that is, command activities that he can get involved in that are not inconsistent with their position as a trial judge. And, despite that major effort, our efficiency re-

ports for our trial judges still do not compare with the equivalent efficiency reports for equivalent positions as staff judge advocates. The very same problem, and I gather this is true of all the services—the very same problem is involved in all of the appellate judges, because if you'll take a look at Article 66, it says, no appellate judge will write an OER on any other appellate judge; so that, within the Army, the 16 judges that have sat on our appellate court, their efficiency reports are rated by the Assistant Judge Advocate General and they're indorsed by The Judge Advocate General. Here again, the same problem. What are they looking at? They're looking at opinions and, if they don't like an opinion, that may detract from the efficiency report that's given on that officer. What they do not see are such things as how he cooperates in a sense of judicial collegiability within the work of the court. I provide them with statistical information on the number of cases that they do, so that sometimes can be helpful; but the things that make up the value of an appellate judge are simply not seen by those people who write the efficiency reports for those appellate judges.

Now, whether or not the senior judge of the panel, or of the Court of Military Review, should be a rater or a senior rater, I'm not certain. But, I am reasonably confident, at least from the Army point of view, that the present structure under Article 66 is simply not satisfactory and does not give the correct perspective of our appellate court judges. Now the consequences of that, for the majority of them, are nil because they are senior 0–6s who are not likely to be promoted. But when we want to attract, both into the trial judiciary and into the appellate judiciary, young, eager, aggressive, fast-burning officers, that's not the place for them to get good OERs that are going to contribute toward their advancement in the Corps. That, as I see it, is the problem within the trial and appellate judges in terms of independence and attracting quality people, and not tenure. I think tenure is a red herring that's driven across there to make us look like civilian courts when that's simply not necessary.

Mr. HONIGMAN. General, aren't you really talking about two different problems? On the one hand, you're talking about the problem of attracting capable judges—

Brig. Gen. HANSEN. And rewarding them.

Mr. HONIGMAN. —and rewarding them. On the other hand, you're talking about the problem of either a perception, or at some times the reality of a judge bending to improper pressure, which is the tenure, or the guaranteed term of office, or something. I really don't think you can say that tenure is a red herring because it's addressing a problem that you really haven't been focusing on.

Brig. Gen. HANSEN. Well, I think the answer is that it is a red herring; that as a practical matter, our judges do have that sort of tenure subject to a very important consideration, and that is, the ability of the The Judge Advocates General to draw upon those resources when needed. In other words, I'm saying first of all, it's not broken; don't fix it. Secondly, even if you fix it, I'm not sure that does anything to the problem of perceptions. Lastly, if you fix it in the manner of tenure, it's going to have a major impact on The Judge Advocate General's ability to utilize those resources where needed. So while they are indeed two separate things, as you point out, I think that tenure is a red herring and is not a problem; but I see promotions as a problem.

Mr. HONIGMAN. I see. Would it be possible—even though the system isn't as you say broken—instead of fixing it, to codify it? If the system works, as it now works, with an anticipation that a judge will serve for a term of office—

Brig. Gen. HANSEN. A normal three-year assignment—

Mr. HONIGMAN. —a normal three-year or two-year cycle, or whatever it is, and only in the most exigent situations will The Judge Advocate General seek to relieve him of his judicial role to give him another role. Would it be harmful to codify that system in a statute?

Brig. Gen. HANSEN. I think what you do is, when you talk about changing things on the basis of exigent situations, then you immediately put in a litigable point that need not be there.

Mr. HONIGMAN. Thank you.

Col. MITCHELL. In many exigent circumstances anyway, it's the local commander who knows the circumstances and they may be such that there isn't sufficient time to coordinate with everybody in Washington on whether or not a judge should be utilized. That perhaps affects the Marine Corps more than the Army because you're so much larger; you have a separate legal corps.

Brig. Gen. HANSEN. Yes, I think that's probably true. Our problems, of the nature I've been talking about, are essentially generated personnel problems that surface directly at The Judge Advocate General level within the Army, and are fixed at that level by reallocation of resources in whatever manner is appropriate.

Col. MITCHELL. I'm a little bit surprised at the amount of discussion over the protections that tenure is going to afford. I realize that when one starts talking about appearances, you're looking often in the eyes of the beholder, so you're not going to satisfy everybody on appearances and there's no point of even trying. Now, the issue of command influence is another matter; but on the other hand, do you have any idea on the extent of which

command influence against law officers and military judges has historically been a problem?

Brig. Gen. HANSEN. I think it's been so minimal that the necessity to do some of the things that we did was very small. My personal view, however, is that the fix of a separate trial judge organization was a good fix; at least in the Army where we have enough resources to provide those as a separate—You know, we used to use the deputy SJA as the trial judge, and I think that was really a little close. I was troubled by that perception, but—so I see that as a good fix. It was a strong perception; more than just a small one. It gave us a very independent trial judiciary; a truly independent trial judiciary. They're not beholden to the local command for OERs; they're not beholden to the local command for any purposes, so that any quarrel that there is between the function of a trial judge, is a quarrel between him and The Judge Advocate General, because he's the one that puts him in there. For example, we just had an extraordinary writ that the government sought to bring against a trial judge who dismissed a case on speedy trial. My court, in denying the writ, because we said we had no power to intervene under these circumstances—The language of the appellate judge: This military judge was wrong; he was dead wrong. I suppose there comes a time when, if you get enough of those wrongs and dead wrongs, it's time to replace that judge in terms of competence, and *Ledbetter* tells us how we go about doing that. The position that we take within the judiciary, the Army judiciary, and I think the one that has been historically taken by The Judge Advocates General within the Army, is illustrated by the XVIII Airborne Corps case I said, in which The Judge Advocate General says, I certify this man as a general court-martial judge; I put him there; he tries your cases; that's it. That's the way the problem was handled. That particular judge now is on the appellate court and doing a very fine job. He was a good trial judge. He had a bad day, but that's too bad.

Col. MITCHELL. What do you see as a solution to it, and I frankly think from all experience that you sort of hit the nail on the head with respect to the career enhancement situation. What do you see as the solution to that problem?

Brig. Gen. HANSEN. Well, the problem with suggesting solutions is that they impact somewhere else. For example, the West Point promotion as a matter of course doesn't seem to get charged against the Army promotion list. In other words, when we promote an 0–6 up there on the staff and faculty JAG Corps, that doesn't take away one of the 14 slots that we get down here. If, in fact, that same sort of thing happened, I suspect that our trial judges then would be picking up all of the promotions to 0–6, and they're getting harder and harder. What that would certainly do is encourage more of our fast-burners to move into the trial judiciary, that's for certain. But some sort of method by which those promotions don't get charged against the general officer strength promotion of the JAG Corps; but at the same time, those individuals who elect to remain in the judiciary chain in some manner, and I think we have people who belong there as opposed to being staff judge advocates, and vice versa. I could never have been a trial judge, I know that; so I think some sort of chain which would insure due course promotion, would give more protection against unlawful influence than anything else, because that trial judge who's sitting down there, even if he has tenure—what tenure gets him is three years of bad OERs if I think he's not voting for the government, that's what tenure gets him; you know, if you want to talk about true independence, what gives him tenure, is promotion in due course.

Col. MITCHELL. Is that the carrot that will attract people to the judiciary where now you'd see them not being attracted to the judiciary?

Brig. Gen. HANSEN. I think it may well help. I'll give you a personal experience. My predecessor as Staff Judge Advocate at Fort Dix got a below the zone promotion to 0–6 and went to the Army War College. The same thing happened to me, below the zone and going to the War College, and the Chief of PP&T said he had a lot of volunteers for my replacement. Now, Dix isn't exactly what you would normally consider a desirable tour, but for some reason, it was. Maybe that's a little silly, but I think due course would attract good people to start with, whereas I think there is some reluctance to enter the judiciary and the appellate courts as anything less than an 0–6.

Capt. BYRNE. General, as an alternative to that, what if we, for example, had flag and general officer billets say, on the Court of Military Appeals, that were not chargeable to the JAG list?

Brig. Gen. HANSEN. The Court of Military Appeals? Well, you have the problem with the Code that says they'll come from civil life, so——

Capt. BYRNE. Of course, we're reviewing the Code.

Brig. Gen. HANSEN. Yes. I think you'd have a lot of trouble selling Congress that. I think it would have the primary advantage of getting some true experience on how the system works at the Court of Military Appeals level. Now we are truly fortunate with the current chief judge, because as I'm sure you're aware of his background in military justice and the like. But that wasn't always true. Judge Fletcher, for example, came on with no appreciable background or understanding, and a lot of bad decisions could flow until those judges do understand our system. We are going to have a new judge sometime soon I guess on the Court of Military Appeals;

I don't know who he is or whether he has any background. But the appellate courts, or the appellate divisions, for the first year or year and a half, that's an educational process, not a legal argument process.

Capt. BYRNE. Isn't this a rather high level to have an educational process going on?

Brig. Gen. HANSEN. Well, it's—A part of the problem I think is that in the past, the retirement package for the Court of Military Appeals has not been very good, and I think there have been a lot of quality people who have been turned off by that, who might have come to the court with a broader background than some of those that we have. Frankly, I think we've got better judges on the Court of Military Appeals than the system deserves.

Col. MITCHELL. What do you mean by that?

Brig. Gen. HANSEN. Well, I think we've got some very fine people whose retirement package has not been commensurate with their abilities. In that sense, I think we've got better than we deserved considering what we have to offer.

Capt. BYRNE. But you're not really that familiar with the retirement package, right?

Brig. Gen. HANSEN. No. No, I—There have been so many proposals of potential retirement packages, that it's kind of hard to follow, and I'm not familiar with the current one with the Court of Claims. The only thing I can say is we need to get the very best package we can get so we'll attract the very best people we can get. Now, how you do that, I don't know, but that should be the bottom line.

Col. MITCHELL. Should the current members of the court be excluded from any new retirement package?

Brig. Gen. HANSEN. No, why? If we're successful, the good judges will—

Col. MITCHELL. It was just a question.

Brig. Gen. HANSEN. Sure. Okay, the second one I'd like to address just as a field staff judge advocate, and my clerk of court has been trying to suck out some data that might indicate one way or another, but I'm afraid we're not doing very well in terms of the data that we can get. But just as a staff judge advocate and as an appellate judge who sees some of the level of sentences that are coming in, I just have a real gut feeling that the BCD and a year proposal would suck off a good number of cases that are currently going to the general court-martial level; that that enhanced additional six months makes a pretty substantial increase. I think there may be some benefits to accuseds too. If you get a case in at the general court-martial level, where the potential is 32 years, his bargain is going to be higher than if it gets into a BCD where only one year is at risk. I think by increasing the potential of a BCD to a year, you are in fact tacking on another sentence limitation that can be of value to the soldier in the field, and will attract more staff judge advocates because, among other things, they get rid of the delay assorted with an Article 32 Investigation and some of the other preliminary steps that we currently practice under but will be changed.

Mr. HONIGMAN. But, General, isn't the converse also possible, that by exposing the fellow who is now facing a six month sentence to a year long sentence, you may be placing him in a worse bargaining position than he would be in if the jurisdiction remains the same? You may have shorter sentences for more onerous crimes, but longer sentences than was the case for the simpler offenses.

Brig. Gen. HANSEN. Yes. One of the statistics we're trying to pull out, and unfortunately it was one that we dropped a number of years ago, and that was before the BCD special incidentally, so you need to set that aside. But our median sentences for our special courts-martial were four months, so I think the chances of truly increasing that and putting more at risk are not all that great.

Mr. HONIGMAN. But, if you look at four months—if you say that well, now the sentencing authority, judge or jury, adopts a median of two-thirds of the maximum sentence, don't you face the risk that you're going to go up to eight months rather than staying at four?

Brig. Gen. HANSEN. That's certainly a potential, but I guess the point is if you could go up to six, which is really a nothing sentence, you know, if you could go up to six but you're not, you're only hitting him at the four, I wouldn't anticipate a direct proportion of sentence if the two-thirds that you posit—I wouldn't anticipate a two-thirds rise commensurate with the year. Regrettably, at least the Army data base does not currently seem to be capable of withdrawing from it how many cases in general courts-martial sentences are within the BCD and a year. I still have my clerk of court and our USAMSA people trying to suck that out, but I'm not confident we're going to get that. That would be the real illustration of how many general courts-martial you would anticipate being dropped into that lower figure. But there is a major difference, and I think this is still the law and that is, some of the veterans benefits depend upon whether it's a general court-martial or not a general court-martial; so that a BCD by a special court-martial permits them—I think that's true—permits them to offer some benefits under the Veterans Administration that a BCD adjudged by a general court-martial would not.

Mr. HONIGMAN. Should—I hadn't been aware of that. Can we get some member of the working commission, of the working group, to dig that information out for us?

Brig. Gen. HANSEN. I remember doing a paper on this back in '72 when I was at Michigan, and discussing this

point with the local Veterans Administration people in Michigan. I think that distinction is in there.

Capt. BYRNE. Would increasing the jurisdiction of a special court-martial cause under-referral; that is, cases that should go to GCMs to end up at special courts-martial? Do you think that may cause any difficulty?

Brig. Gen. HANSEN. I think that will take place because the staff judge advocate could move the case through his system faster at that level than he can at the general court-martial level.

Capt. BYRNE. The other thing is if we increased the jurisdiction to one year and at the same time we added on a requirement for an Article 32 and say, five days between service of charges and trial, and several other things that are different between the special court-martial and the general court-martial, would that change your view on whether or not you should increase the jurisdictional limits to one year?

Brig. Gen. HANSEN. Well, I think the value of a special court-martial at one year means you can try some of those cases you are currently running at the general court-martial level and, indeed, maybe cause some under-referral as well, without all the baubles and bangles that go with a general court-martial. If you are going to put those baubles and bangles back on, I think then you've detracted from its value in terms of the operating SJA.

Col. MITCHELL. What if you streamlined the Article 32 itself? Instead of increasing the jurisdictional limitations of a special court-martial, we eliminated the delay that is involved—and I suppose it's because of the rather expansive view that's been taken of the Article 32 investigation—and reduced it to something like—more akin perhaps to, as General Hodson suggested, a show cause hearing, or perhaps merely a documented gathering of the facts in the case?

Brig. Gen. HANSEN. Well, one of the things that I think you have to take into account when you're evaluating this, my argument on speedy resolution of cases at lower levels, is the difference at least between the Army and the Navy; I'm not sure about the Air Force. But as you know, within the Army, the BCD special can only be convened by the general court-martial convening authority, so in that sense the focus is the same; but the Navy I understand has commanders who convene that below and that, it seems to me, would be of even more value to them, to try the case and dispose of it further down the chain of command, than taking a general court-martial clear up the pipe to get a BCD and a year's confinement.

Mr. HONIGMAN. General, are there any changes in the nonjudicial punishment system that you would recommend which would also provide a more speedy resolution of cases on lower levels?

Brig. Gen. HANSEN. I'm glad you asked, although that is not a part of this.

Mr. HONIGMAN. You're entirely welcome.

Brig. Gen. HANSEN. I hope that other question I raised about the BCD special indeed comes out right; otherwise, I'm going to be very embarrassed. It's my belief in having seen over the years how we handle Article 15s, that we're making a terrible mistake in our processing of the Article 15s. The Article 15 should not be a part of either the judicial process or the administrative process. Some of the problems we've had is the fact that our line people, particularly our personnel pushers, want the whole-man concept viewed in terms of promotions and assignments, et cetera. Now, there's some value in that, but you do that by commenting on his derelictions in the officer efficiency report, or soldier efficiency report, rather than saying aha, I've got an Article 15. Somehow, that's magic. You do more damage to a guy by an Article 15, an officer dereliction of duty Article 15, than putting in his OER that this officer had been derelict in his performance of duty, and I don't think it's fair. I think the administrative concerns and utilizations of Article 15s can be handled elsewhere. Well, the bottom line of what I would do is go back at least to the Army position back in—certainly, 1959 when I came into the service. That was used to correct conduct, and if it corrected conduct, that should be the end of it. You don't utilize it in courts-martial; you don't use it in admin discharges. Now, the reason I think that's important is that we've made the Article 15 practically a judicial process, even though we call it nonjudicial, and that's wrong. I've had company commanders, line company commanders, in my staff judge advocate days, say to me look, I don't care what authority you give me as an Article 15, only if it's to call the guy in and say you've done wrong, but let it entirely be in my hands; no 48 hours for response; no right to demand trial; no intervention of defense counsel, and all of the bangles that over the years we have hung on that Article 15 tree. That's legitimate, I think it's correct; it performs a legitimate command function; that is, to change conduct. If it changes conduct, that ought to be the end of it and now we've got a productive soldier. If it doesn't change conduct, then we've got courts-martial, we've got administrative elimination actions where the commander can come in and, not with an Article 15 in his hand, say these are my notes on this soldier. He missed revielle. He may have given him an Article 15 for that. He sassed the First Sergeant, and he may have given him—but we don't talk about those. Now, the trade off is: Give the commander Article 15 powers unencumbered by anything outside the command chain, and then don't use it for any other functions or purposes.

Col. MITCHELL. How do you transfer that information back and forth between commands when the man is transferred?

Brig. Gen. HANSEN. Well, the old time one, at least in the Army, one of the last stops of that soldier when he left old Alpha Company was going to see the "First Shirt," and the "First Shirt" pulled out his nonjudicial punishment page and handed it to him. It did not transfer. That guy got a new lease on life. I'm prepared to give that up if we can streamline and move the nonjudicial process quickly, without any long term adverse consequences.

Col. MITCHELL. Let me go back to the '32 for a minute because I'm not really sure you answered my last question.

Brig. Gen. HANSEN. Okay.

Col. MITCHELL. Maybe you didn't want to.

Brig. Gen. HANSEN. There may be some of that.

Col. MITCHELL. General Hodson for example, and it's only one suggestion, suggested we take that Article 32 and streamline that son of a gun, and perhaps as he described it, into a show cause hearing and get away from the discovery notion of what a '32 is about, and thereby speed that process. If that were to come about, would you then need to have such a thing as an increase in the punishment authority of a special court-martial?

Brig. Gen. HANSEN. Well, all that does is help out the general court-martial. It doesn't do anything to or for the BCD special. Now, the only thing I can see positive in the approach that you suggest, if you make it applicable to a BCD special particularly, is that over the years as a staff judge advocate, the cases that turned to jelly the very worst were the BCD specials because there was no probable cause Article 32 to accompany it, and counsel, the defense counsel, were reluctant I gather, for whatever purposes, to bring the strength of their case forward. Indeed, except to come in and sit down and talk to me, there was no vehicle to formally provide alibi witnesses, or whatever else. Those cases tended to be the worst garbage cases of those, as opposed to a general court-martial where we did have that probable cause or discovery function taking place.

Col. MITCHELL. I was driving more at the objection that has been expressed to the complications involved in convening a general court-martial. In other words, the numbers don't appear to be that great to show any great savings by going to a one year special court-martial sentencing authority. But those who say it'll happen, claim it's going to be because we're going to have a simpler process. Well, if you speeded the '32, would you not then remove that objection, because if the '32 took 24 hours instead of nine weeks, wouldn't that affect that argument?

Brig. Gen. HANSEN. Well, it certainly would if you could design it that way. Every place I've been, I've always told the '32 Officer and indeed, even the division post camp station regulations say you'll complete this in 24 hours, and I don't think I've got one yet. Yeah, I think—well, there are two things, as I indicated earlier, two values I see to this. It opens up a greater range of dispositions at a lower level and indeed, as you know, the Manual says we should attempt to resolve criminal offenses at the lowest level adequate to dispose of the case. I think by increasing the BCD special court-martial to a year, and at least within the Army and within the other services, you'll still have that SJA involvement in it as opposed to a regular special where you may or may not. I think the protections can still be there. There are going to be some positive benefits both for the command and for the accused, and those seem to meet my three criteria of change.

Capt. BYRNE. One thing though, if you went to a special court-martial jurisdiction up to one year, you would have a problem or you'd have an argument anyway that where the accused elected members, that three members could sentence someone to one year. What do you think about that point of view? Is that a valid point of view for not going to one year?

Brig. Gen. HANSEN. One judge could sentence him to a year. I see no difference. Now, what you could get, you could get this problem and maybe that would be just—well, no. The automatic review by the Court of Military Review is based on a year or more of confinement. I was thinking that you could give him a year's confinement and no discharge, and avoid appellate review, but that wouldn't be true. You could get 11 months and 29 days without a Court of Military Review review.

The next one I'd like to address is the one of judge sentencing alone. Up to now, I may have appeared to be against all accuseds and I'm going to change my view here because I do not favor going to judge alone in peacetime. I think there is a real value to have judge alone sentencing in wartime. Those of you who've ever had the occasion to try to get all the participants of a court-martial together at one time—and at least in the past, the law made that pretty much of a jurisdictional question. Now, to get a defense counsel from a separate defense command, to get the local trial counsel, to get a judge from a separate judge channel, to get the three to five members of the court-martial, and all of the witnesses, not to forget the accused, together at one time in combat, sometimes it's magic to get everybody there at the same time. I think under those circumstances there is value to streamlining the system under circumstances where the judge alone could try the case and indeed sentence it, perhaps as we have in the current Manual, or

some proposals on the Code, under those areas where the Secretary or the President has designated it a hostile fire zone, or something like that.

Mr. HONIGMAN. So you're really not talking about wartime then, you're talking about a war zone.

Brig. Gen. HANSEN. Wartime or war zone, however we want to define it.

Mr. HONIGMAN. But wartime would include the rear echelons—

Brig. Gen. HANSEN. Oh, I see what you mean. No, that doesn't bother me in the rear echelons. War zone, in that sense is I think a good point and well taken.

Capt. BYRNE. But on that proposal, you'd still have the members there for findings, if the accused so elects.

Brig. Gen. HANSEN. Oh yes.

Capt. BYRNE. General, how would this—how much would this save? You'd still have to get the members together for findings.

Brig. Gen. HANSEN. I'd like to avoid the members in a war zone for the same reasons. That may present some Constitutional questions, but I think the same reasons truly apply. You know, the Vietnam experience, at least out in the field, was a rather unique one and the bangles that have been hung on the military justice system by the appellate courts, I think, worked only because we could move people by helicopter and with a fair degree of assurance that we were not going to be interfered with. If you read any of the books of discussions of combat operations in a projected European scenario, this structure is going to simply collapse. I think it would be well if you all haven't, to read through John Hackett's book, World War III, or Third World War, I'm not sure; he's written two of them, but it's the first one in which he talks about and leads you through a scenario in the early portions of a war in Europe. Try to ask yourself, based on your knowledge of the military justice procedures, participants, players, and the things that have to take place, whether or not you think those would work in the scenarios that he's articulating. I think there are certainly a substantial number, and I number myself as one of them, that do not think the Code will operate.

Mr. HONIGMAN. General, hasn't there recently been an Army study about the operations of the Code during periods of war?

Brig. Gen. HANSEN. Yes, there has.

Mr. HONIGMAN. Do they come to the same conclusions regarding a European conflict?

Brig. Gen. HANSEN. Well, they've suggested a number of changes which they think will obviate some of those problems. I think there are some others that might be made; why the Study Group did not include those, I'm not sure. But that was a very fine beginning and one that was long overdue.

Col. MITCHELL. But they assumed themselves out of the larger questions mainly because their focus was on wartime legislation and at that point in time, any major changes in the Code would cause more confusion than the changes themselves would be worth.

Brig. Gen. HANSEN. Oh, I agree with that.

Col. MITCHELL. Even assuming you could implement them physically.

Brig. Gen. HANSEN. I think some of those changes need to be in place and, you know, ready to operate should the need arise. Exactly what the Code Committee would do with some of those changes I'm not sure—proposals—Nor indeed, am I sure that they'll be coming out of The Judge Advocate General of the Army to the Code Committee for possible consideration, but there's much that needs to be done in that area; but your point has sort of got us off on this. I think you have the same problem if the soldier requests trial by jury but we have judge alone sentencing. You'd still have the same problem of getting the court members there as you would have if they stayed there for the trial. We do have some statistics here and I'll leave these with you. Indeed, Mister Chairman, I'll offer you—If you do come up with some statistics packages, we have a "jim dandy" new color plotter over in USALSA and we'd be glad to run off whatever charts you need to include in your file because they're very colorful now—provided we get a footnote that the AMO Officer of The Judge Advocate General produced it—but I'll leave these with you. The two that are particularly interesting in terms of sentencing—this little blob down here at the bottom which is Sentence by Members—Guilty Plea, so those are really the members sentencing cases. You can see that over the years from '77 to '83, surprisingly, they've remained rather constant. In other words, the number of cases where the accused has selected, those numbers of cases have remained relatively constant. Judge alone—Guilty Plea, in which the majority—and there may be some others stuck in there where they used the judge to—or the court to sentence, but very few—are fairly constant, and they are constantly increasing is the point. So at least within the Army, the increase in the number of cases that we've seen over the years has indeed been a shift to judge alone, so I think you could legitimately argue that you might want to legitimize what is taking place in the field by providing for judge alone sentencing. But at the same time, we see a fairly constant number of cases there, approximately 200 a year, of accuseds who preferred to put their trust and faith in the jury, and I don't think that option should be taken from them except in a war zone where other considerations take place. We have, over the years in the Army, done a number of court-martial sentencing seminars in which a roomful of military judges are given the same facts and

asked to provide a sentence. The uniformity that people claim will come about by judge alone sentencing just simply is not there. I'm confident that the disparity in sentences between the low judge and the high judge would probably be the same if you'd assembled the same number of panels of court members, gave them the same statistics and said okay, guys, have at it. At least as I read the literature, the major advantage deemed through judge alone sentencing is some sort of uniformity and, as I say, I really don't see that neither in our seminar organization where we talk about these, and sentences coming from the same judge on what looks like roughly the same sort of case.

Col. MITCHELL. General, isn't it sort of illogical though to assume that if one places his dollars on the concept of individualized sentencing, that we're somehow going to come out with a lot of consistency in the decisions?

Brig. Gen. HANSEN. Oh yes. I think you're starting with a bad premise; that is, that all the factors that go into a sentence can be put into a computer and they'll come out consistent, because they simply do not. You can take—to the extent that this is ever true—You can take the exact same crime, the exact same extenuation and mitigation, and one soldier stands before the judge and makes a wonderful witness, sincere, repentant and all the rest, and that guy is going to get off without a discharge. The next guy comes in with a bad attitude and he's going to the slammer.

Col. MITCHELL. So the whole concept really of consistency is kind of hogwash isn't it then?

Brig. Gen. HANSEN. I think it's not achievable.

Col. MITCHELL. I also know there are some plans around whereby cases are weighted with different factors and, where cases are weighted, it's based also upon an input from what judges in fact are doing, but all that really does is sort of reduce everything to the lowest common denominator; so that's not any better than flying off the handle. So, if I understand you correctly, we really ought not to be too awfully concerned about the matter of consistency of sentencing.

Brig. Gen. HANSEN. I think that's true.

Capt. BYRNE. General, let me ask you something. I've done a lot of reading on why the states went to judge alone sentencing. They said that the reason was that they get more consistent sentences. Now, talking about the way the Army operates, most of the time I'm sure you have one judge in one locality. Is that judge likely to be more consistent in his or her sentencing than say, if you had constant members—courts coming in and out in that locality?

Brig. Gen. HANSEN. That is probably true. If your sense of direction is more consistency. I'm not sure, even there, that you're going to get all that much consistency but to the extent you will, you will.

Capt. BYRNE. But from the one judge, you would?

Brig. Gen. HANSEN. Surely, sure. Most of our commands—I think this is true—will appoint a court for some definite time; not for each case, but for six months or whatever it is, so those cases—I think it's pretty clear. For example—and I did see this as a staff judge advocate—when you get a new court, the first guy that comes in and says, well I just bought this stolen tape recorder from a guy at the bus stop, that court may buy some of that; but about the third or fourth time they hear that story, their attitude changes.

Col. MITCHELL. In the Naval service though where the incidence of judge only trial is almost exclusive, aren't you not always dealing with an ignorant jury, even more so than the typical ignorant jury that the civilians talk about when they talk about a jury sentencing without—

Brig. Gen. HANSEN. Yours are almost all judge alone, you say?

Col. MITCHELL. What's the percentage? Isn't it about 78 to 82 percent or something like that?

Capt. BYRNE. It's rising.

Col. MITCHELL. It's gross.

Capt. BYRNE. I think that Chief Judge Price said it was up to close to 80 percent.

Brig. Gen. HANSEN. Well, I think that may reflect a perception on the part of your trial defense counsel that they're going to get a lighter sentence from Judge 'A' than they would be if they called a jury in.

Col. MITCHELL. The point is, of course, that the Navy juries then, being excluded from the vast majority of cases tried in the Navy, really don't have any feel for what's going on.

Brig. Gen. HANSEN. I agree with that, yes. You know, we're having the same problem and this is a broader problem than that, and that relates to the basic position of a commander or a line officer, and the whole system. Back in '59, for example, you had all jury cases, so that the commanders, who still have a very prominent role to play in the overall structure of military justice, they gained experience from their time as court members, from their time as counsel at special courts-martial, from their time in processing cases. And in the Army for example, we've got installations where the commander just takes the CID report to the SJA's office; he is then presented with a packet saying we think these are the crimes; he makes no legal analysis of what facts versus the crime. It goes through the process, ends up at judge alone trial, and we are now creating battalion and brigade commanders—certainly, battalion, and I think a lot of brigade commanders, and in time those commanders are going to be division commanders—with zero experi-

ence in military justice; yet, under the Code, they're called upon to perform a number of services within that system, and that's bad.

Col. MITCHELL. Isn't that same ignorance though, doesn't it become a whipsaw? The accused and his lawyer sitting back there saying, aha, this judge without—and I'm going to assume appropriateness on the part of the military judge here and the sentence—I'm looking at this appropriate sentencing military judge, but I don't like the way he views appropriateness and I know I've got this not only institutionally ignorant, but now stupid because of the lack of experience, members court that I can get to sit on my case, and I'm going to opt for that because I'm going to walk out of that court with nothing.

Brig. Gen. HANSEN. Well, I think that's likely. Here's the problem that I see if you remove the option of the accused to request jurors. Currently, I think we have a lot of judges—you know, a contested jury trial case is hard work. A lot of instructions have to be prepared; everybody has to be on his toes to handle objections and that. I think we have a lot of judges who give the accused a break in order to encourage judge alone trials. As long as they come out with reasonable sentences that the defense can tolerate, they're going to request judge alone trials, both trials and sentences. When that level begins to become what counsel think is unduly harsh, you see a shift to jurors—well, we'll try it; it can't be any worse than old Hanging Harry down here. Now, if you make sentencing solely a judge responsibility, then that limitation is gone. Accused, you've got me, *ipse dixit;* you can't ask for a jury; I'll give you what I want to.

Mr. RIPPLE. General, has the Army kept any statistics which indicate the type of charged offense where the accused does ask for a jury as opposed to a military judge alone?

Brig. Gen. HANSEN. We have that data in our data bank, but because of some very special problems with our computer, the people over in the Pentagon are not sure we can get that out, but it's in there. We can bounce off the kinds of crimes that are tried by judge alone if we could get it out of there.

Mr. RIPPLE. In your own experience, do you have any feel for the situation? Do you, in effect, find that more of your AWOL offenses or perhaps your run of the mill desertion offenses are military judge alone, while your more—those crimes more analogous to the civilian common law types would in fact be tried—contested and tried before a military jury?

Brig. Gen. HANSEN. My feeling is that the military offenses are tried by judge alone, and although I don't have the statistics, I'll provide them 'cause I think we do have these; we have statistics on the comparison of the number of cases—the percentage which are being tried by judge alone. Some of that will come out of that data there.

Mr. RIPPLE. May I suggest something and just get your reaction to it? The Colonel indicates that the Naval service has a very high degree of military judge alone cases and in the Army it's somewhat less. Could it possibly be that you're using the military justice system differently? Is it perhaps because more people are tried for—The Naval services are disposing of smaller AWOLs and things of that nature by courts-martial as opposed to the administrative route; therefore, using the military justice system more and, in effect, using those with judge alone as a one-man admin board in the court-martial context?

Brig. Gen. HANSEN. Yes, my impression, again without any statistics, is that we are doing relatively few military offense cases now. I don't know what the—I think the Navy really has a problem; you know, to send a guy out to sea for a year or however long those battleships have been off Lebanon, that's a problem. The Marines I think have the same problem; you know, you uproot a bunch of kids and send them off to Okinawa for whatever the tour is. I think those generate military type offenses, the AWOLs, the disobedience, the disrespect and those sorts of things. We've seen a real decline in those since the Vietnam era.

Mr. RIPPLE. To have those with a military jury and everything else, slows down the entire process; it's very costly; it creates all sorts of headaches for the command. While on the other hand, the Army commander who's sending a common law crime to a court is less encumbered by the fact that he's going to have a real criminal law case on his hands for a while with a jury and everything.

Brig. Gen. HANSEN. I think there's a different reaction both among commanders and jurors, functioning as jurors, between larceny and the military offenses. Military offenses obviously strike to to the core and heart of discipline which is their reason for being. I think that's probably why we see—or my impression is that more of those cases are tried by judge alone than with members.

Col. MITCHELL. I'd like to come back to this whipsaw business because it's an argument offered—I want to make sure that I understand your previous answer a little more clearly. I don't want to postulate the problem of which is going to result in the lighter sentence. What I'm dealing with is a question of whether or not the whipsaw is going to result in a disproportionately light sentence. In other words, we assume in the question that the military judge is giving an appropriate sentence and we've got the ignorant court hanging out here with virtually no experience in matters of military justice. We know that often these juries are picked from the most

available rather than the best suited personnel, so the defense counsel looks at this sort of thing and says I can beat this appropriately sentencing judge if I get this ignorant court over here, and then the judge who says wait a minute, if I'm going to have judge only trials and ride my economic horse off into the sunset like I should, then I've got to get down inside these awkward sentencing folks. Don't we start on just kind of a tail chase to see who can get to the lowest sentence first? And if so, is this option then, without any real viable chance for command to challenge the option, a good idea?

Brig. Gen. HANSEN. Yes, I think there's a potential for that to happen. I get that message from our circuit court conferences when we're talking over a beer as opposed to talking formally, that some of the judges do that. They have a very expansive docket and trial by judge alone is an economical way to move that docket. I think there is some real value to the command if you can move 20 cases judge alone, either guilty or not guilty, there is still a savings of time, as opposed to in the same time only being able to move six or seven ones with court members; that's of value to the command. It disposes of the case; it gets people back to work; you can send, for example, at a training center, you can send the trainees off to their units of assignment without having to hold them around, because a trainee who's held at a training center becomes a court-martial problem, probably nine out of ten times. But, what you postulate is certainly possible. I think the more accurate thing, if I read my judges—and then the trial defense counsel also belong to me and I attend a lot of their meetings—what they're looking at is not usually a, can I slip this guy through with no sentence sort of; that is, how far can I drive the system down. They are looking at appropriateness of sentence, and if they've got a judge that they think is simply coming down with sentences which are inappropriate, they'll look to jurors. I think that's the usual scenario, and if you take away that alternative, I think then the judge has truly got carte blanche.

Col. MITCHELL. If we increased, in the statute, the punishment authority of NJP of commanding officers so that the Navy and Marine Corps and perhaps even the Coast Guard, who have a greater need for discipline—so their commanders could dispose of these kinds of cases much more quickly and perhaps effectively. Do you see that program as being sort of a good idea as far as getting the system unchoked, so that the impact of the jury sentencing business is not really as great as it appears to be now?

Brig. Gen. HANSEN. Well, as I said earlier, my view is we've got to break the linkage between nonjudicial punishment and the court-martial administrative process. Every time we get in trouble it's because we try to utilize a procedure which I call conduct changing—we try to utilize that for some other purpose, and that's when we get in trouble. And if we're going to—and I think this is a legitimate argument—if we're going to use it for enhancing punishment in a court-martial, or if we're going to use it for other personnel actions of detriment to a soldier, then we're going to hang more baubles on it to make sure that the beginning action is protected. If you cut off all of the tail uses of this, I think we can legitimately say all right then, we can cut off some of the baubles and we can make it what it's supposed to be, a commander's tool to change immediate conduct. Lord knows, if you've been out in the field and talked to soldiers, the company commander calls him in and says John, I'm going to give you an Article 15 for failure to repair. If he could give it right now, that soldier would take it and be gone. But he says, now you get 72 hours to decide whether you want trial by court-martial and you get to talk to a lawyer. He goes back to the barracks and within 10 hours he's convinced himself that he really didn't fail to repair at all; and when that Article 15 is over, you've still got a dissatisfied soldier. If ever there's any truthfulness to the proposition that crime and conduct is deterred by immediate, swift and appropriate action, the Article 15 is a good illustration of that; but then, when we start using it for other things, that's when we get in trouble. You know, the Army really shot itself in the foot. We had, back in the '68, '69 time frame, a provision in our Article 15 regulation that said the imposing commander could put it in the personnel side of the house—of his file—which meant the promotion boards got to see it, or he could put it in the restricted side; that is, promotion boards did not get to see it when they made the decision—this particular officer has become so bad. So along comes the Sergeant Major of the Army who got in trouble with the First Infantry Division in some club things, and they looked at his restricted fiche and they said, my God, he's got eight Article 15s. He'd have never been the Sergeant Major of the Army—he'd never been in trouble—if we'd only known. And we had the problem, I think this is true, with the Provost Marshal General at that time. And so what did they do? All of those that were in the restricted fiche were pulled back and put into the performance fiche. Yet that was not the intent of the commander at the time he imposed that Article 15. So what did we have happening? Well, there was a provision in the Manual that said a commander may later set it aside. So here is a young Lieutenant who got an Article 15 for failure to adequately secure ammunition and properly so, and they gave him a ten dollar fine, and that's probably all it was worth. Now, he's a Major coming up before the board, and here's that Article 15 back in there. He may have been an exemplary soldier or officer in between times. The commander wanted to change conduct of that Lieu-

tenant and now, where the promotion rate to Major is 30 percent, that's an obvious discriminator, no matter whether he was a water-walker in between or not. But those are some of the illustrations of how we shoot ourselves in the foot by making the Article 15 process something that it never was designed to be and never should be utilized—My personal view is, particularly at the training centers because we used to draw kids there at Fort Dix who nobody ever told them no, and truly meant it. You know, Mom said "Son, don't stay out 'till midnite" and he did. What happened? Nothing. So they approach military service in the same way—I do what I want; I'm my own boss. And we get there and if we give him an Article 15 and take thirty bucks, put him on restriction for 30 days—as a matter of fact, my view is young soldiers view the 30 days restriction worse than the thirty dollar fine. That's the first start of making him into a disciplined soldier; that there are rules and you obey them; if you don't, there are consequences. And you do it without ruining his potential for further service. I feel very strongly about—and let me push one on to you, because I think it's important. In the Army, you know, the Laird Memorandum which was passed a number of years ago—you've got to have lawyers; you've got to have 72 hours; you can have a spokesman, and remember all those bangles that hung on it? We got an exception to cut that out for what we called our summarized Article 15. Anytime a commander wanted to give a guy an Article 15 and would not punish him more than 14 days restriction and 14 days extra duty, cut out all those bangles. They said okay, let's try it and see how it's working. We had a shift of a whole lot of those rascals into summarized Article 15s. They could still demand trial—I think we've had two demands for trial in over three years. We've had a few appeals, very few; yet, here's a process and we can't use it for anything. Here's an illustration of how a process can work to change conduct and the commanders love it. This is their tool. Yet, what did we as JAGs do? Instead of having a little unit punishment book like we used to have, we've got forms—you have to fill these forms out. Now, we've got records; it's dumb.

Capt. STEINBACH. General, the question I want to ask is, with the records that you seem to have in the Army today, do even these summarized Article 15s wind up in that two-sided file?

Brig. Gen. HANSEN. Nope. Nope, they stay at the local command and that's it.

Capt. STEINBACH. The ones that get the full-blown treatment, that get in the record, are the ones that I'm going to address next. The original legislation had a provision where the Article 15 would be kept away from the Board of Corrections process and services just as the court-martial records are now with the enactment of the Jepsen Bill. In the Army, have you seen many cases where the Board of Correction of Records is relitigating the Article 15s?

Brig. Gen. HANSEN. I've no experience with them; I'm out of that business now.

Col. HEMINGWAY. General, before we conclude, you mentioned when you were talking about the promotion of judges, a system similar to the faculty assigned at West Point. Are you talking about the permanent professors who are Presidential appointments, who automatically become Colonels; or are you talking about a system that the Army has for the regular faculty members there?

Brig. Gen. HANSEN. I don't know the distinction you're drawing because I'm not familiar with it. I do know that those who are permanent faculty members, they draw by statute due course promotions; that is, when their year group is promoted to 0–5 or 0–6, they're promoted.

Col. HEMINGWAY. So you're talking the permanent professors?

Brig. Gen. HANSEN. Yes.

Col. HEMINGWAY. All right, understand.

Mr. STERRITT. I have one question. Maybe you've answered this and I misunderstood it. If trial by members is retained for the purposes of findings, what is the logistic problem that exists with respect to keeping them at the scene for the sentencing hearing.

Brig. Gen. HANSEN. None. I think it would be—and my concern is that in combat, I think it would be advisable, and I don't know what the constitutional implications of it might be, but I think in combat it would be advisable to remove them from findings if possible too, for the same reasons.

Mr. RIPPLE. General, could you very briefly give us an idea of what kind of continuing education your trial and appellate judges have opportunities for, especially what type of inter-reaction they have with members of the civilian judiciary?

Brig. Gen. HANSEN. Well, first of all, in the two years I've been there, the judges simply find whatever courses they want, and we generally send them to them. The two that we use most frequently for our trial judges are the programs out in Reno. We try to schedule our judges for those as a routine matter. If they find something else, they can go to that.

Mr. RIPPLE. General, are they in class with the civilian judges when they're out there?

Brig. Gen. HANSEN. Yes. For our appellate judges—and I don't recall now who the sponsoring agency is, but it's one of the big CLE organizations that has programs for appellate judges which, among other things, before you go you send them copies of a bunch of your opinions and they criticize them or critique them along

with the civilian judges that are part of those programs. And those are very fine, both of those

Mr. HONIGMAN. General, could you tell us your thoughts about the possibility of going to a random selection of jury members, either for findings and/or for sentencing purposes?

Brig. Gen. HANSEN. I think that's a very cumbersome process, although we have some aspects of it now. I think the standard process is the staff judge advocate will go to the major commands being supported and say give me a roster of two Colonels, six—et cetera, or however many they work out, and then those are taken into the commander, this roster or list, and he selects those members. Now, the random selection I think was certainly less important under the current law—I mean, my objections to it were more under the current law, when an absent member became a jurisdictional question; if you couldn't find him and couldn't find the old man, everyone sat on their heinies until one of those things showed up, and when you're having trouble getting everyone together, that's a problem. The ability now of the military judge to say we're going right on ahead even though Colonel Smith isn't here, that somewhat distracts from that interest. But, I do know that over the years when I've taken this list into the commander, there are some real proper considerations that are going into the selection. Jones can't do it because the Third Brigade has got its ARTEP during that month and arguably, he could pop up on a random selection. Smith is a two time pass over and I don't care whether he's been made available to the command or not, he's not going to sit on my cases. Those sorts of things go into commanders' concerns as they go through, you know, a potential jury pool for selection of members. I think the blue ribbon jury system we have, to the extent juries can come out with the very best product, works extremely well.

Col. HEMINGWAY. We need to take a break now. Is there anything else, General, that—

Brig. Gen. HANSEN. No, I think I've talked longer than I should have, and maybe more than I should have after my boss reads my testimony.

Col. HEMINGWAY. Thank you very much.

Brig. Gen. HANSEN. Thank you very much for the opportunity.

STATEMENT OF COLONEL JAMES G. GARNER

Given to the Military Justice Act of 1983 Advisory Commission on 8 June 1984 at Washington, D.C.

Col. HEMINGWAY. If you could for the record, please state your name, your rank and your position.

Col. GARNER. I'm Colonel James Gayle Garner. I am the Chief Trial Judge for the U. S. Army Trial Judiciary, or you might rephrase my title as Chief of the U. S. Army Trial Judiciary. Basically, I run the Army Judiciary at the trial level, and I'll talk about that a little bit later.

Before we begin, I asked Gary Casida about the format and he indicated that it was somewhat different, but I do have a few things that I would like to say concerning judge alone sentencing at the outset. I realize that you have your questions, but I do have a particular point of view that I'd like to express.

First of all, did any of you happen to be present at the Homer Ferguson Conference recently?

(Captain Steinbach made an affirmative response.)

Did you happen to hear my presentation at that time? If so, I ask you to bear with me because some of the things I'm going to say were reflected in that talk, although it was not prepared for the purpose of the subject that's addressed here. It was prepared strictly to discuss sentencing as a whole, and I've asked Gary, although we have not punctuated it and made it grammatical, to take the narrative that I used and run it off on the IBM machine, and put it in your file for your consideration. I did put a great deal of work into it, and I ask you to take a look at the bibliography concerning the basic sources there, and some of my research there combined with my experience, both as a staff judge advocate and as a judge, is the basis of the opinion that I'm going to give you today.

Now, I frankly intended to give you basically my opinion and not really give you too much statistical studies, although I have asked Gary, and I know Gary has placed some of the charts that I prepared in your record too, but on some of your questions, I might readdress very briefly some statistical matter because it does bear upon it.

First of all, in talking about sentencing, as I said before, the sentencing decision is about the hardest one that a judge, or members of the court, or the jury has to make. There are two major considerations that run head-on in sentencing. We want equal justice and relative uniformity in dealing with people who come before the bar of justice. Opposing this, is our concept that has been reiterated and reiterated by the Court of Military Appeals of individualized sentencing; so when you run those concepts together, there's going to be a conflict and a problem in working it out, and that's what makes the sentencing decision so hard today.

We know that in the civilian world, as I said, during the past 14 years there has been a great move towards various, what have been called reform movements. We all know that they've taken several forms. We know that through the years they've taken most sentencing away from juries in the states; a small minority, about eight states, still do jury sentencing in non-capital cases. The

rest of the states have gone to judge alone sentencing in non-capital cases. They did it for a number of reasons. The first reason that I've seen in most of the writings, including the military sphere going way back, and in the civilian world, was that jurors are often uneducated. They weren't trained to make this type of decision; they weren't trained in the concept of what are the objectives of sentencing. So for that reason and secondly, they said the trained judge will come up with a more consistent, less disparate sentence. But, I think all of you who've read any of the studies—and just like this morning, I spent two hours in a sentencing seminar with a group of about 40 people, some of whom were civilian judges, who were reservists, many of whom had been judges before, and some were just beginning to be judges. Any problem we dealt with, we did not find any real consistency, there were always ups, highs and lows. You're all familiar with the study in the Federal district courts in the northeast, wherein they gave 20 problems, very detailed, to these judges and you know the disparity that came out; so when we really come down to point of fact, we are never going to achieve uniformity unless we take a Procrustean approach; that is, cut off their heads or their feet to make them short enough, or stretch them on a rack to make them long enough. In other words, I'm saying that I'm not sure that uniformity is the goal. I think what we're seeking—because disparity, if it's for a reason, we'd call it individualized sentencing. Let's face it; that's true. So, for that reason—I'm getting off the subject but, basically, judge sentencing has come under a lot of criticism in the civilian world. I outlined in my speech 12 reforms and all of them are designed to do two things basically as far as judge sentencing is concerned; one, it tended to make them a little heavier because the perception among law and order types was that judges were too lenient and letting the criminals out. Secondly, if they didn't restrict their discretion, they took it away from them and shifted it to parole boards or other bodies. At the same time, there were certain movements to restrict the discretion of the parole board. All of you know about the guidelines put out by the United States Parole Commission wherein, literally, the federal judge in most cases decides—it's oversimplifying—whether or not a man goes to jail. How long he stays there, the Parole Commission decides almost automatically, using their matrix—that being a popular word today, I've got to use it—their matrix, putting in the elements that categorize the offense and categorize the offender and, lo and behold, that's what he's going to serve. So, it's a little ironic that we are now looking at the question of should we do it; should we go to judge alone sentencing, and that was the subject I wanted to address.

Out front, let me say this. I do not believe we should go to judge alone sentencing, and let me tell you the reasons why. If our motivation is to wipe out disparity or inconsistency, it's not going to do it. It is simply not going to do it. I've sat through too many sentencing seminars, both with civilian groups and military groups, and it does not work. You've read the literature, I don't need to tell you, it doesn't work so, as a goal I think we have to throw that out in the beginning. Secondly, I believe that a lot of the criticism that's leveled toward military court members—Now, let me make a distinction. We have a habit, and I do it too, of loosely referring to a court-martial panel as the jury. I want to make it absolutely clear, it is not a jury; it was never designed to be a jury. And your random selection question, that is the reason that we do not have random selection. I'll talk about that later if you'd like me to come back to it.

Mr. HONIGMAN. I'd appreciate it.

Col. GARNER. Yes?

Mr. STERRITT. What do you mean, it was never designed to be a jury?

Col. GARNER. Okay, in this sense: If you will look at the case law and in the Manual, it was designed to be a blue ribbon panel. They were to be picked because of their expertise and their knowledge. They wanted to pick the people who were mature; the people who knew how to make decisions; the people who were aware of the military requirements. I won't quote the Manual to you, but there's a formula in there about how you pick court members. You pick the guy who can make—who knows. He's more like the traditional 12 men good and true that you pick out of the neighborhood, who can listen to everything because they represent the decision-making level in the Army. In other words, they were more than a juror off the street. In a sense, we educate them. We teach them decision-making; we teach them something about military justice; they know the situation in the Army. They're a military panel picked for their expertise in things military and in making decisions, and understanding the requirements of the military.

Now we in the Army, and in the other services too, have done a great deal through the years to educate our officers. Captain Byrne knows that this week at the JAG School, there were about 75 commanders sitting in the classroom next to his, going through what we call the Senior Officers Legal Orientation Course this week. Next week, we'll have a couple of Generals in there in what we call the General Officers Legal Orientation Course. We brainwash those people. We do the Marine trick; we run their bottoms off to show—to make ourselves credible. It's to show them that not only are we—We're soldiers as well as lawyers, and we really brainwash them in what military justice is all about; in fact, we imbue them so thoroughly in the concepts of reason-

able doubt and fundamental fairness, and due process, it's amazing. I am not cynical at all about military court members because they are truly, in my opinion and having sat with them in—I don't know—several hundred cases, as a general rule they impress me with the fact that they're not, as we tend to say—they are not really ignorant. The problem happens that sometimes commanders do not pick what they think are the best men; they pick the people that are most available. Sometimes they are not the best decision-makers; sometimes they almost—But, the point is, I've rarely seen a convening authority—and if I may lay on the record a point with Captain Byrne. Before I became a judge, I had been a staff judge advocate to 16 general courts-martial convening authorities, perhaps more than any other Colonel sitting today in the Army. I did not find that they picked court members for the wrong reasons, and I had a couple of mean old SOBs, I'm serious, who would bitch about sentences and things; but they did not pack those courts. They didn't pack the court as the perception is among critics of the military, particularly from the civilian sphere. So that's—First of all, I would like to keep those officers in the system. There are other reasons.

First of all, in 1968, we passed the Justice Act and one of the things we did was that we took the warrant officer out of the role of trial and defense counsel. We had a lawyer trial counsel, a lawyer defense counsel and, for the first time, a lawyer judge. Special court-martial convening authorities, when I would call them and say why had not the case moved forward, or why they'd not done something in the processing of the case, the answer was they'd say you lawyers got it; it's up there in your office. They kind of washed their hands; it became a we-they proposition in a sense. They kind of washed their hands; they felt like it was no longer their court. So, I do not want to take courts-martial away from members, both enlisted or military out of the courtroom as a fact-finder helping to decide what's going to happen. I don't want that we-they syndrome to begin. I'm concerned that, not because there's anything wrong with the military, or military officers, but I'm concerned but I'm concerned that if we went to judge alone sentencing, we would find some segments both in and out of uniform to blame most disciplinary ills on the lenient military judge who did not give out the right kind of sentence. Now, this is not to say that I'm concerned about criticism of commanders of military judges. My judges frankly, if I hear a little complaint now and then about what they're doing, I know that they're exercising their independence; but, number one, we do get complaints because people are human. But when we talk about independence, let me get back to that question of handling complaints. Number one, I don't want the we-they syndrome to happen. I don't want military judges to be blamed for the disciplinary ills. I want to keep both sides in there. As a military judge, and I said at the Homer Ferguson, I find it extremely useful to sit with members, particularly a whole variety of members over a period of months. I learn a lot about what they as representatives of the military community view as being serious and not serious. I like to see their sentences because it helps me in my sentencing process. What they do is input into my—They tend to level what I do. I'd like to keep them in there.

I think that the answer, if there is an answer keeping them in the system, I think the answer is that we must perhaps do a better job of designing realistic instructions setting forth what are desirable sentencing objectives, get them approved by the court so we don't get reverses, so that we can really give them a more meaningful framework in understanding what are the desirable goals of sentencing. We instruct them on the aggravating circumstances, the mitigating circumstances, we tell them about the maximum, we do all these things about the procedure; but the real heart of what we need is not there. The only good thing we tell them is at the end; you've got to fashion a sentence that best satisfies the needs of good order and discipline, the needs of the accused, and the needs of society. We mention general deterrence is a consideration et cetera, and we tailor a few things, but I think maybe meaningful instructions on sentencing objectives perhaps is a thing that we might look at to better educate our court members. Now today, there is an anomaly, of course, between judge alone sentencing and the military court members doing the sentencing. We cannot instruct them, and actually we probably should not, on the administrative consequences of the sentence they adjudge; the case law is fairly clear. The case law is not so clear as to whether or not a judge can consider that, but being human and not being able to look inside our head, we know that they probably do. I, as the Chief Judge of my service, spend a great deal of time educating my judges so that they understand the full system, the good time system; what goes on at the disciplinary barracks; what goes on here. We do educate them. I had a project last year that one of my judges stationed in Kansas went to the correctional activity at Riley, the disciplinary barracks, and he wrote a lengthy paper on the administrative consequences of court-martial sentences, and the current criteria for shipment to those installations. We sent it to all of the judges as part of their educational process, and later I would like to talk about how we educate the judges. So I think they should stay in there. They help me; they continually remind us somewhat of what the community standard should be. Now, maybe they surprise us at times and actually do surprise us. My impression is that most times, and this is interesting, there is a little more leniency among court members, even the quote hardnosed com-

manders, close quote, at least in the Army; I can only speak for the Army. But the point is that I think that the perception of fairness generated by giving the accused the opportunity, and I think it's more than perception, it is fundamentally fair, of having his choice of sentencing authority is a system that we should keep; it works.

Somewhere in your literature, Mister Fulton, the Clerk of Court for the Army Court of Military Review, has prepared a spread-sheet—Major Casida, did you put that in?

Maj. CASIDA. Yes, Sir.

Col. GARNER.—giving you some statistics showing judge alone sentencing, showing you sentencing with court members, all officers and with one-third enlisted personnel. It's fascinating to see there's a fair consistency in that chart. They don't do a bad job. Sure, you get highs and lows, both from judges and members of the court, but human beings are running the system so you're going to get the highs and lows. But courts don't have much—and judges—don't have much problem in dealing with good old common law felonies, particularly where there's violence or a large amount of money is involved, or there's injury to an individual victim. In that broad spectrum, the sentences run fairly reasonably. There's a study which exists, run in 1947, of the median sentences or the average sentences that remained after clemency action by the Secretary of the Army in World War II offenses, and you'd kind of be astounded when you looked at that study because the sentences for offenses is fairly comparable to the sentences shown in the DB today; there's not that big of a discrepancy. The problem comes, and as you asked earlier, in military type offenses, small quantity drug cases, cases involving improper socialization among those of disparate rank which caused detriment to good order and discipline, sometimes called fraternization. Those are the things that cause everybody trouble. So I see no great movement coming down the pike saying we need to change our sentencing pattern. I don't want to see us in the posture of the civilian world where we restrict the discretion, where we have restrictive sentencing guidelines, or have a middle of the road thing. There is another reason. General Eisenhower, testifying about the '51 Uniform Code of Military Justice, said he wanted to keep in there the ability of a commander to knock out the sentence completely for a man that he might need. Because of the penal code of society, I think we do need fairly broad discretion and, again, setting aside those anomalies that are going to occur, I contend that the system is working pretty good, so I'm for keeping our current system and I please commend to you the reading of my remarks, not because of pride of authorship, but because I did put in a bit of time and it deals with the subject.

You raised the question earlier about percentages in the Army on guilty pleas in trials by judge alone; let me just quickly tell you what they are for Fiscal Year 1983. You have a chart that Major Casida has put in for you which shows the average for every fiscal year from 1977 through 1983. Basically, in 1983, fiscal year that is, in the Army, 67.4 percent of the general courts-martial were tried by judge alone; 74.3 percent of the special courts-martial capable of adjudging a BCD and, of course, we try the non-BCD specials and of those, 68.9 percent were tried by judge alone. Before I go to the next point, one thing I said at that—Back in '68 when we came to sentencing by judge alone when requested by the accused, the only reason that they put forth in the legislative history, and I quoted it in my talk, was to save time, to save the time of court members and secondly, they thought that this would happen because they thought the vast majority of guilty plea cases would be tried by judge alone. That's almost a quote out of the legislative history, and it's worked out in practice. That chart will show you the cycle, but in '83 in the Army, of the total guilty plea cases, total guilty plea cases, 77.9 percent of those cases were tried by judge alone; BCD specials, 84.6 percent of those were tried by judge alone, and 82.9 percent of the regular specials were tried by judge alone. I must say that I must disagree with my boss, General Hansen, on one point. He mentioned the concern that perhaps there were judges who would cut the sentence down so they would avoid giving instructions and trying jury cases. I respectfully disagree with him on that. I'm sure that we have had judges who did that occasionally, but on the average—and I keep a pretty close tab on the Army Judiciary and I see them; I go through the Army and I look to see what they are doing. The average Army judge would not do that because the average Army judge loves to try cases and right now the case load is not so heavy that he's really got to do that. Sometimes they complain about being underemployed these days because the case load is down; it's considerably down.

But let me give you my rationale, and I tried it out this morning, and I've tried it out on about six different groups. I tried it on a group of our regional defense counsel in the Army Trial Defense Service; I've addressed every conference of theirs in the last three years; I've talked to these counsel. This is my rationale for it, or maybe you don't want to hear that. Are you interested in why we think that most of the judge alone cases are guilty plea judge alone? Let me give you what the average Army defense counsel—that's what his regional leaders tell me is their thinking. They get a case and the first thing they do as a good lawyer is they sit down and figure out what this case is worth. In other words, what is my best shot with this particular client. If it's a dog,

that is, he knows the guy is going to spend big time and probably get a discharge, the first thing he's going to do is he's going to trot—and there is no evidentiary issue that he can fight and he can see that it's a real loser and the sentence is going to be bad, he'll trot in to the convening authority and make the best possible pretrial agreement that he can. Then he will look at the case and if it's a sympathetic case that court members might be sympathetic to, he'll go with the members to try to beat the pretrial agreement. But if it's not really a sympathetic case for members, he will ask for trial by judge alone. When he does that, the judge is probably going to give him a fairly severe sentence; he's generally going to give him a discharge. I've got a chart that Major Casida has put into your file there comparing for generals, BCD specials and specials in the guilty plea cases, how frequently a discharge is adjudged by members and how frequently by judges. Now, I caution you the two bars don't really compare because you know, it's the same cases; you just have to say that so many discharges and so many were guilty pleas. The many more guilty pleas than—It runs just a little bit higher than the number of guilty pleas in the discharges; whereas members in the guilty plea cases, the bar is about half for guilty pleas and the rest for discharges. So, basically, I think that's the answer. I don't think it's because judges are more lenient. The statistics don't bear it out; in fact, The Advocate, the Army defense publication that you may have read, has periodically published these charts with a little advice saying you guys had better think twice before you go with a judge. Look there, the percentages show that you're much more likely to get a discharge; you're much more likely to get confinement, and it's likely to be longer. So it's not, in my opinion, the statistics. The defense arm doesn't think it's because the judge is more lenient. They keep saying defense counsel, maybe you ought to look at it twice and ask for members.

(Addressing Mr. Honigman) Yes, Sir?

Mr. HONIGMAN. Colonel, I'm just wondering if we could go back for a moment to the concept of participation of members of the community in adjudging guilt or innocence, or reaching a sentence and expressing the community sentiment?

Col. GARNER. Certainly.

Mr. HONIGMAN. Would you favor increasing the number of enlisted persons as members of military juries above the one-third limit, or would you favor having a mandatory one-third of the members be enlisted personnel when the defendant was an enlisted person?

Col. GARNER. Let me say this: First of all, I would not make it mandatory, and I would do that based back on my years as a defense counsel. You do not always want enlisted personnel on that court.

Mr. HONIGMAN. I'm well aware of the reasons why you make that judgment.

Col. GARNER. Okay, so frankly and, again, because of the idea of wanting to be ultimately fair to the accused, no, I would not make it mandatory to have enlisted people on the court. As far as the one-third percentage, I'm not sure that there's any magic to the one-third figure. I would not object to say, half and half.

Mr. HONIGMAN. I'm thinking more along the line of increasing participation and sharing in the experience on the part of the jurors.

Col. GARNER. I don't really see any problem. Some interesting things happen when you have enlisted personnel on courts. Years ago, and you've probably heard people say, maybe in these hearings, that when they ask for enlisted people, the convening authority will appoint all Sergeants Major and——

Mr. HONIGMAN. The crustiest Chief he could find.

Col. GARNER. But that's not entirely true. Let me tell you a brief war story to illustrate that that's not always true. I sat on a general court-martial involving an assault in Darmstadt about three years ago. They asked for enlisted members on the court and the convening authority appointed five officers and four enlisted people to the court. The ranks of the enlisted people ranked from Sergeant E-5 down to PFC, and this has nothing to do with it, but I think it's kind of cute. The defense counsel voir dired the court and he said Gentlemen of the court, has there been any of you, or any member of your family, or any person close to you ever involved in an assault, and a Spec 4—that's an E-4—raised his hand. Counsel said well, I'll voir dire you individually, and he did. He excused the members and a little later got the young man back in there and said you held your hand up when I asked about involvement in an assault case, please explain to us what that was. He said well, I was charged with it three times, but I beat it twice. Obviously, the commander didn't hand-pick him. The point is that it just illustrates the fact that they do not always, in the Army—they're getting away from that to some extent. SJAs are telling their convening authorities not to do that; not to exclude second lieutenants or warrant officers, but to get a cross-section; so they're doing a little better job of getting a cross-section of the community, but not screening them very well I might say.

Col. MITCHELL. Colonel, do you consider your observation about the quality of members being appointed to these courts to be a critical thing and, if so, do you have any recommendations for action which might rectify the situation; or is this primarily an internal service problem?

Col. GARNER. Now, when you say critical, in what sense critical?

Col. MITCHELL. In the sense that what appears to be a significant, without necessarily the same overbearing

concern about the quality of sentencing by military juries. If you could tighten the quality of members being appointed in some way to assure that the commander was putting on his best people, as opposed to the most available, or whoever he happened to grab in the hallway. What sort of corrective measure would you recommend to deal with the situation?

Col. GARNER. Well, I can only address your question in this fashion: It's up to our staff judge advocates to educate their convening authorities to do a better job, and to do a better job of convincing them of who they have to appoint to the courts. I found with my convening authorities, when they were new—and I would sometimes go through two or three during a tenure as an SJA, that's why I had so many of them—I would find that they might tend to do that. I would say to them: Look, General, these guys are going to be deciding really important issues. Let's put more people who are more in the mainstream of what's going on in the Army, instead of having to get some supply officer out of the depot who doesn't know a darn thing about what's happening in the troop units. I think it's up to the SJAs. Again, you must understand that overall, I'm not really critical of the court member appointment process. I think it's the exception rather than the rule that they do it kind of by expediency.

Col. MITCHELL. Now, there's a feeling in some circles that a judge-only sentencing situation would relieve a certain burden on the command to produce court members. One of the points that General Hansen made, and I don't know if you were here at the time he was talking about this or not, but in the Naval service and the Marine Corps, primarily because of the nature of the duty and the extensive deployments involved in those services, the court-martial system is used more often to deal with disciplinary kinds of offenses as opposed to the criminal kind of offense. That tends to clog the system with a bunch of disciplinary cases; consequently, the burden, in the face of members' trials, becomes much greater in those services than perhaps is true where that circumstance doesn't exist. General Hansen's proposal to deal with the problem is to give a more expeditious and perhaps somewhat strengthened NJP authority to the commander, to deal with those cases and get them out of the court-martial system, and thereby relieve the burden on the command as far as producing the court members concerned. Do you agree with that, or——

Col. GARNER. I have a slightly different perspective from that. I must say that General Hansen and I have been close for many years, and we were both staff judge advocates at training centers at the same time. We used to exchange views and still do a great deal. I think, first of all, that today I do not really see that we have an inordinate number of disciplinary offenses in the court-martial system that should not be there. You see that——

Col. MITCHELL. Is that in the Army now, or are you speaking of across the board?

Col. GARNER. I'm speaking of in the Army. In the Army today, frankly, the court-martial case load is more directed towards the common law felony type crimes. In the disciplinary area, we really have a very low percentage, and I think that General Hansen has been away from the arena for a little while, having been a General officer for a time and having worked in the Pentagon and the Appellate Division a while; but there is a very small percentage of cases, and if you will look at Mister Fulton's statistics on the case categories you're going to see that.

Col. MITCHELL. My point is though that while that may be true in the Army, in the Navy and the Marine Corps, it's not necessarily true. My impression is that there's a much heavier utilization of court-martial for that type of thing.

Col. GARNER. That may be true, but I do feel and I agree with him that we made a lot of mistakes in the way we've handled NJP and it's been pushed out of proportion to what it's supposed to be. Now, let me go back in history. In 1969, after the Justice Act was passed, we had a real problem when we first put judges on special courts. I had commanders say to me: God, that captain judge is threatening everything I hold dear in 20 years of military service. And why was he saying that? He was saying it because he was sending a short AWOL into a special court and he expected to get the maximum penalty, and the judge didn't give it. I went around lecturing, and I'll give you the same lecture.

In order to be effective, to enhance discipline for minor disciplinary infractions of a military nature, you've got to have three things; it's got to be fast, it's got to be fair, and it has to be certain. The nonjudicial punishment needs to be fast, fair—it's certainly better than a court-martial, but it needs to be fast, fair and certain. We did hang too many of what he calls gadgets, too many rights and too many procedures. We've tried to judicialize nonjudicial punishment and that was a mistake. I think we do need fairly extensive NJP powers for commanders to deal immediately with—so I agree with him on that point.

Col. MITCHELL. In combat circumstances, do you see yourself altering your position on the involvement of court members?

Col. GARNER. Yes, I feel that in a combat situation we should have the ability to force all trials, both on the merits and for sentencing, into the hands of a judge only because we need the commanders out fighting the war So, I'm speaking of the peacetime environment. For the

wartime, I think we need to have judge alone trials in sentencing because of the manpower.

Mr. STERRITT. Let me ask you a question on that. In the wartime situation, a combat situation, it would appear to me that that would be the situation where the person on trial would want people who had been in the same type of war or combat situation that he had been in and in which the offense has risen. Slightly different from the community standard idea of sentencing, it's more like the historical being punished by those who've been through the same struggles that you have. Your conclusion suggests the opposite and almost seems to me a counteractive to discipline, or counterproductive to it. I know that if the men in field feel that they're not going to be sentenced by people who know what they went through, I think they'll begin to distrust the system. I may be wrong on that. I'm just asking your opinion.

Col. GARNER. I don't think that that is it. Let me kind of give you a sea service contrast. Captain Byrne, isn't it the experience that rarely does a sailor want to be tried by guys out of his wardroom?

Capt. BYRNE. Pardon?

Col. GARNER. Isn't it rare that a sailor facing trouble had rather be tried by somebody ashore, rather than those people out of the wardroom of his ship?

Capt. BYRNE. Probably.

Col. GARNER. And I think maybe that's the same sort of thing. I'm not sure he's going to want those same people there; it may be, depending on the offense. But I think at the same time, I'm looking at it on the fact that number one, we assume that judges are going to do a fairly good job; that's a basic premise I have to make. I think that number one, we've got to be realistic. At that point, if we're going to try them fairly rapidly, I think that we'd be hard put to try them with people out of those units. I hate to use this word, but expediency and the necessity to fight the war will not allow the luxury. In World War II, we didn't have such things as judge alone trials and you'll remember that apparently the people who tried people for combat type offenses in those days were pretty harsh. The point is this: I think that we need to have the community standard known, but I think in a wartime situation, we've got to make some modifications for we've got to fight the war; that's the first and foremost thing we've got to do. Have I answered your question, at least given some sort of answer.

Col. MITCHELL. Your position on instructions, I find somewhat intriguing, and it's not that I don't disagree, but who has the corner on the market of good theories of sentencing?

Col. GARNER. No one does. I have been working now for about six months trying to work to the point that I can come up with some objectives that I think are legitimate; in other words, I'm trying to formulate some instructions. I'm doing more than suggesting it; I'm trying to work out instructions that I think are legitimate. I've done a lot of reading and as you know, there are several schools of thought and we could spend the rest of the day talking about the utilitarian school and the just desserts school, and all the rest of them. We don't have the time to talk about it. I think that it's possible to do. We have evolved in the military I think to some legitimate goals in sentencing; certainly, we can identify the determinants. I attempted to do so in the Homer Ferguson thing; to identify what I thought were the six major determinants in the military and what's the end of the equation. I think it's possible. Of course, you may ask as many do, what is the efficacy of any instruction; you know, we always worry about that. But I think that that is a gap that we need to fill somewhat. You and I both know we cannot lecture court members and teach them these things about this policy and that policy. We don't want to influence them improperly, but I think that the judge should be able to give them a framework, and I think that we could. First of all, Congress and state legislatures today and the reform movements are dictating to their judges and their sentencing authorities, objectives, are they not? I'm sure you've read the literature. They do decide, and in setting up their guidelines, and in setting up the system to control sentencing, they recognize objectives, so it's possible. In other words, I think it can be done. It's just a matter of doing it and getting it approved by the courts so they don't reject for reversible error.

Col. MITCHELL. Well of course, what's approved today becomes reversible error tomorrow, especially in an area like this where the personal views of different appellate judges are likely to bring about profound changes.

Col. GARNER. That's why I say, perhaps the legislature, or the President as the promulgator of the Executive Order. Perhaps he should set the desirable sentencing objectives for the military. In other words, we have people that can do it and thereby avoid your idea about the changing judges on the appellate bench may change that. I think that the Executive or the legislature could tell us, hopefully, after a hell of a lot of study, what desirable sentencing objectives are. My only concern is that they don't know what they should be, and that's why I say the President, the Executive, should be the source of it.

Mr. STERRITT. Hasn't there been some effort in that area in capital punishment sentencing formulas and—

Col. GARNER. Yes, obviously they had to do it because of the Georgia cases and the Texas cases; they were kind of forced to do it. But yes, the President has come up and set out the aggravating factors so that he's

legislated there clearly, and I think that the President could set some objectives and we could develop instructions based on them to enhance them. I think that that, coupled with their innate knowledge—because again, you see, the concerns and problems of the command are a legitimate sentencing determinant for a military judge, and I use it. So, where do we go?

You raised the question about random jury selection and I didn't fully answer it earlier. If you'd like, I'll readdress that.

Mr. HONIGMAN. I'd appreciate it.

Col. GARNER. General Hansen indicated basically that his first objection was that it was too cumbersome, and I think in saying that he may have given you the wrong impression. Obviously, it would be cumbersome. I read an article recently by Jack Kress in The Judge's Journal, and he said that jury sentencing in the bifurcated trial was too cumbersome; but I think that's not really the answer. The answer that I think you might glean from what General Hansen said—and I tend to agree with him—the problem in the random jury selection is that we have to assume that the military has a mission that it's got to fulfill. The random system is going to be cumbersome and it's going to turn up a lot of people that may not be available, immediately available. But more than that, I think that again, the case law has given us the idea that random jury selection is a desirable thing; that way, you get a cross-section of the community. There's a lot of dissatisfaction with random jury selection in a lot of places; so much so, that I'm not sure but what we'd be buying another peck of trouble. And again, back to my basic position, I think the present system works. I think that the critics of the system have a tendency to look upon the commander in the wrong light. I think most of our commanders are men of integrity who want to preserve the system, and I think that again, they appoint court members not out of evil motivations; if they go astray, they appoint them out of not enough concern about who they put on. Do you follow me? Across the board, I think they do basically a pretty good job of appointing court members; so I don't think that random jury selection—I don't think we require it; again, being not a jury, you see. One of the reasons that we haven't been stuck with a six-man jury yet—the Supreme Court may give it to us—is the fact that it is not a jury; it's a blue ribbon panel. So no, I don't think we need it; I don't think it fits.

Mr. HONIGMAN. Let me ask a slightly different question.

Col. GARNER. Surely.

Mr. HONIGMAN. Do you feel that from your experience on the bench, the prosecutors are doing, or can do under the current rules, an adequate job of educating the sentencing agent, whether it's the judge or the jury, in the military consequences and considerations that they should take into account in adjudging a sentence?

Col. GARNER. Are you saying can they give them enough evidence, or can they argue properly?

Mr. HONIGMAN. I guess I'm asking both questions. I think a lot of concern has been articulated on the part of the Commission about the need to have the person adjudging the sentence be immersed in the strictly military aspect of the experience that he should be bringing with him when adjudging a sentence. I'm just wondering whether that can be imparted on an individualized case-by-case basis by the personnel that we now have, and under the rules that we now work under.

Col. GARNER. Perhaps I'm missing the basic point. I think that as far as knowing what the military world is all about, I think most of our court members know that. As far as the information that the prosecutor can place before them relating to the case, right now as you realize, he cannot really educate them into things outside the record so to speak, and that is a handicap. But I don't think that even under our current system that he is overly handicapped. I think prosecutors can do a pretty decent job, particularly now with the change in the Manual; I think the new change enables them to do a lot of things they couldn't do before. We've often had a lot of criticism, and I've been one of those who've said it would be kind of nice if we could have something like a presentence report and, you know, I'm not really sure that that's the right approach. We've thrashed with that a long time about who would prepare it, what it would contain. Last year, I went through the short course for newly appointed Federal judges, as a guest participant; and I've been out in seminars, and done a lot of talking with people. I'm about to determine that I think maybe the presentence report is not the panacea that some people think it is. Actually, talking to Federal judges and most state judges, I find that the military court in their bifurcated proceeding, has before it more information about the background of that accused than many civilian sentencing authorities, even with a presentence report, so I'm sort of backing off of that approach. I think that we have a great deal of information, probably more than most sentencing authorities in the civilian world already.

Mr. HONIGMAN. Thank you.

Col. RABY. Could I just ask one question? I wasn't here for all of your testimony, but one thing I would like to know because I think it's important in terms of long range planning—If the Army, for example, goes to a light division concept and, if as a part of that type of concept, they were to do away with the military personnel records jacket, in the vernacular called the field 201 file, how would that impact on the amount of information available to a judge? Wouldn't you have to have it

in some sort of computer retrieval system, or have some way of getting the same amount of information—

Col. GARNER. Yes, it would very definitely impact because today—It used to be we would get what is known as the Form 2, which is a four-page form that comes out of his MPRJ, plus the 2-1, which was a supplement thereto; today, we get the 2A. We would have to have something like the equivalent frankly. Today, we're finding that occasionally a counsel will show up with a microfiche of the individual's records which he has obtained; and we either have to print it out and use it, and decide what's admissible and what's not admissible in it—But I think we have to have a substitute for that because it really gives us a great deal of information. First of all, anything good about him, the defense is clearly going to bring it out on the record and, although we have complaints, the bad generally comes out too. Let me put it this way: I'm kind of satisfied right now that we have a pretty good feel for sentencing. I'd like to have more. One of my judges in Europe, on his own hook, decided he'd start having a presentence report and I had to stop him because it wasn't permissible; but he went and sent out a questionnaire to the chain of command of the individual, and asked them questions about the rehabilitation potential, et cetera, et cetera. He did it in one case and then he called me and told me about it, and I said, stop. Gee whiz, stop; we may have to have a rehearing in that one. But we really get a lot of information; it's amazing sometimes what we get out of a chain of command. It's not always adverse. That's that position.

Capt. BYRNE. When we've finished with this, can we ask him about tenure and several other things?

Col. HEMINGWAY. I'd like to wrap it up so we can give her a break before General Day gets here.

Capt. BYRNE. That's what I mean, so we may want to just get your views on a few other things.

Col. GARNER. Quick and dirty on tenure? Let me say this: I'm in favor of anything that adds to the independence of judges; that's the thing that I fight for in this job; that's the first premise. Secondly, I will say this: Today in the U.S. Army, we're not having any independence problems and I'll tell you the reasons why I think so. First of all, first and foremost, the leadership in the JAG Corps in the past years and the present have been very much men of honor, integrity and good faith, who appreciate that they have got to insulate their military judges from any influences that could be exerted. I can say today that during the three years that I've been Chief Trial Judge, and the preceding three years as a judge in the field, that never has any superior done anything but respect the necessity—I say that because we do get letters, and the letters may be a complaint. Sometimes it's from the neighbor of a victim—rarely from commanders, by the way. It could be from some people who don't understand the independence, and the answer is always universally, we may not like what he does, but he is the judge; he is independent, and we do not interfere or comment on his in court judicial actions. That is the standard line, so that's the first thing I'd like to say. You know, that's true. As you know, judges are only rated by judges. I am the only trial judge in the Army that has someone who is not a judge rating him, and my senior rater is the Assistant Judge Advocate General. General Hansen, who as Commander of USALSA, and Chief Judge of CMR, rates and senior rates some of my people; but again, he is a judge and he appreciates what judges do, although he's never apologized. The thing is, we are imbued with the idea, so the question comes, do we need tenure. I had difficulty in formulating a concept of tenure that matches to military requirements. In the Army today, we have judges who've been sitting for more than ten years; they've almost got tenure. We know this: In the Army, most judges are going to serve at least a tour of three years, because that's our normal tour length. I've never seen one pulled out for an improper reason. I had a judge who'd been on the bench for nine years, and The Judge Advocate General pulled him. Why? Not because of the way he was deciding cases; he wanted him to be a senior staff judge advocate in the corps. He went out there and he served 18 months as Corps Staff Judge Advocate, a very prestigious position in the Army. At the end of the 18 months, he was returned to the bench; basically, because he wanted to go back on the bench. So what I'm saying is that the men of honor who run our system—We know, as a Lieutenant Colonel or Colonel, if he's doing a decent job, chances are he can probably stay there until he retires, in the Army, unless they want him for a top level job otherwise.

Col. RABY. You mentioned integrity in the system. We had some testimony earlier this morning from one witness who indicated that in a service unnamed, the chief judge had sent out letters of instruction to his subordinate judges—or that was the allegation—regarding sentencing practices, which this particular witness felt was a form of unlawful command influence. In your role as Chief Judge, do you send out policy guidance to your senior judges? If so, do you consider that you've ever treated in the area of violating Article 37? What do you believe is the proper scope of the supervising judge in this area, in monitoring the subordinate judges to insure that they are engaged in some semblance of understanding, in terms of sentencing and so forth?

Col. GARNER. Well, I have to answer your question in a couple of ways. I never put out sentencing policies; in fact, I never dictate what they're going to do in court in a judicial decision. I may suggest to them administrative

procedures; I may suggest to them the procedures—Every Army judge, by the way, gets mail from me once a week, and every reservist gets mail once a month. Among that weekly mailing, for example, if a decision comes out, or there's a trend, I may say say it looks to me like this is the way things are going; but we never dictate to a judge how he's going to rule. Now, I will say this: I think it's my obligation as a senior judge that if I think a judge has gone haywire out there on the sentencing practices, I may call him up and discuss it with him. I think that that's true in the Federal district court system, as any other place. I may discuss it with him, but number one, I'm not going to tell him he's got to change his sentencing practices. Frankly, in the three years I've been in the saddle, I've not really had to do that. I've had a couple of cases where I thought a judge's sentence was way out of line and I called him not as a supervisor, but as a fellow judge, and said by the way, in case I get someone bitching about the sentence, can you give me any idea of some of the rationale behind what you were doing. But I never said to him, gee, you were too light; I try to be scrupulous in not criticizing their opinions; but at the same time, it's kind of nice to know. But no, I have not seen any semblance, when I was down below in the field and since I've been up—I'm very scrupulous about making sure that I don't interfere with what they do in court. I make sure they take their PT test, and that they're not fat, and do all these military things and this sort of thing; but, as far as their in court activities, I treat them as independent entities and I give them my judgment, and I'll be glad to show the court every memo that I've sent out because they're all numbered and they're all public. They are not internal; we have no secret communications. You've seen everything I've sent out. I recall when the *Allen* case came out, I must tell you this as an example. The *Allen* case came out and I felt it required my judges to take quick action to do an instruction. Without even coordinating with Colonel Raby, that day I sent out a proposed instruction saying, it looks to me like you ought to instruct this way. The next day, The Judge Advocate General said he'd like to see the instruction, and I said Al, I've already sent it out. It didn't bother General Clausen. He looked at it; he wanted to write a different one and sent it over to me in handwriting; but with all due respect to the General, I didn't think it was legally correct so I didn't send his out. I let mine stand and nobody bitched about it because that's my job, to help the judges to function, and it's my job to protect their independence. If I could do anything, or work out a system—but I think frankly, it might well be cosmetic. But again, it bothers me if there is a perception that judges need tenure in order to assure their independence. That perception tells us that maybe we ought to examine a measure that we can follow. So obviously, it is the perception that perhaps something like that is needed. We read the *Ledbetter* case; I'm sure you've talked about *Ledbetter,* haven't you? You know, 2 MJ 37; and we see there where Judge Fletcher suggested tenure or something of that sort. But, what can it be? We have procedures for removal of a judge because of misconduct in office. We do have something similar to that that the ABA standard addresses, although we don't have the lay membership. Maybe that's one of the things we should do. Maybe we should beef up our judicial review type commission and put lay members on it, or maybe nonmilitary members on it. But the thing is, the only way right now that I really see is if you got someone from a position of leadership who was not a man of integrity, and who tried to influence it, I've got a feeling that—and I believe enough in the feeling of the judges in the Army today—you'd find some squawks that would go outside the system to help cure it. In other words, I don't think they would sit still to be—I mean, Judge Paul, in *Ledbetter,* probably was not—they probably really didn't attempt to influence him, but he felt it and he certainly aired it. He did not hesitate, and I think that if they think there's been a '37 violation, I think it would be raised. I don't know what General Hansen said to you. Apparently, he suggested that maybe something like the permanent professors at the Military Academy might be the answer, and that could be. But if you really isolate judges and put them out aside in a separate little system, you're going to have to do something to guarantee their promotions. You're going to have to do something to compensate them. I once said well maybe—and the costs would be dramatic—maybe we ought to put all the judges in purple suits and let them be a separate corps for DOD, DOD judges, and they'd have their own system. If they behaved themself, they would get promoted fairly regularly; they probably would never make General; but that's a costly, cumbersome system. Right now, I'm not convinced that the perception of the need is enough to cause us to take the drastic step it would require to build a system.

Col. HEMINGWAY. Thank you. We're going to need to take a break.

STATEMENT OF MAJOR GENERAL JAMES L. DAY

Given on 8 June 1984 to the Military Justice Act of 1983 Advisory Commission, at Washington, D.C.

Col. HEMINGWAY. General, the floor is yours.

Maj. Gen. DAY. Thank you. I detach this month from duty at Headquarters, U.S. Marine Corps where I have

served for a period of about two years. Before that time, I was Commanding General of the First Marine Amphibious Force and the First Marine Division. The comments that I am going to cover today I'll base solely on my views and the experiences that I've had. I don't intend to cover too many, but I would like to cover, in essence, four. The first one is whether the sentencing authority in court-martial cases should be exercised by a military judge in all noncapital cases to which a military judge has been detailed. The second one is whether military judges in the Courts of Military Review should have the power to suspend sentences. Number three will be whether the jurisdiction of special courts-martial should be expanded to permit adjudged sentences including confinement up to one year and, if so, what if any changes should be made to the current appellate jurisdiction. The fourth one, and a very brief coverage, will be whether military judges, including those presiding at the special and general courts-martial and those sitting on the Courts of Military Review, should have tenure. And what I'd like to do if I may—May I kick right into these points?

Col. HEMINGWAY. Yes, Sir.

Maj. Gen. DAY. Let's cover number four first because I don't fully understand that. If by tenure, the question is should they have a certain amount of time as a military judge and should they be limited in the amount of time they have as a military judge, or should there be a hiatus in between of four or five years as a judge, then doing something else and then going back in; that's the only thing that I need an enlightenment on as to whether we're just talking about straight tenure or—

Col. HEMINGWAY. To date, the commission has treated the term "tenure" in our charter as meaning a fixed term of office, whether that be three years, five years, or six years, as a minimum. Now we haven't addressed any prohibitions against, if it's three years, serving consecutive terms.

Maj. Gen. DAY. I understand then. All right, thank you. In that case, my one concern on tenure would be the case where we have someone, a military judge, that doesn't have the confidence of either the Commanding General, or doesn't have the confidence of the command, and how difficult it would be to sever his tenure. And then, if we did have to sever the tenure, if he was going to have a shot at it later on maybe three or four years later, what type of an input would his previous Division Commander or general court-martial authority officer in certain cases—Would he have another shot to obviate this man from serving as a judge again? Now I know that sounds nit-picking, but as far as I would be concerned, if I was involved enough to have a man's tenure terminated because I didn't have the trust in him and I didn't think he was doing the job, I certainly wouldn't want him to reappear somewhere along the line on the bench where, again, he would have jurisdiction over the people I'm in command of. That would be a concern that I would have there. But I do think we need tenure, having said all of that. I think that when a man comes to be a military judge, he has to have the understanding that he's going to be there for a while and he has to be there long enough to develop that trust and that rapport not only with the people he's serving, but with his commander, and that commander has to have absolute trust in him. But I think there should be an effort where we can expedite anyone that is performing unsatisfactorily and get him off the bench, get him out of that position so to speak.

Mr. HONIGMAN. General, do I understand you then that your view of tenure is that the military judge would remain in his position as long as the commander has confidence in him; but that the commander, rather than a higher officer in the Judge Advocate Corps or the Judge Advocate Division—The commander would make the decision to terminate the judge from his position?

Maj. Gen. DAY. I think that's what I said, but it's not exactly what I meant because I don't know if all commanders are prepared to say, this man is doing a fine job or he's doing a mediocre job. I would like to say that it would be up to the commander to sever that tenure only if that man did something wrong. If it was a matter of personality, I don't think that should enter into it. I'd hate like hell to say yeah, I want to get rid of him because I don't believe in what he believes in, philosophically.

Mr. HONIGMAN. Excuse me. When you say he does something wrong, do you mean if you would have a disagreement with him about the substance of a judicial decision, or sentence imposed, something like that or a series thereof?

Maj. Gen. DAY. Yes, I think so. I think that a commander, observing what has happened over the years—and by the time a man is in that position as a commander, I would imagine that it's just like a civilian judgeship; he's seen just about every type of sentence that could come down the line. If this man continually violates, either leans one way to the hard side or to the easy side, then I think the commander should have the authority to go in and request his relief because I think eventually—if he doesn't, then in a very short period of time that position of trust is abrogated, and I think he has to have the trust of that man.

Mr. HONIGMAN. Thank you.

Col. MITCHELL. General, excuse me, Sir, but who should be the releasing authority? You just said the commander should be able to request that that tenure be terminated. Who should actually possess the authority to terminate it?

Maj. Gen. DAY. Well, that's what I don't understand. That's why I don't know where I would go because I've never been in that position to have to request anything negatively about a judge. I don't know if I'd be going through the SJA, or if I would have to come back to the SJA at Headquarters Marine Corps, or the Navy Service, or where I'd have to go.

Col. MITCHELL. Would you favor a situation where the commander in the field could have that authority, or should it remain in Washington somewhere?

Maj. Gen. DAY. I would favor that from one aspect, Charley, but the caveat there would be—again, it's the doggone thing called philosophy. I'd hate to see a man's tenure severed simply because of a philosophical difference instead of more or less a termination for cause. I think the commander should have some authority to make that change if it is for cause.

Mr. RIPPLE. General, how would you feel about having, as a rough analog to the civilian community, some type of a judicial behavior commission perhaps composed of both line officers and judge advocates, who perhaps could make a recommendation either to The Judge Advocate General of the service or perhaps to an Assistant Secretary for removal for cause of that judge?

Maj. Gen. DAY. I think if we had that type of a setup, it should be strictly within the SJA field. I don't think that I have the commanders—or as a commander myself—not at the battalion or regimental level. I don't think that I possess that expertise to say hey, he's not doing well. I would like to see that, but I think it should be within the purview of the SJA to take care of their own and clean up their own house.

Col. MITCHELL. General, in Vietnam, a number of lawyers were taken out of their legal billets, and in many cases volunteered to be taken out of their legal billets, and were assigned to combat duty in command of companies and platoons and so forth. If you had a program whereby military judges could not be utilized outside their military judge responsibilities for a fixed period of time, would the command be faced at times with circumstances where it might be necessary or advisable to assign that military judge to some combat assignment? Now, I say that with the following observations: In the Marine Corps, lawyers are trained up to a point in the same fashion and the same manner as what we euphemistically call the line officers are trained, so we have a certain ability to move back and forth. That might not be true of the other services.

Maj. Gen. DAY. Yeah, I feel very strongly about that. I had a young platoon commander who later became a company commander, who was an SJA in Vietnam. I felt very strongly for this young man and I think that they do have the preparation. Although I'd never say it to General Donovan, it seems like in intelligence, they're just a step above the average person that we have leading rifle platoons and rifle companies, and they did a remarkable job. Again, I had two SJAs in a row at Camp Pendleton; one had been a line company commander, and the other one had been in a line company. They both did a remarkable job as far as going on up the ladder. The young man I had attached to me in Vietnam is now—we just spoke about him, Wally, he did a fine job, and then the other SJA I had out there had been in a line company, so I could never really draw the curtain on them not being qualified, or being able to do the job at hand. We wouldn't have put anyone in those companies or those platoons that didn't want to go. If it was a matter of preparation, I think they were all prepared to do it.

Col. MITCHELL. If the commander in the field then, in a combat or semicombat circumstance, felt the need to utilize that military judge in a combat role, and if he was qualified to be so used, should the commander in the field be deprived of the opportunity to use that individual just because of the concept of tenure?

Maj. Gen. DAY. (After conferring with Brig Gen'l Donovan) Charley, maybe I misunderstood you. Are you talking about judges now, or are you talking—

Col. MITCHELL. Yes, Sir, judges.

Maj. Gen. DAY. Well then, I misled you on that last question when I said that I had—I didn't mean to say that I had judges in those positions; these were lawyers. I don't know if we could deprive him of that type of duty because you're pretty busy and I think you need a judge in that capacity. I don't know if you—I know I don't think I would bring a judge down to command one of my companies or battalions. I think his need elsewhere would be very paramount.

Col. MITCHELL. Yes, Sir. What if need would dictate that to be done?

Maj. Gen. DAY. If need would dictate it—of course, if we had a repeat of Tarawa, or a repeat of the Chosun Reservoir, where literally you're up to your ass in alligators, I think you'd have to do it. I think it would be a matter of survival then and not a matter of convenience.

Col. RABY. Sir, may I ask a question of clarification on a couple of your earlier remarks?

Maj. Gen. DAY. Yes, Sir.

Col. RABY. If I understand the line of your earlier testimony concerning relief of judges, you believe that commanders have the experience, based on seeing many cases and acting as convening authorities and so forth in many cases, to tell whether a judge in a particular command is doing a good judicious job of handling court results. And if a commander perceives that he has a bad judge—which I understood that you've never had that happen to you personally—he should have a way of communicating this to the proper source, which you'd

probably leave to the legal field. He should have somewhere to go to present a reason for relief for cause of that judge.

Maj. Gen. DAY. Yes, I do.

Col. RABY. But, if I also understand your testimony, you are concerned that this shouldn't be merely done on the basis of personality or just because the commander, for personal reasons, didn't like a particular sentence; but it should be done on genuine cause. There should be some mechanism for cause, for good cause.

Maj. Gen. DAY. Absolutely, and that's what I didn't articulate too well, but I think the cause would have to be there, and it couldn't be a personality or a philosophical type of judgment.

Col. RABY. Thank you, Sir.

Maj. Gen. DAY. On Issue Number One which I'd like to discuss is whether the sentencing authority in court-martial cases should be exercised by a military judge in all noncapital cases to which a military judge has been detailed. I believe in that very strongly. I think the key there is experience. I think that probably in the past I wouldn't have said this because in the past we didn't have the experience factor completely along the entire gamut, but I think in recent years, it has pretty well stabilized itself and I would say that, yes, I would like to see a judge in that capacity.

Mr. STERRITT. General, I'd like to ask you a question. I've asked several witnesses this before and I'm not quite getting the concept so if it's a little cloudy, I hope you'll understand. In my readings and study I've often come across the idea of fighting men addressing the punishment for one of their comrades who committed an offense which grows out of their unit activity. In a sense, this was an attribute of good discipline and morale because of the cohesiveness of the unit; it was strengthened by one's peers within the fighting unit, taking care of derelictions committed by their fellow soldiers. Understanding what you just said about the military judge and his experience, if he becomes the sole sentencing body we're going to lose that idea of peer sentencing. Now, do you have an opinion on that, or is that a significant—

Maj. Gen. DAY. Yes, Sir, I'd like to discuss peer sentencing for a while and within the arena that you just discussed it, say in combat. What I've observed and what I've found in the past, through three wars, is that if you are being judged by your peers in a combat situation, and you're being judged for example for going AWOL, not from combat but from a rear base say, where you were stationed, or if you'd had a little bit too much to drink, or if you did certain things that really weren't all that serious, and yet they were detrimental to the overall combat effort, I would think that your peers would be a little bit easier on you than anyone else. But if you had left those peers in a strait, if it had been an actual combat situation and you had taken off during time of fire, I think you will find that your peers there would probably be inordinately stringent in what they would come up with because—So you have a difference right there in sentencing. If I can carry that a little bit further, within the Marine Corps, we have recruit training commands and we have a group of people in these commands that are called drill instructors, as you're all aware of.

If any one body of people stick together, it seems to be that particular body, and if you brought a man up for maltreatment or malfeasance, or maybe just not carrying out the directions that he'd received from his seniors, if he was indeed judged by his peers—because they were going through the same type of pressure cooker day in and day out that this young man was going through—they would have a tendency not to give him the full boat as far as sentencing goes. By the same token, if you brought the recruit up that these people were training, and that recruit had done something wrong that was not, in their view, the best for the Marine Corps, or if he had violated an article of the Uniform Code, or uniform regulations, then we found that they were much tougher on that one individual. Yet, that recruit, that individual, had less time in the service and less time to recognize what his responsibilities were to his country and corps; and yet, they were harder on him than they were on one of their peers who may have had 16 or 18 years of service and knew full well what he was doing wrong.

So, I've taken a look at this over the years and I just feel that now is the time. I would not have recommended that we have a judge in that capacity in the past, but I do now. Of course, that's caveated by the fact that we can terminate that and we'd like to have the best of both worlds; that if we started getting people that did not have that experience again into that judgeship factor, that we would have the authority to terminate it at the earliest time. Now I know that's asking for the best of everything and we might not be able to do it because once we make the decision that that judge is the guide and we don't have the peers sitting up in front of this man, maybe it's irreversible.

Mr. STERRITT. But do you believe the man in combat who was pulled out to go to court-martial for something is going to react well to having a professional judge come in and judge him?

Maj. Gen. DAY. I think if that would happen today, the general philosophy of a lot of the Marines that we have is that you're going to get off easier if you have one judge taking a look at the case. What it's going to be tomorrow, I don't know. But if that man had bugged out, or had set his buddies down in combat, I don't think he'd want to appear in front of his peers. I think he'd want someone that was separated from the action and

did not have the realization of what can happen when one man doesn't carry out his duties in a firing situation.

Col. MITCHELL. General, do you tend to put more trust in Marine Corps lawyers because of their training process, which is virtually identical to that of the line officer and, consequently, in a sense that in the Marine Corps the military judge is more socialized to the military society than might be true in the other services which don't have a comparable training program?

Maj. Gen. DAY. I think so. I don't think there's any doubt about it that I put trust in the Marine SJA probably far more than in any of the other services.

Mr. HONIGMAN. General, we currently have what's been described today as a blue ribbon military panel that finds guilt or innocence and imposes a sentence. If, as you would recommend, the sentencing authority would be located in the military judge, is there any reason to continue the blue ribbon panel if all they're doing is finding guilt or innocence?

Maj. Gen. DAY. I don't know if I understand that question, Sir. I understood it up to the military judge.

Mr. HONIGMAN. Well I guess what I'm getting at is this: The composition of a military jury today consists of persons who are chosen by the convening authority because of their maturity and their experience and their temperment and so on, and they perform two functions. They find the fact of guilt or innocence and they exercise a discretionary function; they try to impose an individualized reasonable and rational sentence. If we take away one of those functions, the discretionary function, and we locate it in the military judge, would it then make sense to go to a random selection of military jurors? Do we need to have people who are personally chosen because of the various factors any longer?

Maj. Gen. DAY. (After conferring with Brig Gen'l Donovan) I think I would be comfortable, and I say this knowing what a few of my peers believe in, but I think I would be just as comfortable with the judge finding them guilty or not guilty, sitting there, of having the whole gamut, instead of just maybe a panel listening to a part of it and then making their decision and then the judge taking it from there. Right now, with what we have in my particular service, the Marine Corps, I think I'd be satisfied with, and comfortable with the judge. Now a while ago you mentioned a statement that I take, when I select a—As convening authority, when I select members for the board there are certain things that I cover, and that's correct; but I think the commander also tries to get a balance. He knows after a certain amount of time so to speak, what officers he has that are easy on certain cases and those that are tough. He can't select the ones that are tough all the time because he just can't have that batting average of a thousand. He has to be able to balance that court out and select different members for different cases. I think it would be a horrible thing if we had to select people only because we're sure that we were going to get a conviction here, or we were sure that we were not going to get a conviction, so he has to select those on balance.

Mr. HONIGMAN. Thank you.

Col. MITCHELL. General, if I can get a little bit intangible, can you really ever expect a peer group which is chosen on the basis of chance, to maintain discipline in an armed force when that group there may not have any leadership quality about it?

Maj. Gen. DAY. I don't know, Charley. You know, I go back, being one of the older guys in the service, back to rocks and shoals, when I knew that they held that over our heads all the time and I didn't even know what rocks and shoals were, but I did know that if you did something wrong, you were going to get ten days on bread and water, or something was going to happen. They always told me that if we have a breakdown on rocks and shoals, the whole disciplinary structure within the military was going to go down because we're going to have people running rampant. Well rocks and shoals left us, and it left us probably when it should have gone, in the early 50s or late 40s, I can't put my hand on it right now. I didn't see any degradation of judicial effort or any lack of discipline when that happened, and I know we had people screaming that when rocks and shoals go, with this new UCMJ we're going to have a problem. Now there was another—and that was just a comment. As far as the peer goes, if he was of unknown quality—Is that what you asked?

Col. MITCHELL. Well one of the ideas, General, has been that the court member panel be composed of people who are randomly selected without regard to grade or perhaps with some deference towards the accused's grade, but basically randomly selected, and the commander would not be in the business of selecting his court members. In that circumstance, whether or not a given panel of officers would be composed, or people would be composed of a leadership quality, it would seem to me would be left to pure chance. My question to you then was simply, can you really expect military discipline, especially in combat, to be maintained by that kind of group.

Maj. Gen. DAY. I think it can. I think if you make it—If you tried to select, Charley, in every single case, someone you think is going to philosophically believe in what you believe in and that they're going to find this guy guilty because you think he's guilty in your mind, or think he's not guilty, I think you're making a mistake. I'm not even sure that—I like the prerogative of being able to select these people for a given case and I think that's one that should lie within the purview of the commanding general, but I don't know if we'd lose a heck of

a lot if it went the other way, if someone else that was disinterested or in a different area selected them.

Col. MITCHELL. Well some of these ideas amount to nothing more than sticking a pin in a roster of names and pulling those out to be court members without any regard to their qualifications to actually sit.

Maj. Gen. DAY. Well, I just had one question. (After conferring with Brig Gen'l Donovan) I don't think there should be strictly a random selection, Charley. I think we have to have some background, the same as you have in civilian courts today as to who is selected to sit on a jury. I think we have to have a roster to go by instead of using the overall combined roster, the alpha roster, to just go down and pick people out. I think you have to have selected people that are, again, on balance and looking for what both the defense and the trial would be looking for, and not just a random selection.

Col. MITCHELL. In combat do you think then, General, that the use of the military judge provides the relief of a certain burden from the commands so that they might turn their attention fully to prosecution of the war?

Maj. Gen. DAY. Oh, certainly. I don't think there's any doubt about that. I think I was very fortunate in Vietnam, as an example, when I had a battalion and probably when I first started to notice the problems we had disciplinarywise, that we never had to send anybody back. But I know I've heard some real horror stories. When they would have to have the company commander back if a man was up there for leaving his place of duty, then they not only had to have the company commander, they probably had to have the squad leader, the platoon sergeant, the platoon leader, and then the company commander. When you take four key people, or five key people out of a rifle company in combat, that can only hurt that company and it can only cause headaches to the battalion commander and everyone else involved.

Col. RABY. Sir, if I may, I'd like to ask a few questions of you in this area. Earlier, you gave a couple of examples of cases which I think most of us would agree were in certain circumstances like the drill sergeant, where it appears that with drill sergeants say, they might be overly sympathetic to let's say a case of maltreatment of trainees, that's a classic. You also gave an example where maybe in combat somebody failed to engage the enemy, you would anticipate the peers would be very harsh on that type of misconduct because it may have put their lives in jeopardy I assume. Then you made some statements from which I thought you concluded, and quite rightly so, that in those cases where the peers are going to be pretty tough by the nature of the offense, we could assume that the accused would not exercise—would exercise his option, right now under the current system, for a judge alone trial and not face his peers when he expected they might be tough. But in those types of cases where he might sense that he'd gain a tactical advantage because they were with him, they would be more apt to exercise their right to go with a panel of officers, or an officer enlisted combination, whatever they thought was tactically to their advantage? Is that a fair summary of what your thinking was?

Maj. Gen. DAY. (The witness nodded in the affirmative.)

Col. RABY. Now I wonder—You have addressed, of course, certain particular types of cases. Based on your years of experience, considering the full panoply of offenses that we have, not just these type we're talking about the extremes of the training environment and the combat environment, but everything ranging from assault to rape to murder and so forth, have you formed a perception concerning today's line officer and today's senior NCO in the service regarding their ability to sit as a member of a panel and adjudge across the board an overall appropriate sentence that would serve the interests of justice and preserve the necessary discipline within a command, to include general deterrence? Do you think that they are falling short today? Do you think they are still doing the job today, across the board?

Maj. Gen. DAY. I think they're doing a better job today than they were in the past, and maybe that's because I can look back in retrospect and, just in the very short past, see what happened over the four years in a row, or almost five years in a row that I was in command of different organizations. When I first got there, I thought there was definitely a shortage of the ability of those people to come to a finding. Today, I think we are in as good a shape as we've ever been, to my observation.

Col. RABY. And that goes to findings, but do you think they are better today in sentencing across the board, or not?

Maj. Gen. DAY. I think they are. I think they're better across the board.

Col. RABY. Now I have one other question, if I may. Let's take a case, and we'll make this purely hypothetical. I want it to be hypothetical. Suppose we had a case where we could have an accused sentenced after being found guilty by a judge and by a group of line officers, or a combination of line officers and enlisted personnel. Let's assume for the purposes of this hypothetical that in both cases, the court somehow gave an identical sentence in both types. The judge gave the same sentence as the court with members. Considering that one of the important features of the military justice system is not only punishment of that accused but general deterrence, deterring other soldiers and Marines from committing

similar offenses, when the word gets out to the military community that this particular Marine or soldier has gotten this sentence, does it have more impact in deterring others if it comes from the officers or the officer enlisted combination, or from a judge that may not be a member of the command? Or, does it matter to the other soldiers who is saying this conduct was wrong and will not be tolerated in the system?

Maj. Gen. DAY. I think it has a greater impact if it comes from a combination type of panel; if it's enlisted and officer, a mixed panel. I think it has more impact than it would if it was an all officer panel, or if it was a single judge, as far as the people in the organization are concerned. I think that as far as the commanders go, there would be no difference on how he'd view the impact. But as for the people that are down in the ranks, that it would have more of an impact coming from the combined type of a jury than it would from a single judge.

Col. RABY. Then in fairness, I can also assume that if we have a hypothetical where a judge gives an appropriate sentence for the offender and the offense, but we have a jury that goes askew and gives either a too harsh sentence or too light a sentence, that that would have or do a greater harm to good order and discipline than if it was converse, the judge fouling up, because of the closeness of the relationships of the individuals within the command.

Maj. Gen. DAY. I think that's true.

Col. RABY. Which do you think is—Do you think sentences go askew often enough in cases so that we should give up a system whereby officers, many of whom go on to be convening authorities, have a chance to go into court and actually participate in the sentencing of a soldier? Do you think they'd learn anything of how to dispose of cases, learn anything in how to make recommendations for future disposition, by engaging in the sentencing process and having to sit in the back of the room? You've been a member of a court I'm sure, Sir.

Maj. Gen. DAY. Um hmm. (Indicating an affirmative response)

Col. RABY. And you know the type of talk that goes on in the deliberations room. Is that a learning experience that we should give up?

Maj. Gen. DAY. I think it is, and I think that's one of the—that was probably the only converse opinion that I had on this. Going back to my days when I was a Lieutenant, a Captain, a Major and a Lieutenant Colonel on some of these boards, what I did learn there probably helped me out as I went up to be the convening authority, and I don't know how you can replace that experience, certainly if you go to a judge. That was why, when I took a look at this, I weighed it very carefully and I said, that's one thing we're going to sacrifice, and that's probably the best thing of the system that we'll probably have to sacrifice if we went to a judge. But the actual experience that you learn through that process, I think not only gives you a better understanding of the mechanism itself, but a better understanding of people because if you eliminate them altogether, which is what I'm saying would probably be the best route, then of course you're going to eliminate that experience-gaining factor.

Col. RABY. If you could make the decision yourself today, which or what type of system would you like to create?

Maj. Gen. DAY. I'd like to see a single judge right now with the type of people that we have in the service, and maybe because we've dropped so precipitously off on our courts-martial and our offenses in the last three or four years. I think I'd make that with the—probably governed by one point and influenced by one point, and that's the point that it would make it a hell of a lot less painful to have that one judge here than for me to have so many officers serving on a court at a certain time it would probably be more of an inconvenience to me than anything else. I think that it would be just as effective to have that judge up there, and probably more effective from my standpoint.

Col. RABY. So to gain conservation of manpower, you would forego the benefit of the training to the officers in the future?

Maj. Gen. DAY. Yes, and I think a big influence there is our readiness, what we are trying to do today, and the services are busier than at any other time as far as the exercises and things that they have going on around here and the commitments.

Col. RABY. Thank you, Sir.

Maj. Gen. DAY. And the last one is whether the jurisdiction of special courts-martial should be expanded to permit adjudgment of sentences including confinement up to one year and, if so, what if any changes should be made to current appellate jurisdiction. I like the idea. I don't know if we'll ever see it, of extending the special courts up to one year. The point here that I'd like to stress is that we have in the past, and I've been involved in this also—If I thought the offense was really a special court-martial offense, but I looked at it and recognized that the maximum that man could get from that offense was six months, then I was probably influenced to go to a general court-martial because I felt down deeply that he should have at least a year or maybe more of confinement for that offense. Also, recognizing that if he got six months confinement, by the time the whole procedure went through the legal gamut, he may well only be serving a month or two months confinement. This has happened many many times and I just feel that maybe we

should go to a year, versus the six months in a special court.

Mr. RIPPLE. General, we've talked a lot about the linkage of these various concepts here today. Would you feel any less secure about going to a year's confinement at a special court-martial if the sentence were to be meted out by a military judge who had no guarantee of tenure, who was replaceable on the spot if he didn't come out the way someone wanted him to come out?

Maj. Gen. DAY. Yeah, I think I would feel very queasy about that, Mr. Ripple. That's why I caveated my remarks before that, about a judge's tenure as far as cause versus a personality thing. I feel that that year, as far as I'm going to be concerned as the Commanding General, that I wouldn't be too overly concerned whether that was given by a single judge or by a panel. I know I've missed something on your question there, and I just can't—

Mr. RIPPLE. Well if the military judge were untenured; in other words, had no guaranteed term of office, would that make you feel a bit insecure?

Maj. Gen. DAY. (After conferring with Brig Gen'l Donovan) Yes, I would have some concern there. I think you have to have tenure, and I think the very reason you have to have tenure is that if you don't and you get a guy up there that doesn't have as stiff a board in that back as he should have, if he even once kowtows to what he thinks the division commander wants, or the commander wants, then we've lost the whole essence of our system. I think there has to be tenure. I don't know if we have many people like that; I don't know of any, and I've never run into any; but if we think about it, then it can happen.

Mr. HONIGMAN. Sir, do you think that if the jurisdiction of the special court were increased there would be a risk that those defendants who now receive a sentence of three months or four months where the maximum is six, would instead receive sentences of six or eight months because the maximum is twelve?

Maj. Gen. DAY. No, Sir, I don't. I think that—I don't think that his peers would do that to him. I don't think that the officers who are trusted with his welfare would do that to him because actually, they're the ones that are sitting there, and I don't think that a military judge would do that to him, would fall back on that. I think that it's probably a chance that we'd have to take, but I believe you'd see a—You may have some say well, we're going to give this guy eight months instead of four months because if we give him four months, he's only going to serve a month anyway; if we give him eight months, he's going to serve the four months, and that philosophy might enter into it, but I don't think it will on a steady basis, and I don't think that in the long run that would affect it.

Mr. HONIGMAN. Thank you.

Col. MITCHELL. General, do you see the idea of the one year special court-martial as avoiding what might in some cases where the expected punishment may be somewhere between six months to about fifteen months—the burden of going forward via this general court-martial route to get that kind of a sentence would be alleviated?

Maj. Gen. DAY. I think it would be. And I think it's a heck of a burden when you want to go to a general court-martial to make sure, or in your own mind that that's the route we should go to see that he gets a fair shake one way or the other, either for the government, or for himself. As far as reducing the amount of general courts, I think it would; I think you'd see a significant reduction if you could go for a year at a special court, and in the amount of the workload that's associated with a general court-martial compared with that of a special court.

Col. MITCHELL. Would you prefer the increase in the punishment authority of a special court-martial to the streamlining of the Article 32 and other administrative procedures which are required to be completed prior to a general court-martial, and leaving the system the way it is?

Maj. Gen. DAY. I would prefer to go to the year on the special court-martial. I don't know, but when you talk about streamlining that Article 32 bear, I don't know if you can really get that down below what we go through on that Article right now or not. You might be able to, but we've lived with that a long time, and I don't think anybody has been able to do anything with it. It's a pretty cumbersome tool.

Capt. BYRNE. General, we now have a situation where we send military judges to a certain term of duty based upon a set assignment; for example, I think in Okinawa it'd be a year, and for some other military judges it would be two or three, depending perhaps of whether they're going to retire. I can't speak for the Marine Corps, but I know in the Navy it's for three years, a set tour. That is not though what I would call tenure. Tenure would be where we could not necessarily move that individual out of that position because of the needs of the military service during that three year period, or during that one year period. Do you favor a situation like that where we couldn't move that individual out of those positions?

Maj. Gen. DAY. I do. I don't think that our system should be predicated on a set three year tour that's layed down by Headquarters Marine Corps if they want to move a man after three years. I think that his tenure should never be less than three years, and I don't think that it should be predicated on the amount of time he's assigned to that area. As an example, if he's assigned to

Camp Pendleton and his tour is three years, then you know he's only going to be a judge for three years simply because that's the maximum time he can sit there. I think that if our requirement is that he spend five years there, I think he should well be able to spend five years in that particular job.

Capt. BYRNE. Yes, Sir, but let's say you send him to Camp Pendleton as a military judge for three years and a need comes up for an SJA at Camp Pendleton, and you feel that he would be the best man for the job despite the fact that he's in a military judge job. Now let's say that he doesn't necessarily want to go to the job, but you feel that he's the best man for the job. Tenure, or the concept in the way that we're talking about it I think would preclude that if he didn't want to go. Would you favor that kind of situation?

Maj. Gen. DAY. I'd be in favor of the man if he didn't want to go. Captain, in answer to that question, of course, you as well as I realize that we have the promotional aspect we have to consider and the career pattern that we have to consider. As a commander, I would say I'd like to have tenure and I'd like to have uninterrupted tenure of that man. As far as that man's future goes, I know that I might well be writing him off the list, or affect him in some manner if I keep him in that job say as a judge, and not have him go over to be the base SJA which looks real good on his record. From a personal standpoint, I'd like to see him in there for a set amount of years and not have that interrupted because of another position somewhere else; but I think I know what the recommendation is going to be in all fairness to that man and to make sure that his career does follow a certain pattern; that it's going to go the other way. They're going to say well—or the majority of people will tell you yes, I think if I as the Commanding General need him over here as my Staff Judge Advocate, that I have the authority and I should move him from this position over to here because he is the best man for the job. But I think also if you ask most of your commanders, that would be causing them quite a bit of quandary because they would know that they would like to keep him over here as a judge where he is getting the experience and is probably giving the people a fair shake, and not have to move him over there simply because of the promotional aspect, or his future in the service. I don't know if you have that same problem in the civilian world, but we certainly do have it in the military.

Capt. BYRNE. Perhaps. Let's also change it a little bit from the same locality. Say you wanted to send him from a military judge at Camp Pendleton to the SJA at Cherry Point during that three year period. He didn't necessarily want to go, but the Marine Corps wanted him to go. Tenure would preclude the Marine Corps from telling him he's got to go.

Maj. Gen. DAY. I would be against it, and I know it counters what most of our commanders in the Marine Corps would say; but I just think that you have to have a man there, or a person there that you have that trust in, and if he's doing the job, I say if it's not broken, don't fix it. Don't send him someplace else simply because of his career pattern. But I also know, having sat on selection boards, that if you don't do it, then his career pattern is going to be affected. But from a personal standpoint, I'd like to see the man stay where he wants to stay and if he's doing a good job, to keep him there, and I think there's a big dependency there on us making that correct assignment from Headquarters Marine Corps. I think it's not too prudent to assign a man to a three year period knowing that some time during that period, he's going to have to change jobs because of the exigencies of the service, or simply because it's best for his future.

Brig. Gen. DONOVAN. Can we take a brief recess?

Col. HEMINGWAY. Certainly. (After a brief recess, the hearing continued as follows:)

Col. RABY. General Day, I've been listening to your remarks about tenure for military judges and I find it very interesting. I recognize, of course, that you're giving us your impressions from your experiences of forty years of military service or thereabout in the line, and that you're not using these as words of legal art. I recognize that throughout your testimony; but, I find it very interesting, your comments about military judges and whether or not they should be assigned. I sense—so you haven't said this—from your testimony that as a former commander, you consider the military judge's position to be a very important one then in our current disciplinary system, say vis-a-vis a staff judge advocate; that you consider him an important player in the puzzle as a staff judge advocate. Many commanders feel that the staff judge advocate is the key man, and I just wonder how you view the importance of a good judge to good order and discipline in today's Army, Marine Corps, Navy and so forth?

Maj. Gen. DAY. I think it's of paramount importance. Of course, when I go for advice, and like in any organization, I go to the SJA when I have a problem with how things are going as far as courts go, or military discipline, or the UCMJ, I go to the SJA, and I never, never go to a judge. He runs his bailiwick and I think he runs it extraordinarily well, and I think it's primarily because he's something alien to me. I don't think that the normal line officer really has had that much affiliation with his SJA officers coming up. He goes to them when he has a problem and, in the last few years because he's been taken out of courts for the most part, he doesn't have that affiliation as he once had, and maybe there is some legerdemain attached to this judge, but for the

most part I put the utmost faith in that guy and I believe in him very strongly, and I guess I step kind of, or walk very softly so I won't have any influence as a commander on what he has decided. I think a lot of him. I think there's a place for him. As far as the assignments go, I've never given that any thought. I don't know who should make the assignments. I know how they are made in the Marine Corps, but I just think that he's a bulwark to our discipline, our very discipline in the service, and we have to treat him as such and recognize him as such.

Col. HEMINGWAY. General, you mentioned that leaving a military judge in a position with tenure may cause some loss of career pattern, implying then that perhaps they won't be quite as competitive as the individual who does get quick broad experience. Would you favor a separate promotion category, or guaranteed promotions for trial judges if they were tenured?

Maj. Gen. DAY. No, Sir, I don't believe I would. And I say that because I know of the experience that that judge has in both being the government counsel and the defense counsel and right on down the line in the experience that he needs to be in the job. I think once we start separating them, however, I think the very same thing is going to happen to that judge that happens to the line officer that doesn't serve on a court. If he's learning from osmosis, or he's learning from exposure, I think that he's going to have to be in both areas. That all goes back to how long a guy should have tenure, and that's why I asked at first did you mean three, or five or six years, or did you mean two years and then a break. That break is what I was talking about, he's back with the SJA, and then back to being a judge again.

Col. MITCHELL. General, there are some practical problems brought up with this tenure business and one of them has to do with the creation of the military judge's fitness report. Some military judges have their fitness reports completed in Washington. Other fitness reports are written on subordinate judges by more senior judges, but the law seems to constrain in the eyes of many people, the comments that can be made in those fitness reports by the reporting senior, the result of which is that the fitness report which is ultimately produced, may not be a very accurate picture of the military judge in question. The second practical problem that's been brought up before the commission so far has to do with the attractiveness of the military judge duty itself. It may be especially critical in the Marine Corps because the lawyers in the Marine Corps are considered across the board with all the other officers in the Marine Corps for promotion; consequently, there is a requirement that these officers move around and get different sorts of experiences. As you had mentioned, one of the principal arguments in favor of tenure has been that we'll be able to keep these officers in military judge billets longer and thereby create a more experienced judiciary. But at the same time, we're creating promotion problems and fitness report problems for those very people. This results in a perception in the eyes of apparently many that duty as a military judge is not desired, and if a lawyer has the opportunity to decline it, that he does so. Is there a solution to what has been described to us at least as being something of a problem?

Maj. Gen. DAY. As far as tenure goes, Charley?

Col. MITCHELL. Yes, Sir, in terms of promotion and fitness reports.

Maj. Gen. DAY. I can't answer that; I don't know. I think just about every judge I've seen has been a super quality type of individual, and I've just taken it for granted that he had gone up through the wickets that he should go up through to be in that position. I don't know how they select them. I do know from personal experience in talking to judges at times about their wanting to return to the regular SJA type of duty, but I don't know if there is a perception across the board.

Col. RABY. General, I have one question. We've talked about promotions and reference has been made several times to the fact that the Marine Corps competes against officers of the line for promotion. In the Army, we used to have a similar system—if I understand your system. As it's operating today, right now, are judge advocates members of promotion boards necessarily that have—when judge advocates are being considered?

Maj. Gen. DAY. Yes.

Col. RABY. You have at least one member or more who sits on the promotion board in most cases?

Maj. Gen. DAY. For a specific rank?

Col. RABY. Yes. I mean, we used to at least have one judge advocate sitting on each promotion board where we were going to have judge advocates come up on the list for example.

Maj. Gen. DAY. (After conferring with Brig General Donovan) I would like to have General Donovan respond to that.

Col. HEMINGWAY. Please.

Brig. Gen. DONOVAN. Good afternoon, Sir. I'm Brigadier General Donovan, serving as Director of Judge Advocate Division. It's a pleasure to accompany General Day during his testimony today.

As to the last question about Marine judge advocate promotions, it is my experience and knowledge that first of all, there is not set policy that one or more Marine judge advocates always be a member of the promotion board which reviews the records of judge advocates in a promotion zone. In fact, more commonly, there will not be a judge advocate on the board, but recurringly, from time to time in a random fashion, Marine judge advocates do serve on the board. For example, this very pro-

motion year, Colonel Blum, B-L-U-M, the senior general court-martial judge on the east coast in the Marine Corps, did come to town and was assigned by the Commandant with the concurrence of the Chief, Naval & Marine Corps Trial Judiciary, to serve as a voting member of the selection board for Majors to Lieutenant Colonels and, in this regard, he looked—as a full voting member, one of nine—not solely at the eligible judge advocates, but at a full list of eligibles, and had a full vote as to all eligibles, including pilots, infantrymen, engineers and so on.

Statistics have been compiled and a recent snapshot of statistics for promotions to Captain, to Major, to Lieutenant Colonel and to Colonel indicates that for the last five years, Marine judge advocates have met or exceeded the fleet average on balance. In the area of general officer selections, a few years ago one of my predecessors in office did sit on a Brigadier selection board while he was a permanent Brigadier.

Col. RABY. We've never gotten into this area before and, I guess not knowing your system, I just wanted to insure that maybe there wasn't—Well, I'll put it to you direct; I guess that's the best way. If we go to tenure, General, under the promotion system that the judge advocates in the Marines have right now, do you get adequate representation, or adequate opportunity to put instructions to that board so that military judges would not be hurt, or would this tenure in your opinion—Could it adversely affect careers?

Brig. Gen. DONOVAN. Manpower types would have extensive experience in which to inform the commission at greater length, but I believe that the precept approved by the Secretary of the Navy addresses the needs of the service and guides the board's attention to give appropriate consideration to various needs. This does occur when there are MOS and grade shortages in judge advocates. It has occurred, and judge advocates as a group have specifically been mentioned. A few years ago, the Commandant recognized the opportunity DOPMA presented to go to a competitive category and made the decision that rather than run the risks of resentment arising between judge advocates and all other Marines, because of the quote, unquote protected selection rates, it would be better to have a single Marine Corps and watch how things went; so far, things are going well.

At this point, I appreciate the opportunity, General Day, but I'll terminate that statement and take my seat. Thank you.

Col. HEMINGWAY. General Day, we've generously interrupted your comments here. Is there anything in your prepared statement that you haven't had an opportunity to address?

Maj. Gen. DAY. Just Number Two, and that was whether military judges and the Courts of Military Review should have the power to suspend sentence. And I feel very strongly on that; that that should still lie within the authority of the Commanding General and his commanders. Military judges aren't—geographically, they're not necessarily at one base. They may be at four or five different bases; they make that decision and they move on. The Commanding General and his commanders and his people have to live with it. I'd like to see that stay with that authority.

Col. HEMINGWAY. Our court reporter is close to the limits of endurance here and with that in mind, do the commission members have any other questions?

(All members indicated a negative response.)

General Day, on your last day here in Washington, thanks very much for taking the time, and the views of senior commanders, I know, weigh very heavily with the commission and will ultimately weigh very heavily with Congress when this testimony and report is transmitted to the "hill." I certainly appreciate, and I know all the other commission members do, your taking your time to come over here today.

Maj. Gen. DAY. Thanks for giving me that opportunity.

(There being nothing further, the statement of Major General Day was concluded at 1740 hours, 8 June 1984.)

TESTIMONY OF: COLONEL DONALD B. STRICKLAND, CHIEF TRIAL JUDGE, USAF, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 29 JUNE 1984

Col. STRICKLAND. Good morning. My name is Col. Donald Strickland. I am presently assigned as the Chief Trial Judge of the Air Force. What I propose to do is to make sort of a brief prepared statement, or reasonably prepared, and then I will subject myself to any questions.

First, I would like to say that my statements this morning are strictly my own personal opinion. They do not necessarily represent the views of The Judge Advocate General of the Air Force or the head of the Judiciary, and since I am retiring in November, they may not even represent the opinion of the Chief of the Trial Judiciary for very long. But I would like to emphasize that they are my personal opinions.

Also, I would like to emphasize that they are very distorted, sort of an Air Force view. I am naturally limited by my own experience and I know this Commission, this working group is much broader, but my opinions are based upon my own personal experiences in the Air Force and how I think these proposals would work in the Air Force.

I think it might be appropriate if I give something of my background just to show you what my experience has been in the area of military justice. Prior to this assignment, I was the staff Judge Advocate for the Commander at 9th Air Force, which I think at that time was the largest GCM in the world in numbers of bases. There were 14 bases.

Prior to that I was the Staff Judge Advocate at Seymour-Johnson Air Force Base, the Air War College, was a military judge in Europe for three years and prior to that I was an Appellant Government Counsel for four years.

I would like first to address the issue of whether the sentencing authority in court-martial cases should be extended to military judges in all noncapital cases, because I think this is the most difficult issue for me and one that I have spent the most time studying, talking to people and thinking about. In fact, my ultimate conclusion which I will make later, if I had to quantify my thinking process and if I had a mechanism of voting in my brain, the conclusion I reach is about a 51–49 vote. And I will say that that has been a reversal in the last two weeks, that I have actually changed my mind.

There is no question in my mind that a military judge is better qualified by education, training and experience and knowledge to sentence an Air Force member in a court-martial, much more so than a court member. The education and training alone, all military judges in the Air Force are naturally lawyers. They are Judge Advocates with 10 to 25 years of experience and with extensive criminal law experience.

They have had certain training, even in sentencing, for example, they all are graduates of the Army Military Judges course in Charlottesville, Virginia, which is a prerequisite of being a Military Judge, and which a considerable body of that course consists of studying the problems of sentencing. They are all graduates of the three-week General Jurisdiction course at the National Judicial College in Reno, Nevada, which a considerable portion of that course is given towards the problems of sentencing.

They all attend a Joint Services Military Judges seminar, each year, which usually the question of sentencing is studied. They also are graduates of the one week National Judicial Advanced Criminal Law course at the National Judicial College. And many of them attended the Homer Ferguson Conference this year and for those of you who attended that you know that we had a considerable block of that on sentencing.

They generally know and are better informed of what light sentences are in the Air Force. I think if you had judge alone sentencing that the sentences for like crimes would be more uniform. Those of you members here who have attended these sentencing seminars know that it will not make for uniformity of sentences because you find judges varying to great degrees. But I think what it would do, it would take care of extremes at each end, the ridiculously low sentences and the ridiculously high sentences.

I will not bore this body this morning with war stories of ridiculous sentences I have seen by courts, because I am sure all of you have equal stories about ridiculous sentencing by judges. Judges also are much more aware of the administrative consequences of a court-martial sentence than the average court member.

In fact, every time a court member asks us what are the certain administrative consequences, we instruct them to ignore them and not to be concerned with that, which is patently ridiculous to give an adequate sentence that considers the questions of justice to ignore the administrative consequences.

Comparing with the court members, it has been my experience from the Air Force that court members unfortunately usually are not the best and the brightest officers on the base. My particular experience has been primarily in Tactical Air Command, where it is very rarely and almost impossible to get a fighter pilot to sit on a court. They are exempted. Usually the court-martial duty is looked at as just an extra duty.

I recall once at Seymour-Johnson having an officer call me, asking me since he helped inventory the commissary last month, why does he have to sit on a court-martial this month. A lot of times the selection process is done by computer, along with any other roster. It is my feeling that, also in the Air Force we do not have enough court-martials at any one base because of the very nature of the way Air Force bases are. The average base has from 3,000 to 6,000 people in it. As you well know, we do not even have a Military Judge on every base. They are all circuit riding judges.

If the average Air Force base has 10 to 15 courts a year, that is a big deal, so very rarely would any one court member ever get to sit on a case, but one case every two to three years, if he gets that much. Most of the courts that I have sat as Military Judge, the court members are strictly virgin court members. They have had no experience with it at all.

Consequently, I do not feel—I think they are always working in a vacuum. They have nothing and no background and no experience to see what an offense is actually worth. I have heard some of the reasons against the proposal to perhaps give Military Judges sentencing authority. I have heard the sense of community argument, somehow or another that members sitting on a base are better informed about the problems of that particular community than a circuit riding Military Judge.

That certainly is an appealing argument, but I think as a practical matter that is just not so. Our Military Judges

in the Air Force work within certain circuits. They travel and they hit these bases quite frequently and I think the average Military Judge is probably better informed about what the issues of the day are than the members of the court, who usually sit in a certain amount of isolation from judicial problems, becuase they are so wrapped up in their normal work.

The other question is the issue of the right of an airman to be punished by his peers or the officers of his command. I am not sure that there is necessarily any right to that and, of course, there is no question that he is not being punished by his peers. By statute alone, the members of the court have to be of a higher rank. Frequently—they always are officers and if he should request one-third enlisted members, it has been my experience in 23 years in the Air Force that we have a panel of first sergeants that end up on the court in any respect.

So in conclusion, I would like to say that I think that Military Judges are better qualified for the job. However, after much blood, sweat and tears and thinking over the problem, I am convinced that the present system probably should not be changed, and that is only for one primary reason. That is the reason that the accused has the choice to make it. We have a mechanism in the Air Force, in the Armed Forces, to take care of ridiculously high sentences. They can be corrected by a convening authority, the Courts of Review and The Judge Advocate General.

Of course, we have no mechanism for taking care of ridiculously light sentences. But I think that is something that we should be prepared to live with, which we have lived with all of these years, that inures to the benefit of the accused and for that reason, I do not recommend that we change it, and for that reason only. The reason I think my vote in my mind is so close is because I still feel very strongly that the Military Judges are much better qualified and in a much better position to do it. But if an Airman wants to make that choice, to go before the court, I do not think we should take away that right from him.

That is all I have as remarks on those issues. Would you like to take questions now?

Mr. HONIGMAN. I was just going to ask whether you would feel more comfortable if we asked questions after you finished each topic or whether you would rather finish your remarks and then have us all jump on you, Colonel?

Col. STRICKLAND. Whatever the Commission—now, my next remarks will not be as lengthy as the last ones, so why don't I go ahead and finish that and then we will get to the questions.

Whether Military Judges and the Court of Military Review should have the power to suspend sentences. I am not in favor of this proposal. I do not think they should have this authority. There may seem to be a certain amount of inconsistency in my remarks, when I say on one hand I think the Military Judges are so much better informed than court members and then I should take the position on this case that the judges should not have the power to suspend.

Even though I think Military Judges are better informed than court members about important issues, I do not think Military Judges are better informed than Commanders about what is in the best interest of justice for the accused.

It has been my personal experience in the Air Force that the judges certainly have the authority to recommend any suspension and in five years or six years I have been a judge, I have never had a Commander who did not carry out my recommendations, except on the few cases they did not, it is usually because they had more knowledge about the accused than I did. There are always certain things that the Rules of Evidence prohibited me from knowing and he did not carry out my recommendations. I think he is better informed and I think he should continue to make that decision.

The next issue is whether the jurisdiction of the special court-martial should be expanded to permit adjugment of sentences including confinement of up to one year. I recommended this proposal should be adopted. I think special courts, the punishment should be extended to one year. The first thing, I think it would make the special court more closely aligned to the typical civilian misdemeanor court which usually has up to one year limitation.

I think it would serve to greatly decrease the number of general courts which by nature in the Armed Forces would make justice much more swift. I think it would give more immediate and maybe appropriate punishment without the lifetime censure on an Airman that the average general court does. As I recall an application in a civil service job, and I do not think that has been changed, there is a question on there, have you been convicted by general court-martial. I know years ago there was the feeling, well, if you have not been convicted by a general and you have been convicted by a special, you can answer that question in your favor.

But I think the stigma in the community, the civilian community for a general court-martial is much worse than the special. I think that a lot of staff Judge Advocates probably are recommending referal of cases to general courts-martial, simply because they do not think the six-month limitation is adequate. I have heard them state that if they thought they could get six months and the BCD they would send it to the special, but if that is the maximum, they are not likely to get any more.

If it were raised to a year, it is my prediction that the number of general courts-martial would greatly go

down, that justice would be swifter, and that the system would work a lot more efficiently.

The next question is whether Military Judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review should have tenure. I am not in favor of that proposal, unless there could be drastic changes in the Air Force personnel promotion and assignment policies. By tenure, I guess I have to put out my own definition. I presume you are not talking about lifetime tenure; you are talking about a tenure for perhaps a number of years, four or five or what have you. May I ask that question of the Commission before I continue?

Col. RABY. As the Commission, we have not adopted a set period as of yet. We are open to taking testimony from the witnesses regarding tenure for life and regarding tenure for term of years and regarding tenure that just mirrors the service's normal duty tour.

Col. STRICKLAND. Since I do not know what the Commission is talking about, I am going to address this issue as the question of tenure as opposed to—obviously, I do not see any possibility in the military having lifetime tenure under our present personnel system.

Mr. HONIGMAN. Sir, it may be helpful, we have adopted a phrase of a guaranteed term of office, which may help to clarify that.

Col. STRICKLAND. All right. Based upon that definition, I am still not in favor of tenure. I think the only way I could possibly be in favor of tenure in the military for Military Judges is if they all were Permanent Bird Colonels. I think that is not likely, that the Judge Advocate General would commit one-third of The Judge Advocate Corps to being Military Judges. The promotion and assignment, it is just not consistent with our promotion and assignment system.

The promotion boards that I have sat upon in the Air Force, one of the things that is looked at quite frequently is the variety of assignments that one has had. To be stuck in a position as a Military Judge for four or five years with no possibilities of getting out would not be good for an officer's career.

I think also that in the Air Force all our Military Judges are traveling judges; unlike the other services where the judges stay in one place, usually in nice quarters and they have nice courtrooms and nice offices and so forth, we have found it fairly difficult to recruit Military Judges in the Air Force and for one reason only. That is the question of travel. There are not many men who want to commit themselves to, even now, a three-year tour of constantly TDY every week, leaving their families, particularly in the grades of usually major and junior lieutenant colonel, who generally have small or teenage children. They do not want to do that.

I have never known a judge in the Air Force who did not love being a judge, who did not like the work and think it was one of the best there was. But the ones who have begged out and wanted to get out, it has been primarily one thing and that is travel.

In conclusion, I think the promotion, the assignment and the travel problems would mitigate against any kind of tenure, and, finally, I do not see any need in it. The Military Judges have in the Air Force absolute judicial independence. The pressures, I have never seen any pressure brought about on a judge. I suppose that there is one weakness in the system now that will be solved by 1 August 1984, and that is the appointment of the way Military Judges are appointed now by the convening authorities.

We have had cases in the past, and I remember where convening authorities and judges have got at loggerheads and the convening authorities have absolutely refused to appoint these judges to civilian cases on their bases. This has been rare, but it has happened. I think under the Military Justice Act of '83 this cannot happen now, and consequently I do not see any need for tenure.

The last two issues I do not want to spend any time on. A fair and equitable retirement system for the judges of the United States Court of Military Appeals, I really do not feel that I am qualified to address that issue. I think in general principals I am for the judges having as fair and equitable a retirement system as possible. I do know, I think, in personal knowledge of a fairly recent experience in trying to recruit a judge, a replacement for Judge Cook, a very prominent attorney from South Carolina, who I knew, refused to take the job and he finally analyzed that the pay, the retirement and so forth was just not worth leaving a lucrative practice in South Carolina to take.

I am not going to address the Article III issue at all. I am glad I sat in on the first part of this conference, since I see that you gentlemen do not see what the Article III court would be. I do not have any background to which I could add to that.

That concludes my prepared remarks. I would be glad to answer any questions.

Mr. HONIGMAN. Col. Strickland, perhaps we could start at the end. As you know and as you observed, we do have some concerns about what, how the Court of Military Appeals might be structured under Article III, and even given your disclaimer, I wonder if you have any thoughts at all that you might share with us about what sort of expanded jurisdiction might or might not make sense if we were to consider that issue.

Col. STRICKLAND. I cannot see that they really need any expanded jurisdiction. It appears to me in the case law that I am familiar with that they have the jurisdiction to do most everything that is really necessary for

them to do, so I am really not for expanding the court at all.

Mr. HONIGMAN. Do you have any views about the degree to which the Court of Military Appeals has been sensitive to the special military considerations and the special needs of the military in the decisions that it has been rendering in the past?

Col. STRICKLAND. It appears to me that that is probably a question concerning my personal philosophy about the opinions of the court, which I have watched this court for 23 years and I spent four years as an Appellate Counsel being worked over by the court. I frankly have been very pleased with the Court of Military Appeals. I know that there have been decisions throughout the years where particular military people have felt they have not understood the problems of the military.

I think courts frequently run into that in the civilian life too. If I go back to a very controversial decision of *Brown* vs. *the Board of Education,* there were many, many people who thought the Supreme Court was not sensitive to the problems that this case was going to engender. Sometimes the law just has to be the law and let society work the problems out the best that it can, if the decision is right.

I do not have any general quarrel with the court. If I had any recommendations to make about the court is I think it should be expanded from three to five members. I think it is too sensitive to the shifts in personnel which make the decisions of the court flip-flop too much. If I can recall my own personal experience, as an Appellate Government Counsel, the first two years I was an Appellate Government Counsel, I never won a case for the government, and it was a rather liberal court at that time, relatively speaking.

One of the members died and was replaced by a more conservative member. The last two years I never lost a case as Appellate Government Counsel.

Mr. HONIGMAN. I would suggest, Colonel, that was due to your increased experience and ability rather than to the change in the court.

Col. STRICKLAND. I would say that, frankly, it did not do much for my ego as to the persuasiveness of my briefs and arguments. I think that is the biggest weakness in the court, with one shift, then the whole philosophy of the court shifts. And I think we saw that fairly recently in the last four years, where it just seemed like one day, I was explaining to a Commander that we no longer have jurisdiction for off-base drug offenders, and then, what was it, three years, four years later, we all of a sudden have it again. I think if we had a five-man court that would be a more—we would not see these historic shifts.

Other than that, I think the Court of Military Appeals has been sensitive generally and there have been times when they have not. I have no quarrel with it.

Col. HEMINGWAY. Do you have anything else?

Mr. HONIGMAN. I do have a few other questions. Granted that your view, Colonel, is that the power to suspend a sentence should not be given to the military judge, if nevertheless that power were granted, how would you handle revocation of a sentence, of the suspension of the sentence?

Col. STRICKLAND. That is an interesting question. I just do not think I can answer it right now. I have not thought about it, since I was not in favor that they be given it. I did not address that issue or how to handle it.

Mr. HONIGMAN. I understand.

Col. STRICKLAND. I am trying to think here. I would suppose we might have to have some kind of subsequent hearing in front of the judge, but then you get the problem, suppose that judge is gone or reassigned, then it may be before another judge. I guess that is the way we would have to work it. I do not think we could give it back to a convening authority. I think it would have to be by another judge, preferably the same judge.

Mr. HONIGMAN. You mentioned earlier in your testimony that typically the members of a court-martial who are sitting as the sentencing authority do not have the ability or the background to consider the administrative consequences of a sentence. Do you feel that that is a reflection of the ability of the prosecutors generally speaking to inform them about those considerations? Do you think that is a problem that could be solved by the advocacy of the prosecutor?

Col. STRICKLAND. Perhaps there could be problems that could be solved by proper instructions in the court and I am going to say something here I am not quite sure, but it seems like to me there are some cases in COMA which have talked about that the court should not talk about the administrative consequences of an act. It seems like we usually end up instructing court members when they ask that, that they should be given an appropriate sentence and not consider what the convening authority will do, what parole boards will do, et cetera, whatever they think is appropriate.

So we by our instructions absolutely limit their knowledge. It would be possible, I suppose, if we would work the law around, that if we gave them more informed instructions that the normal parole procedures when a person with over a year sentence would normally serve one-third of that sentence, but I guess the thinking has been, well, that does not really mean that is going to work out and we just get them totally confused by doing it. That is why they do not have the knowledge, because we have intentionally withheld it from them.

Mr. HONIGMAN. In that case, would you agree that it really is not proper for a military judge to be factoring those considerations into his sentence even if he is aware of what the administrative consequences would be?

Col. STRICKLAND. No, I think that any informed judge ought to consider all of the consequences. I know—did you attend the recent Homer Ferguson Conference?

Mr. HONIGMAN. I am afraid I did not.

Col. STRICKLAND. We had a judge there who has been a federal district court judge, Judge Tjoflat, who now is on the court of appeals in Florida, and their discussion and my discussion with civilian judges is they always considered the administrative consequences of it and to ignore it, you are not doing your job.

I see nothing wrong with a judge being informed of what is really going to happen with the sentence.

Mr. HONIGMAN. But, of course, in the civilian system, the judge is always the sentencing authority.

Col. STRICKLAND. That is right.

Mr. HONIGMAN. Therefore, those considerations are always present; whereas, in the military system, they will be present only in those situations where the judge is imposing the sentence but not present in the situation where the members are imposing the sentence.

Col. STRICKLAND. That is very true, but the fact we have created a system that the members really do not know what goes on, if the accused elects to go before the judge, I do not think the judge can play ignorant of what he knows.

Mr. HONIGMAN. You mentioned that there is some concern that court members are typically not the best and the brightest officers on the base and gave us an example that fighter pilots are often not selected. Do you consider this situation to be an argument that would support a move toward a random selection of jury members, regardless of their military occupation?

Col. HEMINGWAY. You mean court members.

Mr. HONIGMAN. Court members.

Col. STRICKLAND. Perhaps it would, except that I think that, of course, you would have to amend Article 25 of the Code to do that. You could not do it under the present law. I am not sure that the random selection would make it that much better if you still had the exclusions. The problem we sort of have at a lot of bases is not random selection; most of the base Commanders I worked for have sort of wanted to spread out the experience of court members. They wanted as many to get that experience as possible.

But usually in the Tactical Air Command bases, the fighter pilots are excluded from any kind of extra duty and court-martial work is considered extra duty, which is particularly unfortunate, because most of the time the fighter pilots are going to be the future base and wing commanders and general officers in the Air Force. So I think it is particularly unfortunate that they do not get to sit as junior officers on courts-martial and later they are convening them and perhaps they have never even seen one.

Mr. HONIGMAN. If I may ask just two other questions. We talked about the expansion of the jurisdiction of the court-martial. Do you see a danger that where the maximum sentence of a special court-martial may be raised from six months to a year that the accused whose degree of culpability might be merit a four-month sentence, which is perceived as two-thirds of the maximum, might instead find himself with an eight-month sentence, also perceived as two-thirds of the maximum?

Col. STRICKLAND. I suppose that is a possibility, but I do not think it really will make all that much difference of what the maximum will be. The reason I am for that proposal is I think it would make our justice system more efficient. Now, I have been fairly critical in the past, particularly as a staff judge advocate for a convening authority, that our system is so complicated and so convoluted, that if we had to go to war it just would not work.

I had a personal experience where we had a base in Iceland and we had a big drug bust with 16 cases up there. All we had was one staff Judge Advocate and a sergeant. We had no judge, no prosecutor, no defense counsel, no court reporters. And we had to process 16 general courts-martial and it was just an administrative nightmare and I concluded from that experience that I do not see how this is going to work.

Now, fortunately, I think in the Military Justice Act of '83, we have corrected a lot of these problems. I am not sure in the Air Force to what we extent we are going to, I think by regulation we are probably going to go a little farther than the Manual has required us to do. I think it would be a more efficient form of justice and would be just as much justice. Of all of these proposals, I think this is the best one I see in there.

Mr. HONIGMAN. Would you favor any changes or expansions in the provisions for Article 15 punishment?

Col. STRICKLAND. No, I think they are about right where they are.

Mr. HONIGMAN. Thank you, sir.

Col. RABY. In regard to your comments about expanding the special court-martial jurisdiction to one year, you have concluded that you favor it because of the efficiency to be gained.

Col. STRICKLAND. Yes.

Col. RABY. If a change in the legislation to cause this jurisdiction expansion was also coupled with requirements for Article 32 investigation or the same or a greater post trial review process than currently exists, would the efficiency to be gained remain the same?

Col. STRICKLAND. Absolutely not, in fact, I would see no point in it.

Col. RABY. Now, you addressed your perceptions as to whether there would be any danger of a soldier who now gets four months of getting greater sentences just because the maximum punishment level of the court was increased. Do you see any danger that a Commander would start under-referring cases merely that were controversial, for example, a sexual harassment or a rape case, where the accused comes in and says there was a consent, and you have some of those messy cases, or child molestation cases where family sometimes is not willing to cooperate fully, either because of economic results of the action or otherwise, do you see a compromise, so to speak, by referring these cases now to an expanded special court-martial jurisdiction level and thus perhaps causing a degrading of the overall discipline within the command?

Col. STRICKLAND. You mean you think they might refer it to a lesser forum than they would now; in other words, they might refer it to a special rather than to a general?

Col. RABY. In an appropriate circumstance.

Col. STRICKLAND. I am not sure that the extra six months would necessarily make that much difference. As you well know from your experience, what goes in the make up of the decisions of the referred cases is a very complicated, philosophical concept and it is very difficult to know. There are always cases in which you as an SJA or you as a Commander, you just do not know. You do not know what the facts are. You have these accusations and almost the sense of the community. You cannot sit there and play God and you have the evidence and you know in a lot of cases you have to sit in the court and let the chips fall where they may.

I do not think that six months' difference would cause an under-referral. But I am sure it is possible in some Commander's mind.

Col. RABY. All right, Colonel, thank you. Now, you indicated that you believed it was proper for judges to consider the administrative consequences that a sentence brings when formulating an appropriate sentence for an accused.

Col. STRICKLAND. Yes, I did.

Col. RABY. Having also sat in conflicts and having studied this, I tend to accept that, but I also wonder then why it is equally proper for court members to receive the same information under proper instructions from the judge if they retain sentencing authority. Is there a legitimate reason for not changing the law and giving them this information?

Col. STRICKLAND. That is a very good question. Probably not. The only problem I have with that is that we as judges know that, for example, the parole system, normally if a guy after one-third of his sentence, but that is presupposing that he meets all of the requirements, and we have been to schools where we have had the commandant talk to us of the disciplinary barracks, this is just not automatic that after one-third he automatically gets it. He has to live up to all of these conditions and I just think judges are a little more aware of that and it will be possible to formulate the instructions to court members. It would be, I think, extremely difficult. Perhaps you could say normally on good behavior and so forth. I just do not know if you could ever get it all across. That is, I think, one thing that mitigates against jury sentencing.

I think I made my point clear, the only reason I am for jury sentencing is because it is the right of the accused that I hate to take away from him. I still believe very strongly that Military Judges know more what they are doing in the area than the average juror.

Col. RABY. You advocate that your perception is that, of course, judges have a good working knowledge of the parole and clemency system and it is not automatic and it should be earned. Yet, those of us who have worked in the Criminal Law Policy Division know, for example, that the United States Disciplinary Barracks because of a shortage of space has in the past three years, imposed arbitrary decisions that certain prisoners after serving a certain amount of their sentences will be put in for parole and will be placed in a parole category, because of space requirements, which it seems to me raises some interesting questions in that area.

Col. STRICKLAND. That is the truth, whether the court is sentencing or whether the panel is sentencing.

Col. RABY. In the area of the size of the court, you hit upon a very important point where you indicated that with the three-member appellate court, which as I understand is a smaller number than recommended by the American Bar Association, but anytime one judge, active judge, leaves the bench that it can cause major shifts in a substantial body of law.

Col. STRICKLAND. And it has done so in the past.

Col. RABY. And I believe you indicate that in your years of experience you have seen where this has caused trouble, obviously caused trouble to the practicing attorney and judge in applying the law. You have also seen where that has caused you problems in explaining to commanders the rationale for the sudden and abrupt shifts in certain major areas of the law. Is that correct?

Col. STRICKLAND. That is correct.

Col. RABY. Does this in your opinion detract from the Court of Military Appeals' credibility with commanders in the field?

Col. STRICKLAND. Yes, I think it does. Anytime you have radical shifts so often, it is bound to distract. It distracts from me as an attorney, that every three or four

years we are going to have a complete and philosophical shift of jurisdiction and this is one issue that I think I personally feel stronger on than anything that is on this paper.

I have followed the court for years, I have watched it. In fact, once when I was doing some graduate work for my master's degree, I did a study of the court about, particularly the issues of the sociological views and how it has affected military justice and that is the conclusion I came up with. It is just too small.

Col. RABY. You have been Chief Judge serving on the Court of Military Review for how long, sir?

Col. STRICKLAND. I am not on the Court of Military Review. I am the Chief Trial Judge.

Col. RABY. Chief Trial Judge, excuse me.

Col. STRICKLAND. I have been in this job for two years.

Col. RABY. You have the opportunity to read the opinions of the Court of Military Appeals, at least every opinion probably in the last two years that they have come out with. Have you not?

Col. STRICKLAND. In fact, I have read every one they have written in the last 15 years.

Col. RABY. In the last, let's just take the last three years of the court, which probably are more—you can remember those clearer, of those opinions, do you have a feel for, without giving any special percentages, unless you can, how many of those opinions were all three judges concurring, as opposed to how many were of split opinions, two to one, some even one-one-one? In other words, where the change of one judge could alter an opinion in theory.

Col. STRICKLAND. I do not have the figures for those three years. As all of us know who read opinions here, we have I think what you might say one conservative judge, one fairly liberal judge and a swing-man. That has always been the case. A particular research project I was working on, it happened to be back in '68, and I am more familiar with that figure, where I studied where every time Judge Ferguson always voted for the accused and Judge Quinn always voted for the government and the years that Judge Kilday was there, he was a swing-man. When he was replaced then we had a fairly liberal court. When Judge Kilday died and was replaced by Judge Darden, it swung back. If you go through it throughout history, you will find out that one man changes the complexion of it.

Col. RABY. Let me ask about three more quick questions in conclusion. If that court were increased to a five-man court, where say you could have two panels of two members and the chief judge sitting as a third member of each panel, would the stability of that court be enhanced and would its reputation with field commanders be enhanced in your opinion?

Col. STRICKLAND. I think it would for the simple reason I have stated before. I think you would not have these historical short shifts in philosophical views. It would be more consistent.

Col. RABY. If we did go for a recommendation for Article III power for the court, should COMA and the Courts of Military Review have the power to review administrative actions of commanders and administrative charges, and if it not, why not?

Col. STRICKLAND. I do not think so and the reason is, I just think they ought to stay in the criminal law business. If we want to have, if we think there should be some kind of, more of a review, than the administrative discharges we have, then I think we should set up a separate body to have them. I just do not think we should get the court in it, for the simple reason the Rules of Evidence do not even apply in administrative discharges.

Col. RABY. One final follow-up question and then I will pass it. If they were given this jurisdiction, not only in terms of how it would affect the court, would that have any impact on the manning, the required manning of the government and defense and appellate?

Col. STRICKLAND. Yes.

Col. RABY. And the cost to the government for maintaining such a system?

Col. STRICKLAND: You mean to review administrative discharges?

Col. RABY. Right.

Col. STRICKLAND. Not only would we have to expand the government lawyers and defense lawyers, we would have to expand the court. They just could not handle it. You are talking about—I do not know what the workload is in the other services, but I think the administrative discharges are probably a lot more than the numbers of the courts. I think you are talking about doubling, tripling and maybe quadrupling the workload of everyone who is involved in the system.

Col. RABY. Thank you very much, sir.

Capt. BYRNE. Colonel, if a Military Judge alone sentencing were passed by Congress, would the suspension power flow with that as well? If you are going to do one, should you also have the suspension power?

Col. STRICKLAND. I do not think so. In fact, when I first started working on this, I thought that I was going to support Military Judge alone sentencing and then when I came to the suspension thing, I said, well, it looks like there is some inconsistency here. I am saying on one hand the judges are better informed and then on the other hand we are going to give this to the convening authority. I think the convening authority should have it, because they are better informed about the entire military history and the record of the accused than the judge. And that is because we are limited by our Rules of Evidence as to what we know.

So I do not think it should necessarily follow. I could support judge alone sentencing and not suspension power. I do not see an inconsistency, because both of them have to do with the information of the person making the decision. I think the judge has more information to begin with and in the second issue of suspension I believe that the convening authority has more information.

Capt. BYRNE. If you had a choice, assuming that you had the power to make that decision, whom do you believe would be the most likely to serve the needs of military society's: judges on the Court of Military Appeals, the senior military lawyers or civilian lawyers?

Col. STRICKLAND. The Court of Military Appeals?

Capt. BYRNE. Yes, sir.

Col. STRICKLAND. I think we should have civilian employees. Otherwise, I do not see that it is any different from the Courts of Review. I think the whole legislative history and the intent of Congress is the supreme court of military should be a civilian body, like the the supreme authority. And if you had senior military officers on the Court of Military Appeals, I see no point in having a Court of Military Appeals. Why not just simply stop at the Courts of Review?

Capt. BYRNE. Assuming that Congress was convinced that—I am assuming that you had the choice.

Col. STRICKLAND. If I had the choice, I would leave it civilian.

Capt. BYRNE. How about if it was civilian and military?

Col. STRICKLAND. I think I would still leave it civilian.

Capt. BYRNE. Is there any particular reason for that, other than the expressed intent of Congress now?

Col. STRICKLAND. I guess philosophically I believe that our highest court should be uncontaminated by any military experience that would in any way affect the decision. I just think it is better for them to be a civilian court. Otherwise, I do not see any point in having the Courts of Review other than calling them intermediate courts of appeals and then having another military court on top of that. I would stay with the civilian court.

Capt. BYRNE. When you say uncontaminated by military experience, would you then say that judges, for example, that have had experience in civilian practice should not sit as judges on the highest civilian courts?

Col. STRICKLAND. Obviously not. There is no other place to go. The research study that I previously referred to that I did, I was trying to go through the Court of Military Appeals and compare it with some of the studies that had been done by political scientists on judicial behavior, in which they studied one's educational, different parts of the country, religious, political backgrounds, how it affected judicial decisions.

I found my study on the Court of Military Appeals to be completely adverse or different than the studies of other appellate courts and the year I was doing this was '68. For example, Judge Ferguson by all of the previous studies of the political scientists, being from the midwest, Protestant, Republican should have been a conservative on the court. He was not.

Judge Quinn being the eastern Catholic Democrat should have been the liberal on the court, but he was not. I went back and looked at the backgrounds of all of the previous judges on the court and I found one thing controlled their philosophies and that was their previous military experience.

Judge Quinn had been a captain in the Navy and I went back to Judge Brossman and all of the judges before them, and it seemed to me that the, the conclusion reached, is the previous military experience of the judge made him more conservative and more likely to vote for the government. And I have not brought that study up to date, and that is the long way of answering your question.

Col. MITCHELL. Colonel, I want to sort of lay out to you a proposition which has been set forth by a number of military commentators and I will ask you whether or not you agree or you disagree with the observation to help me understand a little better where you are coming from. Some of these commentators have written that both civilian and military laws have the same basic objective, to maintain common security, when you talk about military, civilian or whatever society.

They have expressed the view that while the three elements that they perceive of this common objective are the same that the order of their precedence is different in the military society. Particularly, they are talking about that in civil justice the first aim that they describe is to protect society and the state from the effects of anti-social behavior of individuals or groups.

The second aim is to protect the rights of individuals and minor groups of law abiding people from their own less law abiding folks as well as from the unfair, restrictive or punitive actions of the state itself.

The third aim is to define and control the mechanisms for the orderly and equitable transfer of property rights and the uses and expansions of common resources.

In a military code, these commentators claim that the order changes and that the first aim is to safeguard the state from both external and internal enemies. The second aim is the husbanding of the expansion of state properties and the protection of military resources and that the third aim, while important, is nonetheless third, and that is the protection of individual rights.

Do you agree with that order or would you disagree with that ordering?

Col. STRICKLAND. I think that ordering is probably correct. I think perhaps we have reversed it for the military, but that does not bother me. We are not working for Sears and Roebuck. There is a big difference here. It makes no difference whether the guy working for Sears and Roebuck is smoking pot while he is stacking boxes. It makes a big difference if he is working on an F/4 aircraft while he is smoking it. I think that we have legitimate differences that we should take into consideration.

Col. MITCHELL. Should then any military code or any amendment or change to the military code be made with a very heavy concern for that order of priorities?

Col. STRICKLAND. I think it is probably functioning right now with the order of priorities. I think a glaring example is the urinalysis program we have got in the military. Can you imagine any civilian institution going to the expense and the trouble and the time and the effort to find out whether two weeks ago somebody smoked marijuana? I do not think that General Motors is doing anything like that. Obviously, I think that is a legitimate interest that is being covered right now and I do not see any need that we change anything.

Col. MITCHELL. As a general proposition though, you would agree that any code or any change in the code should bear those priorities in mind?

Col. STRICKLAND. Yes.

Col. MITCHELL. It has been suggested that perhaps there be a system of punishment in the military which does not carry a lasting record, which may involve a punishment somewhat more significant than is now the case at the hands of the Commander at NJP and that perhaps we just jump from there into a kind of catchall GCM for the most serious offenders.

What do you think about that idea, as a juxtaposition to the one year special court-martial jurisdiction limit?

Col. STRICKLAND. Would you repeat your question. I am sorry, I got a little mixed up.

Col. MITCHELL. It has been suggested that there be some increase in the punishment authority of the commanding officer.

Col. STRICKLAND. Expanded Article 15 authority?

Col. MITCHELL. Expanded Article 15 authority and then a jump from there into the general court-martial, which would then become the basis which catches all of the serious misconduct and everything else fundamental that becomes a matter of discipline. What would you think about that as opposed to increasing the limit of the special court-martial to one year?

Col. STRICKLAND. I like increasing the special court-martial to one year. I gather you might be referring to the proposals I think that the Navy had a few years ago, is that what you are talking about specifically, to greatly expand the authority of the Article 15 or the captain's mast, which included jail sentences and so forth?

Col. MITCHELL. I am aware of that also, but I think this suggestion was made by an Army officer.

Col. STRICKLAND. No, I am not for expanding the Article 15 jurisdiction. A commander now who can take two stripes and two months' pay and put a man in correctional custody for 30 days is quite adequate.

Col. MITCHELL. Do you really think that given the numbers of GCMs that are really tried, and even in the Air Force, I am sure that the percentages of GCM vs. other kinds of courts is probably about the same as other services, although I do not know that, but do you think that the efficiencies to be gained by increasing the jurisdiction of the special court-martial to one year are really significant?

Col. STRICKLAND. Yes, if not today, if we got in a war, it really would be.

Col. MITCHELL. What I had in mind, I guess, is the general courts at the present time seem to be running at about eight percent and in my recollection—perhaps now we are back to the initial limitation of the code, it has never really been heavier than that. So is that really a large enough number of cases to warrant shifting the jurisdictional limit up to a year?

Col. STRICKLAND. I do not have the figures. In the Air Force for some strange reason, even though—we had a five-year period from '78 to '82, where the court-martial load in the Air Force actually doubled. In the last year it has decreased in total workload, but the general courts have stayed about the same, which has caused us some problem and we are trying to figure out why.

I think expanding the special court confinement to one year is an excellent idea and I would stay with that.

Col. MITCHELL. Do you see that there is any danger that the military judges are going to read a message in that increase?

Col. STRICKLAND. No.

Col. MITCHELL. The message that their sentences really have not been stiff enough?

Col. STRICKLAND. No, I do not think the military judges are going to read that.

Col. MITCHELL. What about the court members?

Col. STRICKLAND. There is always a psychological thing there, which I must admit is possible, because that is the sort of problem I have right now with some of the general courts that we are trying in the Air Force. You know transferring marijuana is 15 years. Well, if you send them to a general court,—I tried a case not long ago where we had three small baggies, and it is in the general court, where the maximum sentence was 45 years, which we all know is a little bit ridiculous. But we had an energetic young prosecutor who got up before the court, and he said we don't really want 45;

we think 15 would be enough. And that is the kind of ridiculous thing we are getting into.

Col. MITCHELL. In connection with that one year special court-martial business again, let me ask you one more question about that. If that kind of a system came in, without getting specific, we will assume that there might be some increase in appellate jurisdiction of some sort or some broader appellate jurisdiction, would you favor cutting off the review at the Court of Military Appeals in guilty plea cases?

Col. STRICKLAND. Not have guilty plea cases go to the Court of Military Appeals?

Col. MITCHELL. That is right.

Col. STRICKLAND. No, I do not think so. If you plead guilty, there are not many issues left. You have got jurisdiction, the providence of the plea, and what else? I can't think of anything. I don't think that many guilty pleas would probably get there. I think under the new system, isn't in the new amendments to the manuel COMA is going to have to agree to take the case? I don't think they agree to take that many guilty plea cases anyway. There are only about two issues I can think of.

Col. MITCHELL. Well, multiplicity seems to be the big one right now.

Col. STRICKLAND. And I suppose inadequacy of counsel.

Col. RABY. Conditional guilty pleas now will be authorized under the new MCM. That was supported by COMA.

Col. MITCHELL. If my recollection serves me right, the Air Force as a service was in the previous year against the notion that Military Judges should have the sentencing authority.

Col. STRICKLAND. Again, as I stated, I am talking about personal opinion.

Col. MITCHELL. I understand that, but the Air Force position was contrary to that. Now, what kind of training do Air Force lawyers get?

Col. HEMINGWAY. Col. Mitchell, if I can, our next witness is going to address the entire litany of training programs we have.

Col. STRICKLAND. I will bow to Col. Rasher. He has got all of the training, I think. I think I sort of outlined the special training that judges get.

Col. MITCHELL. I was thinking more of military type of training than legal training. In connection with that, do you think that there should be some fundamental and specific training and experience requirements before a person is put on the bench as a Military Judge?

Col. STRICKLAND. Yes, very definitely.

Col. MITCHELL. Do you think there should be a higher standard than now exists in the law for the qualifications of Military Judges?

Col. STRICKLAND. I do not see as a practical matter in the Air Force, how you can get much of a higher standard. If you want to get even more specialized training, I know Military Judges in the Air Force are picked personally by The Judge Advocate General. Also, not only are they selected by The Judge Advocate General, they are personally interviewed by The Judge Advocate General and it is the only job I know in the Air Force JAG department that requires a personal interview before they are selected.

So the selection process, I do not think can get any higher. We hope we select the best lawyers to be judges. As I said, before I have outlined the training and in compliment to Col. Raby there, I think the three-week Military Judges Course at the Army JAG School is one of the best military courses that I have ever attended and that includes the Air War College.

Col. MITCHELL. The Army always does that. Let me ask you whether you think that the position of the Air Force being against Military Judges only sentencing derives at least to some degree from a lack of confidence in the Military Judge doing the sentencing or the lack of confidence in the Judge Advocate in the Air Force.

Col. STRICKLAND. The lack of confidence in the judges to do the sentencing?

Col. MITCHELL. Yes.

Col. STRICKLAND. I do not know, I do not think so. The position of the Air Force, I gather, when you spoke of a position, it must be General Bruton's position, and I gather his position has already been stated. Fifty percent of the trials in the Air Force now are Military Judge alone, so we are only talking about the other 50 percent.

I think the argument against judge alone sentencing may sort of parallel with what I said, I think it goes back to the feeling that it would be taking away a right of the accused to select a panel. Now, he certainly can go judge alone if he wants to.

Col. MITCHELL. Do you think the uniformity in sentencing is really a significant factor at all?

Col. STRICKLAND. No, and you are not going to get it if you go to Military Judges. If you attend any of these training sessions I am talking about—I was even more shocked when I was at the National Judicial College with the civilian judges giving scenarios of how wide those vary. You won't get uniformity. Of course, you don't need uniformity of sentences. Every case is a little bit different. Every accused is a little bit different.

Col. MITCHELL. When you say it would be almost ridiculous to expect it with individualized sentencing, you would have uniformity.

Col. STRICKLAND. That is right. You would not have to have that.

Col. HEMINGWAY. Col. Mitchell, we are 20 minutes into the next witness.

Col. MITCHELL. I am getting there. His answers are long. Would you favor any sort of mandatory maximum/minimum sentence formulated in the statute as opposed to now the table of maximum punishments giving you a maximum limitation?

Col. STRICKLAND. Absolutely not. I am one hundred percent philosophically opposed to minimum sentences in the military and in civilian. I think judges are more qualified and better capable of making that decision than anyone else in society.

Col. MITCHELL. Is the failure you described on the part of at least some commands, if not many of them, to put fighter pilots, who are apparently a favored species in the Air Force, is that a product of the arbitrary factoring of these people out or is that a product of operational requirements regarding those pilots?

Col. STRICKLAND. Well, I guess I said this is my personal opinion. I think it is a fact of arbitrarily factoring them out. I know the fighter pilots have spare time. I know in fact they are not flying every minute of every day of every week. I think it is looked at as an extra duty and they do not want fighter pilots to be involved in extra duties. They do not want them counting beans in the commissary and they do not want them sitting in courts.

Col. MITCHELL. You mentioned that perhaps a radical shift in the philosophy at the Court of Military Appeals level was affecting their credibility in the field. Did I understand you correctly on that?

Col. STRICKLAND. Yes, I think that though it certainly was a problem in the last five to six years when we had such a radical shift, in actual case law without reviewing it, you know what it is.

Col. MITCHELL. What about such things as foraying into areas of reviewing NJPs? I know now in the Navy an NJP case up there that has been argued and they are awaiting a decision on, and they had that *Dobzynski* vs. *Green* case back in 15 CMR, even in the more mundane things like the confusion that apparently exists now in the area of multiplicity, which seems to have a public perception reaction as well.

Col. STRICKLAND. I suppose I am not the only military lawyer that would say I am frustrated. I do not think multiplicity is an issue they should not get in. I do not quarrel with them getting into it. I just wish they would get into it and clarify it. I am not advocating that this is not a legitimate issue for them to do. My concern is how mixed up they have got us.

Col. MITCHELL. Their credibility really depends on a number of things, aside from philosophical shifts then.

Col. STRICKLAND. Yes, that is just one issue, for which I think the law is sort of muddy.

Col. MITCHELL. I guess the last question I would like to ask you is what—you used some interesting terminology that struck me, when you mentioned that the Court of Military Appeals should not be contaminated by military experience. I would just like to know what you mean by contamination.

Col. STRICKLAND. That is probably a strong word and I guess maybe I ought to retract that. I think that it is impossible to spend many, many years in the military without having certain views and very strong views on it. I do not know if I can explain it any better. I just think our highest court should be a civilian court. Otherwise, I do not see any point in having it. Why don't we simply stop at the courts of review and have an intermediate court?

I agree with Congress in 1951 making our supreme court a military supreme court. I would just like to see it be five members.

Col. MITCHELL. Do you subscribe to the theory then that there is such a thing as a military mind which somehow is incapable of objectivity at that sort of level?

Col. STRICKLAND. No, I do not think the military mind is incapable of objectivity, but I think military experience is a certain experience like the experience of being a lawyer or a doctor or anyone else, anyone that is a product of their training or environment and so forth. It is ridiculous to think we would ignore that.

Col. HEMINGWAY. Thank you very much. We need to take a very brief break.

(Whereupon, there was a recess.)

TESTIMONY OF: LT. COLONEL DONALD C. RASHER, CHIEF, CAREER MANAGEMENT, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 29 JUNE 1984

Col. HEMINGWAY. Our next witness is Lt. Colonel Donald C. Rasher, the Chief of Career Management for the Air Force.

Lt. Col. RASHER. Quickly, before I start, I would like to define my role as the Chief of Career Management for the Air Force JAG Department. Essentially we have an office that handles career management from, I guess, the birth of the JAG, because we do the recruiting for Judge Advocates. We do the selecting of Judge Advocates to come into the Department and then we monitor and manage their careers right up to the point where, in Col. Strickland's case, he is going to be retiring in November and we watch over just about everything from a personnel standpoint.

We are perceived, or at least our largest role is perceived to be that of assignment. We do an awful lot of other things in regard to the management of Judge Advocate careers. I am The Judge Advocate General's

agent, so to speak, to develop assignment recommendations.

We have 1340 Judge Advocates on active duty right now. We have an authorized strength of 1329, so we are at full strength and we project to remain at full strength. We try to be a little bit over, if at all possible. Of these people, 39 of these individuals are serving either as Military Judges or on the Court of Review. So that gives you a feel for the percentage of numbers. In terms of the overall force, we are talking about three percent.

A little bit about my background, I have been a staff Judge Advocate for five years at a special court jurisdiction and I have served at different levels of command and this four-year tour, and it is similar to what I am going to say about judges' tours within the Air Force, this four-year tour has given me the opportunity to do something that is totally unique and different than most lawyers have an opportunity to do. I do not practice law. I am a personnel manager.

I think it is important that an attorney and a lawyer and a Judge Advocate do the job that I am doing though, because we are making a lot of important decisions about qualities of people in regard to jobs. I brought Major Bill Bowen along and Bill handles my recruiting and training and if there are any questions with regard to education and training, Bill would be prepared to answer those questions.

I think that I can probably, from a standpoint of what you people are looking at, probably address three things and only three things, although I certainly have my own personal experience to address other matters, but those three things would be judges performing in a judicial role and how is that role limited; the tenure issue that I know you are looking at and also the promotion issue, the mandatory promotion issue.

I have got some opinions, and these are both personal, but also professional opinions about all three of those issues. In regard to the first issue, that being the judicial function issue, we have 39 judges in the Air Force right now. Eight of these people are on the Court of Review and they exclusively do Court of Review work, and that is it. They get involved in no other things but that role.

The balance of the judges we have are in our field judiciary and we are set up in seven circuits, as you might know, and we have a chief judge in each one of these circuits and I would say that 98 percent of the judges' work in the field of judiciary is judicial roles, and maybe the other two percent can be attributed to the fact that our Chief Judges in each circuit have some managerial responsibilities.

As far as I am concerned, our judges are doing judges' work and that is all they are doing. My opinion is that is the way it ought to be. In regard to mandatory promotion, and that probably gets involved and interelates with tenure, in the Air Force promotion system, and I guess it is a system mandated in a sense by Congress, because in the military, as you know, we have an up or out system, and promotion is based on potential, not necessarily performance. Although performance is certainly the best indicator of potential and we would vehemently oppose any type of mandatory promotion system for any category of Judge Advocates, including judges which are three percent of our people.

We have attorneys in the Air Force. We have individuals who work systems procurement. As a matter of fact, we have one right here in this building, the Office of Scientific Research. They are awful important people. They are a community of their own and we feel the same way about those people. We have a community of labor lawyers in the Air Force. We would oppose that for those sorts of people. We believe that the best people ought to get promoted based on potential and I will talk a little bit about how we select Military Judges. I think we do a very good job in selecting the best people. So we generally do not have to worry about promotion. Because if we are doing our job initially the right way, the promotions will come, because we are putting the right people into the job.

It is not such a hard thing to select about ten, 11 or 12 people every year to go into our judges' jobs.

In regard to tenure, and I do not know how you all have defined tenure, and I guess you can define it two ways; one, some type of fixed term and then the other way, once a judge forever a judge until one dies, retires, resigns one's commission or reaches some sort of mandatory retirement date. In a sense in the Air Force, we have tenure.

We have tenure because when we put people into positions, if we are putting the right people into positions, we tell them precisely, that you are going to go serve in that job for about so much time. In my three years of running Career Management, no judges have been removed for any reasons whatsoever other than the fact that either their tours ended and when we send people overseas they are on controlled tours and our judges who go overseas go for three years. They know that before they go. In regard to the judges we have assigned in the Continental United States, we tell them that we are going to put them into a job for about three to four years, which is precisely or is precisely the way we look at every other Judge Advocate in the system.

So in a sense we have tenure already, but not tenure in the sense that we call it tenure. I do not think we need tenure, and I speak for The Judge Advocate General and I speak for the Air Force, I believe in this respect, I do not think we need tenure, because I do not think we have had a problem in the Air Force and I do not think that tenure would be good for the Air Force

judicial system, nor for the Air Force's Judge Advocate General Department for a lot of reasons. The most important of which is the fact that we believe that to be an effective Judge Advocate, one must have a variety of experience and a variety of challenges, and we believe to be a good Military Judge one must have these experiences before becoming a judge. And we believe that to be a good senior leader in our department, one must draw upon a variety of experiences, including being a military judge.

I guess Col. Hemingway is a good example. He has served on our Court of Review and now he is a Division Chief at Headquarters and I would suppose that his experiences on that court make him a better Judge Advocate at this point. And that is the way we look at people. General Bruton feels very strongly about this in regard to every job we have in the department.

If we were to have someone working at Systems or Log. Command Headquarters on maybe the most sophisticated procurement in the world, he still believes that that person at the three- to four- to five-year point ought to move on and do something bigger and better, and, yes, there is a little bit of a tradeoff when the new person comes in, because there is always catch-up time, but maybe the tradeoff is worth it in the sense of new blood and fresh ideas and giving people a chance to keep on moving along. And that is the way we look at the entire system, including Military Judges.

I overheard a little bit of what Col. Strickland talked to you about in regard to the kinds of people we have as Military Judges. We select 10, 11 or 12 people every year and that is because our normal fixed tenure tour is about three to four years and you know how many judges we have, and we spend an awful lot of time and thought in regard to who we put into judges' jobs. But people come from different backgrounds when they go into these jobs, and I think that makes for a stronger judiciary.

As an example, to give you an example, some of the new judges that will be going into place this summer, one of the individuals is a graduate of Air Command Staff College, and that is where he was up until one week ago. Before that, he was a staff Judge Advocate, and he is going to be a judge. He was handpicked. He had been a staff Judge Advocate. He was competitively selected to go to school and now he is going off to be a judge.

There is the way we look at people and there is the way we try to handpick those people. As Col. Strickland said, The Judge Advocate General handpicks these people. He charges me with doing some of the background work and making recommendations. He not only selects them, he interviews them before the assignment becomes official.

I think it is also important to note that judges after their tours, they are generally quality officers to start with, go on to bigger and better things maybe in the grand scheme of things, and we worry an awful lot about making sure the judges are well taken care of after their judging experience and they make superb staff Judge Advocates when they come to Headquarters.

Something maybe unique about the Air Force is, and as Col. Strickland mentioned, if there is one negative about being a judge in the Air Force, it is the travel. The judges generally love their work, but because of the travel, we have an awful lot of people who call me all of the time saying, please do not make me a judge; I would love to be a judge, but because of the travel, I do not want to be a judge.

And I have some judges who call me and say, I know you put me here for three years and I know you think of tours being between three and four years. In my case would you please think in terms of three years, because the travel has gotten to me. That is probably a good reason in the Air Force scheme of things to maybe move people on to something different.

Those are just a few thoughts that I had and I know your time is short, so I am open to whatever questions you might have.

Col. MITCHELL. I talked to you before you got started about what kind of—what is the military training given to an Air Force JAGs and their access?

Lt. Col. RASHER. We access JAGs from different sources. The Marines, the Navy, and the Army have a funded legal education program and right now between 15 and 25 of our new Judge Advocates every year have come through funded legal education program. These people were on active duty as officers for between two and six years, when they were selected to go to law school. They go off to the law school and upon graduation and admission to a bar they become Judge Advocates.

About 40 to 45 percent of these people are Academy graduates. So in that category of people we are talking about Academy graduates who have served on active duty in various career fields for between two and six years before they even go to law school. Now, that only represents a small portion of how we access people. We access about 20 to 25 people a year through the ROTC educational delay pipeline.

These individuals have been commissioned, undergraduate commission and college. They go on to law school under the educational delay program. On completion of law school, they come on active duty. So they have had four years of ROTC training, in some cases two years, because we have a two-year program, before they come on active duty and that happens before law school.

The bulk or at least the majority of our new individuals in accessions in the department come from the direct appointment program. I think the Army has a very large direct appointment program also. These people have essentially no training whatsoever when we bring them on as Judge Advocates. They are either fresh out of law school or fresh out of at least the entry level job market and they have decided they want to look for something else to do in life.

When we bring these people on active duty, we send them, number one, to a two-week officer orientation course, which I guess is a scaled down officers training school, because we have condensed about three months into two weeks and it is for professionals only, but they get some basic military training, including marching, which does not come in that handy as they become Judge Advocates, but they get the basic military training, and then from there they go to a seven-week Judge Advocate Staff Officer Course, which is run by Judge Advocates for Judge Advocates only.

So they get nine weeks of initial training before they really start performing as Judge Advocates. After that point, Major Bill Bowen deals with all of our continuing education and we probably send between 800 and 1000 of our Judge Advocates off to some training every year, in every area of the law, from environmental to—and I guess this gets away from your question.

Col. HEMINGWAY. How many people go to, say Squadron Officers School each year?

Lt. Col. RASHER. I can get the PME, professional military education. In the last couple of years, we, The Judge Advocate General Department, have had a big push on to encourage all of our Judge Advocates to do as much professional military education as they can do. We have three levels in the Air Force, Squadron Officers School for junior captains. We have Intermediate Service Air Command and Staff College, and the Navy has the Armed Forces Staff College, and in the senior service we have the senior service schools. I would say right now that probably 75 percent of our junior officers are completing Squadron Officers School at least by correspondence and it is possible that between 10 and 15 percent are going in residence.

I would say right now that 100 percent of our junior field graders are completing Intermediate Service School and the reason I say almost 100 percent is because we have made it very clear to people that if you do not have that on your record, you are in big trouble from a promotional standpoint. We are not asking that much. Most of the people who complete these schools complete them by correspondence or seminar. We send seven from the department off every year to Intermediate Service School, including two to Armed Forces Staff College.

I would say that almost 100 percent of our junior lieutenant colonels through senior lieutenant colonels will complete at least one senior service school, either by residence, correspondence or seminar, and we push that very hard, and people take it seriously. I think the reason they take it seriously is because we have done statistical looks at promotion and we have found that PME or the lack of PME can be a large tie breaker, because we are in a very competitive promotion system right now.

Col. MITCHELL. You in the Air Force do not have the opportunity to cross over from legal billets to operational billets, do you?

Lt. Col. RASHER. We have the opportunity, but then we do not have the opportunity to cross back into the legal billet so easily. We have a lot of Judge Advocates who are crossing out of the legal career field into line billets, so to speak, but they are doing that basically because we can only retain 35 percent of our junior force from a force model standpoint and more than 35 percent of our junior force wants to stay with us and those people generally fall outside that 35 percent.

Col. MITCHELL. Do you think that training program that you just described is adequate to, at least for Air Force needs to socialize your Judge Advocates to the needs and the imperatives of the Air Force's?

Lt. Col. RASHER. I think that training program supplemented by the philosophy that we have as to what Judge Advocates should be doing professionally is enough and what I mean by that second part is that Judge Advocates are also officers and we make that very clear to Judge Advocates that you are a lawyer and you are an officer and maybe you are even an officer first, but it is a very close call. And you are expected to be very much involved with operational things and to get involved in what the Air Force is all about and what the Air Force needs.

Col. MITCHELL. Do you think your optimism in that respect is shared by your Air Force operational types?

Lt. Col. RASHER. I think that is a personality thing. I think it is probably shared by some and not shared by others. It has been shared by my commander, so I can reflect on that personal experience. I am sure in some cases it is not shared by everyone.

Col. MITCHELL. You mentioned that you have a fairly strict selection process in the Air Force of Military Judges. That may not be true in the other services. Do you think that there should be some sort of a statutory training and experience qualification for Military Judges?

Lt. Col. RASHER. No.

Col. MITCHELL. Why not?

Lt. Col. RASHER. I think the people we select as Military Judges, we have deemed that they are qualified to go on.

Col. MITCHELL. I understand that. I think my question to you was with the observation that maybe the other services don't do that. It may be you have a situation where you have a significantly better selection process than the others do.

Lt. Col. RASHER. I cannot reflect on that.

Col. MITCHELL. If I mentioned that to you as a fact of life, would you favor putting into the statute certain training and experience qualifications for Military Judges?

Lt. Col. RASHER. No. I think I would favor the other services possibly looking at how we select judges and maybe doing some catch-up, assuming this is a fact.

Col. MITCHELL. You would say there would be no need to put that in the statute?

Lt. Col. RASHER. I do not think so.

Col. MITCHELL. There is in respect to this question of tenure, there is in civilian life tenure of service that serves a practical purpose to protect a judge his means of livelihood from the adverse political or public reaction to a given decision or perhaps a pattern of decisions. In military life you are dealing with situations where the judge, no matter what the quality of his decision is protected as to his pay, he is protected as to his rank, he is protected as to his status as an officer.

What can you see that the concept of tenure in the military society really adds to the equation in that respect?

Lt. Col. RASHER. I do not think it adds anything to the equation, other than the fact that you could make a point, depending upon how long this tenure was for, that you might get some more expertise and experience in Military Judges. But other than that, I see nothing.

Col. MITCHELL. As far as protecting his livelihood, you see nothing more that that concept really offers in the military?

Lt. Col. RASHER. Absolutely not. DOPMA takes care of an awful lot of that.

Capt. BYRNE. No questions.

Col. RABY. You indicated in your testimony that there was a lot of travel connected with being a Military Judge in the Air Force, and I realize you do have some unique problems. You also have some benefits in terms of being able to transport your people long distances that we in the Army lack and the Navy to a degree, but especially the Army.

Lt. Col. RASHER. I think we share those benefits with you people though.

Col. RABY. Oh, yes, I am not digging you. I am just pointing out as I understood your testimony, you do have substantial travel requirement and I believe that the Air Force judge, while it may have more than the other services, but still I believe Army has circuits, Navy has circuits and their judges too must travel, sometimes using, thanks to you, Air Force facilities. So that is a problem.

You indicated that when you call up people and discuss assignments with them that a certain number of them were begging off because of the travel. Is that is correct? That is a detractor.

Lt. Col. RASHER. That is a large consideration when I talk to people about potential next assignments and possibly we are discussing being a Military Judge as one of those assignments.

Col. RABY. Another factor that maybe you can shed some light on is that one of the Army former Judge Advocate Generals testified that in regard to Army practice he was unaware of any general officer in the United States Army JAG ever having served a tour as a Military Judge on the Court of Military Review prior to getting his star. How many Air Force general officers have you known in your career that were Military Judges or members of the Court of Military review or both before getting their stars?

Lt. Col. RASHER. Off the top of my head, I cannot answer the question. I would have to research that.

Col. RABY. Could you do that and let me know?

Lt. Col. RASHER. I could.

Col. RABY. How many Air Force general officers in the JAG Corps do you know that were previously staff Judge Advocates of a major command?

Lt. Col. RASHER. A fair amount at a minimum, not necessarily 100 percent, but a fair amount.

Col. RABY. Do you know any general officer in the JAG that was not a staff Judge Advocate at some time in his career?

Lt. Col. RASHER. No. Of course, we only have five general officers right now.

Col. RABY. Well, that is about all we have got. Now, personally, if you were given the choice of being the Staff Judge Advocate of SAC or a general court martial Military Judge or a member of the Court of Military Review, which would you prefer to be?

Lt. Col. RASHER. I would rather answer that question by saying if you were to ask that question of a number of people, much to your surprise—

Col. RABY. I am asking for a competitive officer that wants to be a Colonel and perhaps be competitive and go to Air Force War College and be at least competitive for serious consideration to reach the rank of general officer. Which assignment would he prefer to have?

Lt. Col. RASHER. SAC is a bad example, because we select people for general before we sent them, but maybe TAC would be a good example, another large command, and I would say that the individual who serves the TAC is probably in the large scheme of things looking more competitive, and he would perceive that he would be more competitive than possibly the individ-

ual sitting in either Col. Strickland's position or maybe a Chief Judge in one of the circuits.

Col. RABY. I am not asking trick questions or trying to trap the Air Force or anything else. I am asking these questions, because there are honest and legitimate perceptions among Army Judge Advocates and others that frankly being a Military Judge is not the career enhancement assignment that being a staff Judge Advocate is; that staff Judge Advocate assignments are roughly educated to command assignments for the line and are given serious consideration by promotion boards and I have sat on promotion boards, I might add, in the Army.

Lt. Col. RASHER. We have an interesting position and this is something that General Bruton feels very strongly about and becuase of the quality of our force we are able to implement this decision, and that is that amongst the Lt. Colonels and below, and those are the people that I deal with; I do not deal with the 06s, other than to talk to them I don't make any decisions in regard to these people, that people will not serve in two successive staff Judge Advocate assignments and staff Judge Advocates are looked at the same way as Military Judges. They are generally given a job and they will leave at the three- to four-year point.

No matter how good they are and no matter how much they love it, and I talk to an awful lot of people about how much they love it and how much they want it again, we have a policy not to let them do it in successive assignments. And that is to allow more people to have that opportunity and that is, again, to get people to have a variety of challenges and experience.

Col. RABY. The reason I am asking some of these questions is if we adopt certain things like judge alone sentencing, I think it is quite clear to the extent practicable we would like to have some of the best quality officers be interested in the job of Military Judges. I gather from your testimony that you do not see a relevancy, a reasonable relevancy between tenure for Military Judges and attracting quality judges, not that you do not have quality judges. Let's say even more.

Lt. Col. RASHER. You mean a connection between those?

Col. RABY. Yes.

Lt. Col. RASHER. No. When you say attracting them, we have them already. We would prefer to select someone as a judge who felt good about the job both professionally and personally, and that makes sense. So we have the people. It is not a matter of attracting them.

Col. RABY. Can you make more people feel good about the job or call up and say, hey, I would like to be considered for a Military Judge job?

Lt. Col. RASHER. I don't think so at all. As a matter of fact, if the tenure were too long, I think it would create some problems, because one of the reasons that maybe all of us are military lawyers amongst the military lawyers here and not making lots of money practicing law in the civilian world, maybe one of the reasons is because we are being provided the opportunity to do an awful lot of different things in one system and that is one of the reasons I am in the Air Force and practicing law in the Air Force. I enjoy that and I look forward to some day being a Military Judge for three years, and some day going to SAC for three years. But I would not want to be a Military Judge for my entire life, just as I would not want to be making hundreds of thousands of dollars in New York City in a very, very limited sphere of law, and once I got there I would have to stay there because of the money.

Col. RABY. Please, Colonel, speak for yourself, especially as we go to retirement and realize how our retirement pay benefits stack up and our future medical care benefits stack up.

Lt. Col. RASHER. I really mean what I say, sir.

Col. RABY. How about incentive pay for judges, would that attract more judges?

Lt. Col. RASHER. Again, I do not think we have an attraction problem. And then I think that you get involved in the inequities; do we need incentive pay for the person who has got to lock himself in a room for four years and handle one multi-billion dollar procurement? It is awful glamorous when you read about it for five minutes, but a four- or five- or six-year project, it is not. Does he deserve incentive pay? Do I deserve incentive pay to take on a job that I take on dealing with 1300 lawyers who all want to do different things?

Col. RABY. There is no question about it.

Lt. Col. RASHER. No, I do not think it is something that should even be considered.

Col. RABY. So, in other words, when you said you had people begging off in regard to judge requirements because of the travel, you are now telling me you do not have that many people begging off?

Lt. Col. RASHER. Right.

Col. RABY. So that you have no need for any sort of proposal, be it tenure, incentive pay, upgrading the quality of judges, adding a general officer billet to the Court of Military Review, as an additional allocation of a general officer space to your branch, not as taking away from one other place and shifting, you do not have any of those needs in order to attract a better quality applicant or to cause good quality applicants to vie more competitively for assignment to judges. Is that correct?

Lt. Col. RASHER. We will take the additional general officer's position.

Col. RABY. And you think that would help?

Lt. Col. RASHER. No.

Col. RABY. But I say would that help, if you could get one?

Lt. Col. RASHER. I do not think we have a problem. We have some people who desperately want to be judges, who are very good at it, and as a matter of fact, when we talk about tenure, I can think of a judge that I tried a case before. In 1972 he was a judge in California. The next time I ran into him he was a judge at Yokota Air Base in Japan. The next time I ran into him he was a staff Judge Advocate of McChord Air Base and I assigned him to be a judge down at Randolph, Texas where he is right now, and he just got promoted to Colonel. He loves being a judge, and we have some people like that, and he is good at it.

We took him out of that judge's job for a short while and I think that will make him a better judge.

Col. RABY. We have talked about the facts as you see them. Now, I want to talk about public perception for just a second. Regardless of the actual needs of the Air Force and the Army and the Marine Corps and the Navy, do you have any views concerning how the public perception—and by the public I will define that in large terms to include not only civilian members of a bar, civilian onlookers and monitors of the Military Justice System, members of Congress and staffers, but also the Airmen, soldiers and sailors and Marines who are enlisted personnel who are subject to our system—whether or not they would perceive judges as being more competent, more fair, more likely to be fair in their cases if they had tenure of office?

Lt. Col. RASHER. I do not think it would make one iota of difference, in answer to your question. I am convinced that generally public perceptions about everything we do in the military are based on either a lack of knowledge or some limited knowledge, and the best example I can give you is when I go home and my dad takes me down to the coffee shop and all of his friends say how are you doing, are you still in the Army, I know they are looking at me and thinking I march to work in the morning. They know I passed the bar exam, but I do not think in their wildest imagination that they can conceive that I am really practicing law, and that is their perception of me.

I could talk to them until I am blind or blue in the face and I do not think you can change that sort of thing. I think once someone lives through the system in any sense, and I remember so many times the court members came up to me as the staff Judge Advocate after a court-martial and said, I never realized the system was so good; now, I understand something. I think that changes perception, education as much as you can get.

I have a theory about the Military Justice System. Some day here is how I am going to make my money, you know there was a book "Military Justice is to Justice as Military Music is to Music," and I am going to write a book, and I have got this thing coined, so you can't steal it, "Military Music Ain't so Bad at All." I would like to talk about some of those things, because I truly believe that.

Col. RABY. Thank you very much. I appreciate your comments. I have no further questions, but I do hope when you go home that your friends do not ask you if you are still in the Army.

Lt. Col. RASHER. You know my dad was in the Army-Air Corps, and we were part of the Army at one time when he was there.

Mr. HONIGMAN. I have just maybe two or three very quick questions. As I understand it, one of your rationales for not adopting a system of tenure, and I think we have all defined tenure as not locking a judge into a job forever, but simply as a guaranteed term of office. And I do not think we have come to any judgments about how long that term should be.

But one of your rationales is that there is no reason to embody that sort of system in the statute because as a practical matter it already exists in the Air Force. Is that correct?

Lt. Col. RASHER. That is a fair statement.

Mr. HONIGMAN. Given that as a practical matter, it already exists, how would it be detrimental to confirm that reality in a statute?

Lt. Col. RASHER. Quite possibly it would not be, but it exists and I do not think it is necessary.

Mr. HONIGMAN. But you would agree that it would not necessarily be harmful?

Lt. Col. RASHER. Yes, I would agree as long as there was a mechanism. You know, right now there still is a mechanism to remove a judge from the judge's judicial responsibilities and there can be some very good reasons to do so. We have not done it once in the three years that I have been in the job that I am. So, therefore, I am not sure what kind of mechanism we really have. But I think you would have to have that if you went to a statutory scheme of things.

Mr. HONIGMAN. I think we are all agreed that any guaranteed term of office would be subject to some procedure for removal for cause or physical or mental disability or some demonstrable unfitness to serve as a judge.

Let me shift to a different question. You have testified that there is some reluctance on the part of some potential selectees for the position as judge, because of the travel required. And, frankly, I don't know if this is true, but is it a fact that many Air Force bases are generally within some proximity to installations of another service?

Lt. Col. RASHER. In some cases, it is.

Mr. HONIGMAN. Would there be any benefit to adopting some system of cross-assignment, whereby a single judge would, say, ride a circuit of the local Air Force

base, Marine Corps base, Navy base, Army base, that would ameliorate to some extent the problem of assigning Air Force judges to ride a very large geographical circuit?

Lt. Col. RASHER. I have never thought about that, so it is hard for me to respond. When we talk about travel, we are not talking about travel in the sense of the plane connections or getting on an Air Force airplane in the middle of the night. We are not talking about that part as much as the time away from one's family.

Mr. HONIGMAN. I understand that, to spend a week here and then a week there and then a week somewhere else.

Lt. Col. RASHER. So whether one goes to Dover, Delaware or to Spain from Washington, D.C., it really has no bearing.

Mr. HONIGMAN. Would your opinion change if there were some provision to ensure that no service would lose any slots for judges if that sort of system were adopted?

Lt. Col. RASHER. I do not think I expressed an opinion in regard to your question, so I cannot change it.

Mr. HONIGMAN. Do you have an opinion.

Lt. Col. RASHER. I am responsible for watching over authorizations or slots and we are not in favor of losing authorizations or slots as a general principle.

Mr. HONIGMAN. Let me just go back to my first question. Would there be some benefit to be derived from that sort of system, where, say, the same judge would ride a circuit composed of McGuire Air Force Base and Fort Dix and whatever the Navy installation is up there?

Lt. Col. RASHER. I suppose for the people who feel that being away, traveling an awful lot is a negative, I suppose if I could say to those people, as you know some of the Military Judge positions we have are in locations where there is a dense pack of "installations" nearby and, therefore, the travel is kind of deminimis in that case, I suppose that could change the opinion of a few people.

Let me say something about travel. I have thought about some things, and travel is a two-way street, because I have got a list in my mind of positives and negatives of being a Military Judge, and the travel burden as a negative is also the travel opportunity as a positive. And a lot of people want the job for that very reason. It is a wonderful—as a matter of fact, getting back to your question, sir, if somebody would offer me the job of Chief Judge in our 6th Judicial Circuit in Europe when my time comes, and I would have to be a Colonel at that time, I would feel that that might be the best job that we have in the whole entire Air Force. That is my perception.

Col. RABY. I note you said when your time comes.

Lt. Col. RASHER. And I know that Col. Howey, who is out there, will tell you that he feels the same way. That opportunity is a plus. The nature of the work is a plus, but then again the nature of the work for some people might be a negative. Independence is a plus, but then maybe the independence is a negative because you have very little supervision and you supervise very few people. You do not supervise anyone unless you are one of the chief judges, and you can go on and on.

The work schedule is a plus in terms of flexibility. The work schedule is a minus in terms of you maybe can sit around and do nothing for three or four straight days or at least actively do nothing. I think judges when they have spare time probably do some legal research and that sort of thing. But you can go on and on and I think for every plus, you can take the same category and consider it a minus, and these are personal perceptions.

Mr. HONIGMAN. Thank you very much.

Capt. BYRNE. I know you are in a hurry, but I just want to address one issue on guaranteed term of service. Say you had an individual, say, in August of '81 who came into the Military Judge slot for three years until, say, August of '84, and an opportunity opened up, say, in May of '84, because of the daisy chain, that the individual would have to transfer in May of '84, to be able to be in place to take that billet because it requires a turn-over. Would this be a reason why a guaranteed term of years would be an impediment to that kind of situation?

Lt. Col. RASHER. That is a good point, because when I say to you we put people in the jobs, we generally look at CONUS, Continental United States, jobs as three to four years and overseas tours are fixed, but the way we do assignments is we do not get boxed into someone who starts in August has to end their three years in August.

We think in terms of summer, for instance, and summer starts on the first of May and maybe ends at the end of August and if we had that issue then maybe that would deprive that person of being a candidate for that job. Right now that person can certainly go on to that job.

Now, we can fix these things; we can get around these things. Because if that job is opening in May, maybe it is opening becuase I am at the behest of The Judge Advocate General moving the incumbent in May. I can certainly allow that to happen in August, but sometimes I do not have control over that, retirement, separations and other problems. So we do not ever deal in real fixed sorts of things down to the precise day. We have to educate our JAGs because sometimes they think we do. And that includes overseas tours and DEROS. We routinely curtail and extend people who go overseas for months on either end of the totem pole for personal rea-

sons. Judicial people it happens to all of the time, particularly to judges and circuit counsels, who call us up and say I can't get to my next assignment; this case got delayed, and fix it. We are doing it all of the time.

Capt. BYRNE. Thank you.

Col. MITCHELL. Does the Air Force ever have any unaccompanied billets for tours restricted to one year?

Lt. Col. RASHER. Yes, we do, but none for anyone in the judiciary. We have ten unaccompanied tours in Korea, at three places in Korea right now. We have two in Comiso, which is in Italy, a new GLCM installation, and two at Florence, Belgium, also a GLCM installation. So we only have 14 uncompanied tours.

Col. MITCHELL. What do you do in war, when you get into a management situation like they got into in Vietnam where people were running out of country every 12 months? What would a tenure concept do to moving Military Judges around in accordance with such personnel policy?

Col. HEMINGWAY. Could you not just keep them in the judiciary in and out of the country?

Lt. Col. RASHER. I would suspect that if we needed judges in a war time situation that, number one, we would probably take people who were in the job and based on some sort of rational system generally the last person overseas becomes the top of the list to go overseas. These people would serve in their same role.

Col. MITCHELL. If there is a tenure concept on active, it would have to be one which it was not a tenure in a specific judicial billet. It would have to be tenure in the position of Military Judge.

Lt. Col. RASHER. I would guess so or at least a specific geographical location, because billets we can take the position that we have authorizations for so many judges in California and Col. Strickland can say because of case load shifts, we need to move one of those authorizations, i.e. billets, someplace else. We do that all of the time.

Col. MITCHELL. Would tenure affect the ability to have shifts in manpower, for example, if it were determined that you needed more procurement lawyers and you needed Military Judges and you wanted to diminish the number of Military Judges and take those excess Military Judges and move them over to the procurement field, would the concept of tenure with a guaranteed term of years in that bill, would that affect such a reduction?

Lt. Col. RASHER. If you had a substantial reduction, yes, absolutely. If we are talking nickel and dime, one position moved, I suppose normal attrition would fix at some place in a short term basis.

Col. MITCHELL. Looking at war time then, where you might have a great expansion and bring in a lot of reserves and have a lot of reserve Military Judges out in the country-side supporting the war effort and in the post-war area you would have a chop and all of these guys you would move temporarily to other positions and then be phased out of the Air Force and back to their civilian life, would any concept of tenure have to take into account in that kind of—

Lt. Col. RASHER. I would guess and that would be a big problem, if we had 150 tenure judges and the war stopped and we needed to get back to 39.

Col. HEMINGWAY. Thank you very much.

Lt. Col. RASHER. Thank you. It was a pleasure.

Col. HEMINGWAY. We will take a brief break.

(Whereupon, there was a recess.)

STATEMENT OF: BRIGADIER GENERAL JOHN R. DEBARR, RETIRED DIRECTOR, JA DIVISION, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 29 June 1984

Col. HEMINGWAY. Our next witness is Brigadier General John DeBarr, the retired Director of the Marine Corps Legal Service.

Brig. Gen. DEBARR. As a way of background—is that how you would like me to start?

Col. HEMINGWAY. Yes, sir.

Brig. Gen. DEBARR. I enlisted in the Marine Corps in 1942, was ordered to active duty in '43, commissioned in '44, served in combat in the Pacific, was released to inactive duty in '46, was recalled in '50, and then remained in the Corps until I retired in '76. Since my retirement, I have been teaching law at Cal. Western in San Diego as a full-time law professor.

And interesting to note, one of the courses that I teach is a seminar in military law, military justice. I have even gone so far as to make it a substantive course for one semester, but generally speaking I limit it to a seminar course, a two-hour seminar course. I am getting students who have had little or no experience with the military. I have to turn students away. I limit it to 20 students, and I generally have 50 to 60 that apply for the course.

I point that out to you just to show you that there is some interest in military law. Of course, San Diego is a military community and there is an interest in military law.

As far as my experience in military law, when I was called back in 1950, the Military Justice Act went into effect in 1951, and I was in the first class at Naval Justice School after the inception of the Military Justice Act, and, as a matter of fact, the reason I remained in the Marine Corps was because of the need at that time for military lawyers in the Marine Corps and they made

it so attractive for some of us who had our law degrees and were members of a bar to stay on active duty.

From that time until the time I retired, the initial period in the beginning years, I rotated and did both line duty and military law duty, but in my later years, it was primarily law. I had three tours of duty as a Military Judge, which meant that I did three tours as a Military Judge serving with the Navy. In addition to that, I did two other tours of duty with the Navy in Naval Command, one as an appellate defense counsel with the Navy Judge Advocate, and my second tour of duty was in New York City with the Third Naval District as a legal officer.

As far as my tours of duty as Military Judge, I had some fascinating experiences. My first experience as a Military Judge was working out of the Washington office and I and a Navy captain took care of the general court-martials in Europe, North Africa and the Middle East, and up and down the east coast. So I sat as a Military Judge on aircraft carriers, tankers and in the major areas of Europe as a Military Judge.

Then I served a year as a Military Judge in Vietnam, where I was a Military Judge for all of the Navy and Marine Corps cases in Vietnam. I served as a judge with commands at DMZ all the way to the Delta on an LST, sitting as a judge aboard an aircraft carrier off the coast. During the year I was there, I sat on 198 general courts in less than a 12-month period and, of course, they were all serious felony cases.

Then I served as a Military Judge out of the judicial circuit at Camp Pendleton. In addition to that I have served as a staff Judge Advocate for two major commands, one at El Toro and one at the Marine Corps base at Camp Pendleton. Then, of course, I served as the director of the Judge Advocate Division at Headquarters Marine Corps for three years.

I appreciate and thank you for this opportunity to appear before you and share my experiences with you. I do not know how you want me to proceed from here, whether you want me to ask me questions and take me from there or whether you want me to just generally discourse. What is your pleasure?

Col. HEMINGWAY. Do you have a prepared statement? If not, we will go into the questions.

Brig. Gen. DEBARR. No, I do not have a prepared statement.

Col. MITCHELL. General, what is your reaction to the proposal that the Military Judge should do all of the sentencing in the court-martial, special or general?

Brig. Gen. DEBARR. In other words, you are talking about the judge doing the sentencing rather than the members of the court?

Col. MITCHELL. Correct.

Brig. Gen. DEBARR. Of course, there are minuses and pluses. You can make arguments both ways. I take the position that there are more pluses on the sentencing alone by the judge, and the reason I do that I believe is from the experiences I have had in Vietnam. I believe that you must take into consideration the fact that the Military Justice System applies in war time as in peace time.

It is difficult at best, under the best of conditions in war time to implement the Code of Military Justice, and I found in Vietnam that it was most difficult for the commands to supply court members and to supply the witnesses, to get the expert witnesses and to have the psychiatric examination under war time conditions. I believe that by giving the judge the authority to do the sentencing, you are going to reduce the time of court-martials.

And that is very important under emergency conditions. I also believe that it would tend to give a better overall sentence. I think that our judges are well-trained and they are able to take into consideration all of those things that are pertinent and all those things that are relevant in sentencing and I think they are just in a better position to do the sentencing than court members. Of course, we are talking about noncapital cases.

When it comes to a capital case, then I do believe you should have the court members determine that, whether there is going to be a life sentence or a death sentence.

Col. MITCHELL. Do you see any useful purpose to be served in the combat situations or by having the trials in their entirety be conducted by Military Judges? In other words, doing away with the requirement to have members involved in trials at all when you are holding trials in combat operational areas?

Brig. Gen. DEBARR. Well, there is a lot to be said, Charlie, as far as limiting it to judge alone. However, I feel that it is an option that should remain with the accused and I do believe that it also brings the military members into the judicial system and I believe that is very important. I heard the previous witness mention the fact that education, education in explaining to our military members the justice system is very important and I do believe that the one way our military people get involved with the judicial system and with the military law system is by participating in court-martials. I feel very strongly that even in combat conditions, that the option should remain with the accused for the trial, but not for sentencing.

Col. MITCHELL. The reason I ask that question, I have a very vivid impression of Vietnam. When I came out of the bush and began trying cases, and having a rather large case load, and watching the general staff members of the command coming in and sitting on courts day in and day out as court members, I began to wonder after a

while just which staff sergeant in the staff section was making the decisions that guided the course of the war.

Brig. Gen. DEBARR. There is much to be said, I agree. We had, as a matter of fact, there was one of my court members that was killed from an incoming rocket while we were sitting on a case and it was very disruptive as far as the commands were concerned, Charlie, very disruptive. The committee might give some consideration to limiting the trials in some ways during emergency type situations.

Of course, you get involved with the problem of due process there, and I do not know how successful you would be in that area. But it is complicated. It is very difficult to conduct a court-martial under war time conditions. I will tell you it is very difficult.

Col. MITCHELL. What is your reaction to the proposal that Military Judges in the courts of military review be empowered to suspend sentences?

Brig. Gen. DEBARR. There again, you have pluses and minuses, but I feel strongly that the suspension authority should remain with the commanders. The reason I say that is because that is really the crux of military justice. If you take away the authority to suspend from the Commander, it is impinging upon the entire authoritative structure of the military. I feel very strongly that suspension authority should remain with the military service.

Col. MITCHELL. Some have suggested that both the Military Judge and the Commander be empowered to suspend, so that you could get into a situation where the Military Judge might suspend the sentence that the Commander would not want suspended and he would have to in turn live with the decision of the Military Judge. On the other hand, the Military Judge might decide the suspension was not in order and the Commander would decide a suspension was appropriate and he would suspend the sentence. What is your reaction to that?

Brig. Gen. DEBARR. As I say, I believe that authority should remain with the Commander. The Commander is in a better position to determine the relevance of a suspension, and it is a tool that he can use to improve the discipline in his command. It is a tool that he can use to bring the individuals back into the military service. I strongly feel that it is an area in which we should not permit the commanding officer and the judge to get into a contest of whether the individual should be suspended. That authority should remain with the Commander.

Col. MITCHELL. The decision to suspend sentences, at least I think I am correct in saying, that traditionally it is a clemency kind of decision as opposed to one of appropriateness of sentence. In your experience do Commanders in considering whether or not to suspend a sentence look at things which appear to be irrelevant to the court-martial process itself?

Let me put some flesh on that for you. You remember that there have been times in the Marine Corps history when there has been a careful reevaluation of the personnel who were on active duty with a view toward eliminating the trouble makers and so forth by administrative means, and that the Commander who is then charged to the chain of command with administering such evaluation and policy is the same Commander who is going to evaluate an accused who has been convicted at court-martial process in terms of whether or not to recommend or to take clemency action in the form of suspending the sentence or not.

I have had some Commanders explain to me their concern that if the Military Judge were given suspension power that the judges are wholly unaware of this other policy consideration and a suspension decision would put the Commander in the place of having to separate some people who were perhaps falling into the trouble maker category, but nonetheless in less serious forms than this court-martial accused and yet he would be forced to retain this court-martial accused because of the recommended or the suspension decision of the Military Judge.

Do you see that from your experience as being a legitimate problem?

Brig. Gen. DEBARR. I think you have stated it very well, Charlie. It would be a problem, but I think you have to consider the role of the defense counsel in all of this. Do not underestimate the actions of the defense counsel. The defense counsel can do much to call to the attention of the convening authority the reasons for a suspended sentence and by permitting the Commander, if you give the Commander that authority the Commander is going to have the use of the expertise and the resources of his entire command to make a determination as to the worthiness of suspending a sentence, and certainly he is able to call on many more sources to make that determination than the judge.

I was always very impressed with the activity and the professionalism of our defense counsel. I always thought they did a sterling job. And that defense counsel should be the first person to make a plea to that convening authority to suspend the sentence, and then the convening authority has his entire command to call upon to make that determination. The system is good. There is nothing wrong with the system.

Col. MITCHELL. Colonel, I think rather than have me question you all the way through all of these questions, it might be a good idea to just pass them around and then let me come back and ask more pertinent questions that I may have based on other's questions.

Mr. HONIGMAN. Maybe it would be a good idea if we just asked Gen. DeBarr if he would give us his views on

the questions before the Commission and then we can resume the questioning with a little bit better focus.

Brig. Gen. DEBARR. Well, we have already discussed the sentencing authority to be exercised by a Military Judge, and also the suspension question.

I believe the third is whether the jurisdiction of the special court-martial should be expanded to permit adjudging of sentences, including confinement of up to one year, and what, if any, change should be made to current appellate jurisdiction.

There is a gap between the special and the general court-martial as far as sentencing is concerned. You are limited to six months in the special and, of course, you have no limitation in the general. It seems to me that in some instances a Command in considering that perhaps a six-month sentence or the possibility of a six-month confinement sentence was not a sufficient amount to rehabilitate or to make a determination as to whether the individual accused should remain in the service or not forces that Commander then to assign that case to a general court-martial, and that is unfortunate.

I do believe that if you give the authority to the special court-martial to give sentences up to one year, that you would find that it would be very helpful, not only to the Command, but to the entire Military Justice System and after all it would be more in conformity with what we have in civilian justice. You are just giving the court more authority to make a determination of what is considered to be an appropriate sentence.

You are limiting that court to a six-month sentence when they may very well feel that eight months might be an appropriate sentence. On the other hand, I think that steps should be taken to ensure that the Commands are not using that additional time to add to the confinement potential. In other words, if a case is only worth three months' confinement, that is what the case should be and that is what the accused should be given.

I think our appellate review process would make certain that a Command did not exceed its authority of approving a sentence greater than six months, when it should only be six months. I think that is why we have an appellate process, to ensure the appropriateness of the sentence, so you have the means for ensuring the appropriateness. I say by giving the authority to the special court-martial it is going to be a great improvement as far as military justice is concerned.

Whether Military Judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure, I would agree with the previous witness that the present system is most attractive. It was attractive to me, because I felt that I wanted to do anything and everything as far as military justice was concerned, and I think it did me in good stead when I was being considered for flag rank. My records showed that I did everything as far as a military lawyer.

Mr. HONIGMAN. Sir, perhaps to clarify the question. We have been thinking of tenure as a guaranteed term of office for some indeterminant length, but we have not set ourselves on what length we might consider to be appropriate, but we have not, and with some provisions for removal of a judge for cause during their term. But I do not think we are thinking of tenure as locking an individual into the position of judge for the duration of his military service.

Brig. Gen. DEBARR. Making it a special branch, so to speak.

Mr. HONIGMAN. That is right.

Brig. Gen. DEBARR. Flexibility for the military is very important. There, again, my war time experience comes into play. My assignment as a Military Judge in Vietnam was for one year. Certainly, we should not force upon the services a time limit. Services need flexibility. And it may be very well that it is necessary to reassign an individual after a period of, say, two years or three years sitting on the bench, rather than locking the individual in for a four-year tour of duty in one job. I think that just makes it very difficult for the military services in times of war to satisfy their needs.

I remember during the Vietnam period so many of our assignments were for a year or less than a year, and we were moved from command to command and it all came about as a result of necessary rotations to Vietnam. And I say for that one reason alone, you should permit the services the flexibility of making the determination as to the length of tours.

I have found, as was stated by the previous witness, during my time in the Marine Corps that the assignments were rather static. In other words, when I made assignments as Director of the Judge Advocate division in the Marine Corps, I made an assignment on the basis that it was going to be at least, say, a three-year or a four-year tour of duty. As a matter of fact, we would make assignments to ensure that perhaps the individual, especially individuals with school children might remain in one geographic area for longer periods of time, perhaps six, seven or eight years. Where you have more than one command, like we have at Camp Pendleton in the Marine Corps where you have three commands, you can actually rotate the individuals from one command to another and an individual could well remain there for eight years.

I believe that flexibility is needed. It is desirable and I do not think it should be changed. On the other hand, I certainly would make certain that an individual assigned to a judgeship would not be removable unless there was good reason to remove him. In other words, if he is assigned to a job that normally is for a three-year tour of

duty or a four-year tour of duty, certainly that tour of duty should remain for a three- or four-year term. And he should not be removed simply at the qualms of the command, the local command or the military service.

I believe those are the areas I was asked—

Mr. HONIGMAN. There is still the question of whether the Court of Military Appeals should be in Article III.

Brig. Gen. DEBARR. An Article III court?

Mr. HONIGMAN. An Article III court and what changes, if any, might be made to its jurisdiction.

Brig. Gen. DEBARR. There again, I believe that we have the unique system, the military justice, the military law system. It is unique in that it is separate from our civilian system. And I do believe that it should remain that way, and the reason I feel so strongly about it is if you make us an Article III court, I mean an Article III jurisdiction, put us under Article III jurisdiction that you are doing away with the authority of the Commander and Chief.

Our Commander and Chief, the President, is now in the chain of command and that is one of the uniquenesses of the system, and I think it should remain that way. If you are going to make it an Article III set-up, then why have a Military Justice System? Why not give it to the Federal District Court? I think it is very important that we maintain our separateness, that we maintain our Military Justice System.

It is separate, it is unique, and it should remain that way. I think if you start fooling around and taking away out of Article I and putting it into Article III you are going to bring about results which are not in accord with the needs of the military services.

Capt. BYRNE. Gen. DeBarr, I do not know what questions specifically you were asked. Were you asked about COMA retirement as well?

Brig. Gen. DEBARR. Yes, that was mentioned as a possibility of being covered.

Capt. BYRNE. One of the proposed changes to the retirement plan would call for an application of the Tax Court proposal or the Tax Court retirement plan to the CMA judges. The Tax Court provisions allow retirement for permanent disability or at age 70 or at age 65 with 15 years of service on the court. It also provides in what area I would like to mention to you that a judge may retire at full salary after serving a 15-year term if he is not reappointed despite his expressed willingness to serve another term.

In other words, it makes no difference which way he goes, if he chooses after 15 years to not seek reappointment, then he probably would not, but if he desires reappointment and he is not reappointed, he gets a hundred percent retirement. Now, from the point of view of the system as a whole that would, in my view anyway, mean that at least there is a question that a judge whose decisions were not reflected of the best interests from the point of view of the military of high morale, good honor and discipline that that judge would in effect be benefited by simply expressing a willingness to be reappointed and by being denied that opportunity by the executive.

What do you think about that provision in a retirement system for Court of Military Appeals judges?

Brig. Gen. DEBARR. The 15-year period is in my view a satisfactory probation. The individual that is appointed to the Court of Military Appeals is guaranteed to remain on the bench for 15 years, and that should remain. I also believe that if at the end of that 15-year period he still is qualified and there is no reason to remove him from the bench and he desires to remain on the bench that he should be given another 15-year appointment.

On the other hand, I do not believe he should be permitted the option of stepping down off the bench after 15 years and receiving full retirement. I just think that is, it is a provision that is not necessary. It is not necessary because generally when an individual is appointed to the bench it is considered to be a long-term commitment and certainly after 15 years on the Court of Military Appeals, I do not know that the work is that heavy, that it is that demanding that an individual should be given that privilege.

I think there is a difference between the Court of Military Appeals and our other courts, I think, some of the other courts where the judges have a much more demanding load and perhaps a much more complicated law that they are participating in. After all military justice and what the Court of Military Appeals deals with is a very small segment of criminal law. It is military criminal law and they are limited to that area. So I would think that 15 years is not a sufficient length of time to guarantee an individual full retirement, unless he has reached the mandatory retirement age, whatever you feel that is proper. Perhaps 70 years, as used in our Federal Court System, is an adequate time.

Certainly there should be provisions for retirement and whatever those provisions are, if the individual meets those requirements then he should be given his full retirement.

Does that answer your question?

Capt. BYRNE. Sir, yes, it does. But I am focusing on the reappointment provision.

Brig. Gen. DEBARR. I feel strongly on reappointment, that if the individual is qualified—by that I mean if his age is not a problem or his health is not a problem and he has been on the bench for 15 years—I do believe that he should be accorded the option of remaining there. He should be reappointed.

Col. RABY. General, it is good to have you here today and certainly you have the reputation, I think, within

military judicial circles and Judge Advocate circles of being your own man, and certainly if there is anyone that was not thwarted in rendering an honest free opinion because of lack of tenure, we know it to be you. Your reputation is very good throughout the various branches of our profession.

Brig. Gen. DEBARR. Thank you.

Col. RABY. I would like to clarify a couple of matters that you have discussed today. You did mention that during a time of war there is a court member supply problem and that court-martials do drain heavily on the time of court members. You indicated that perhaps the Commission should consider whether or not to make recommendations to alleviate this problem.

My one question to you in this area is who is in the best position to really balance this allocation of time? Should we as lawyers attempt to, through the Commission, decide whether we should put in recommendations to relieve court members of their sentencing or maybe even findings obligations in time of war or is that a question best decided by commanders as to where their manpower should be utilized during combat?

The reason I ask you this is because we did do certain war-time legislation studies in the Army recently, and surprisingly some of our commanders voiced concerns that even in combat they believe the court-martial function important enough that they should be connected with it. And this is why I have a little hesitation in this area. I just wonder if we really are the best ones to decide in a given command whether that command's officers are best needed because of discipline needs there in the courtroom or tending to assisting G3 duties or whatever at that particular moment.

Brig. Gen. DEBARR. The number one consideration is to ensure that the system is judicious and that it is fair and that it is in keeping with due process. In other words, we want to make certain that we are giving the individual accused a fair trial. When you get into the case in chief versus sentencing, there is a big difference and that is why I fall on the side of permitting court members or giving the accused the option of determining whether court members should make the determination of guilt or innocence.

As far as sentencing is concerned, I fall on the side of giving that authority to the judge, one, because I do believe he is better qualified; and, two, because it is going to help the command as far as manpower and timeliness is concerned. I respect the views of that commander and your commanders that were expressed in the survey and certainly they would know better than we lawyers as to how best to utilize the time of the members of their command. But at the same token, I do believe that we should be helping the command as much as we can.

So long as we satisfy the needs of our judiciary and we can satisfy those needs by lowering or limiting the time requirements, I think we should do that. I do believe that we will be helping the command in that respect. From my point of view, from what I saw in Vietnam, it was difficult for those commands to come up with all of the court members that were required.

And I believe that if we can do something to help that commander that we should do it, especially in war time. If it is necessary that we make that determination, then we should make that determination. If we are the experts in that area, we should be the experts in that area.

Col. RABY. That leads me to the second question. Certainly, I believe studies and our own knowledge supports the fact that judges are very well-equipped to adjudge sentences in court-martial cases. When we are talking about offenses, like armed robbery, rape, murder, perhaps substantially better-equipped than line officers in weighing the elements of the offense, the gravamen of the offense, weighing that against the circumstances surrounding the crime and the mitigation, extenuation and aggravation of it, but there are some peculiar military offenses. Some of these crop up in combat, in particular, and some at other times, such as are Military Judges really better equipped to adjudge sentences in offenses along these lines, failure to do the utmost to engage the enemy, where the line officer really knows the volume and intensity of combat in a particular situation and perhaps has been in the field and actually experienced combat refusals at the platoon level, the squad level, at the company level, where we, with rare exceptions, most Military Judges have not had that experience?

Or how about an offense such as fraternization, which, of course, the Air Force now perhaps does not have fraternization—maybe it does—but offenses that have elements that are clearly based on custom of a service and an argument could be made that the officers of the line and enlisted personnel who live and daily experience the attitudes of their peers, contemporaries in these areas are best judges of the customs and the impact of it or maybe even AWOL, effects of that on unit morale and discipline.

Do you really believe that judges are better-equipped than lay courts, blue ribbon military lay courts in these limited areas and unique offenses?

Brig. Gen. DEBARR. It is incumbent upon the judge to understand his community and the judge must have an understanding of the needs of the community. And, of course, it is the same as a judge in our state or federal courts, our judges are supposed to understand and know what is required as far as their community is concerned, and that goes for the military.

And I do believe a judge who is worth his salt certainly understands the demands and the needs of the

military. You see in that type of situation that you have described, certainly an argument can be made that perhaps the line officer, the member of the command is in a better position to make a determination of an appropriate sentence, but at the same time perhaps that is going to weigh too heavily in his consideration.

A judge has to balance all of the things that are presented to him in determining an appropriate sentence. And I believe in that type of situation perhaps more than at any other time a judge may be better qualified to determine an appropriate sentence, because not only must he understand the needs of the community, the military community, the military command, but he must also understand the needs that go with making a determination or an appropriate sentence. He has to consider who that accused is and what he has done and there are many other considerations that go into making and determining an appropriate sentence.

I do believe that a judge who is going in there with an open mind and who is going to consider the facts of the case and the requirements of the community and the needs that are presented to him is in a better position to determine the appropriate sentencing.

Col. RABY. Sir, I have just two more questions. One is a follow-up on this one. It seems somewhat unique to me that Congress gave the accused the option to request judge alone or to request a court with officer members and at least one-third enlisted personnel, even though they will be a blue ribbon selection, or to not make any option and thus in effect to choose trial by commissioned officers, and that they would impose his sentence.

An argument can be advanced that one of the reasons Congress did this was to give the accused the right to have a time when he would select lay people to determine not only findings but sentence, so that consideration such as custom and the unwritten law would come into play. As not only a Military Judge, a former Military Judge, a former Judge Advocate for many years, but also as a law professor, what are your views concerning the appropriateness of taking the unwritten law into account in sentencing and what is the likelihood of a court with members—well, I will phrase it this way. Is it not more likely that a court with members would take the unwritten law into account rather than a judicially trained Military Judge?

Brig. Gen. DEBARR. I feel that is true as far as sentencing is concerned, but as far as the guilt or innocence of the accused, I have always found it to be that court members were most attentive and were very fair in basing their determination on the facts that were presented to them. Generally speaking, a military court is rather a sophisticated group of members. They are generally educated. They have had life experiences themselves. They are generally parents. They are in a better position to listen to the instructions of the law officer than, say, the average court that you have in your civilian practice.

And I have found it to be that the court members were very anxious to stay within the rules that were set down by the law officer and they acted within those rules. I found them to be a rather sophisticated court.

Col. RABY. Sir, my final question to you is several witnesses have come before this Commission and expressed their views concerning the size of the Court of Military Appeals and how its size has a substantial impact on the precendential value of its opinions and the stability of military law.

Have you formed any personal opinion regarding the size of COMA and what that size should be for the good of military justice?

Brig. Gen. DEBARR. There have been times when I was most concerned with the numbers on the Court of Military Appeals, especially when there was a change, especially when there was one member who was leaving the court, and I do believe that consideration should be given to increasing the membership of the Court of Military Appeals.

I am convinced that three members is an insufficient number. I would prefer to see at least five members on that Court of Military Appeals. I believe by having additional members it would give us better insurance as far as a more stable court and would permit the continued operation of the court during those times when there is a need for a member to leave the court, either voluntarily or by reason of death or by reason of health.

When that happens, because of our process, because of the appointment process, there is always a delay from the time the member leaves the court until there is a reappointment and it has been unfortunate at times. So I am of the belief that consideration should be given to increasing the size of the Court of Military Appeals.

Col. RABY. Thank you, sir.

Mr. HONIGMAN. Gen. DeBarr, I think that you and Col. Raby have put your fingers on a very fundamental question. We have a Uniform Code of Military Justice that operates primarily in peace time but must be able to operate under the very different and difficult conditions of war time.

Do you believe that consideration should be given to having two Codes of Military Justice, one, designed for peace time and the second designed for the different conditions of war time and if so what would you change to create a war time Code of Military Justice?

Brig. Gen. DEBARR. I feel very strongly that the advancement and the present operation of the Code of Military Justice is—well, it follows the necessity for due process and I believe that it is very difficult to make or

to determine the changes that should be made during war time that would detract from due process.

I think that there are certain steps that can be taken and certain changes that can be made, namely, the authority of the judge to determine the sentence. That certainly would lessen the demands on the command. But I do believe if you try to have a separate system, it is going to be at the expense of due process, and I think we have to be very careful about that.

The Military Justice System has evolved over the period of years since its inception in 1951. I believe that the present system is, I do not want to say perfect—I don't know that anything is perfect—but I think as far as the system itself is concerned, it is a pretty good system. And I hate to see too many changes made to it. I am very concerned about that, because I believe we have reached a point where we actually are protecting the rights of the accused and we are doing it within the system, which seems to meet also the needs of the military.

So as far as an answer to your question is concerned, I do not know that we should have a separate system. I would hesitate very much to recommend that there be two separate systems. I think that once you determine that our system meets the requirements, the constitutional requirements that then we should stay within that system, and if we do make any changes that they meet the constitutional requirements.

Mr. HONIGMAN. Thank you. In your testimony you mentioned your belief that it is important to bring military members into the judicial system. Would that concern be in your view a reason to retain the system whereby military members participate in the sentencing function, in balancing the needs of discipline against the needs of due process in assessing the impact of an accused action upon the military system and its efficiency and so on?

Brig. Gen. DEBARR. Certainly that argument can be made, but I believe that it is necessary to improve the Justice System and I believe that one of the ways of improving the Justice System is by eliminating the need for court members to participate in the sentencing. It is going to cost. It means that it is going to remove those court members from participating and by their participating they are being brought into the system, so to speak, but I believe by retaining them in the case in chief or permitting the accused to make that determination as to whether he wants court members or not, that is a sufficient basis of allowing the members of the military to participate in our judicial system.

Mr. HONIGMAN. If you are going to assist them where the members of the court are not exercising a discretionary function, the sentencing function, but instead are simply answering the question of guilt or innocence, which is a function very like that performed by a civilian panel, would you view that as eliminating one of the rationals for the military blue ribbon jury system?

Brig. Gen. DEBARR. No.

Mr. HONIGMAN. Would you feel that that sort of change might support a move toward a random selection of court members rather than the current system under which the commander exercises some personal review of the members' experience and temperament and so on?

Brig. Gen. DEBARR. No, and the reason I do is because there again you need some flexibility. Certainly the guidelines can be established by either this committee or by the legal experts as to what the requirements should be and then staying within those requirements, the Commander should be afforded the option of determining the number and the rank of those members that are to be assigned. As I recall it in the Marine Corps, the way it was done was the G–1 would generally submit a request to all of the commanders within the command, asking them to submit the names of a certain number of individuals and in accordance with rank. Perhaps he would ask the one regiment or one battalion to submit two colonels and three captains and four lieutenants, and, of course, that would be throughout the command.

In that way it afforded the commander to determine the availability of those members and that is very important, because it may well be that an individual member is going to be off at school or he is off on a special mission or he has just reported into the command and he is going through a breaking in period. There are so many considerations to be taken, so many things to be considered by that commander in the appointment of members of a court. And I do believe we should afford him every opportunity to make that decision. Only he can determine whether an individual is available or not.

Mr. HONIGMAN. Assuming that there is some mechanism for excusing persons who are not available because there is a military need that would be more important than having him serve, and I think you have identified some of the needs and some of the efficiencies, if the jury is simply confined to finding a fact, guilt or innocence, what is the rationale for concern with the rank of the members of the jury, assuming that the rank was superior to that of the accused?

Brig. Gen. DEBARR. There, again, it is an option that you are affording that commander to appoint those members to the court that are reasonably available. The entire military establishment is based upon a command structure, based upon a rank structure and if you are going to have a true representation of the community then certainly you should have representation from the command, and that would include all rank.

You have the provision for challenge and the defense counsel, he has the option of exercising his challenges

and either for cause or preemptorily. He has the opportunity of voir diring the court members. He has the opportunity of making an investigation of the background of the court members. I believe that the defense counsel is in the excellent position of really satisfying the requirement that the court members be made up of individuals who are going to be giving their attention to the facts presented to them and they are going to make a determination based upon those facts and those facts alone.

Mr. HONIGMAN. But he does exercise that function within the confines of a pool of potential members who have been personally selected by the commander.

Brig. Gen. DEBARR. Right.

Mr. HONIGMAN. If the commander's view is that a predisposition of some sort would make an officer or an enlisted person an appropriate member of the pool of potential members, the defense counsel is stuck with persons who may be predisposed in some way.

Brig. Gen. DEBARR. If that is the case, I would hope that that defense counsel is going to weed that individual out. He is going to make that determination based upon his voir dire, and that voir dire, of course, can be very extensive. Not only that but you are dealing—here again, you are dealing with a community function and generally speaking your counsel, and especially your defense counsel, they are wise to the ways of the world and they are wise to the qualms of that local commander. They know pretty well whether the commander is going out of his way to appoint individuals to that court that are subject to his desires.

I have found in my experience that the defense counsel were very good in making those determinations.

Mr. HONIGMAN. Let me just ask one more question. You have mentioned that you feel that it is important that the Military Judge have an understanding of the needs and the evaluations of the military community in imposing a sentence. If he does not have an opportunity to somehow be instructed or to review sentences imposed by members of the line community, where will he gain his understanding of how the community evaluates military offenses?

Brig. Gen. DEBARR. That never seemed to be a problem as far as our civilian system of justice. Our counsel are individuals, generally speaking, who have had some experience. They are going to gain experience as they move up the ladder. They are going to gain experience with every case that they present in court. I do not know that that would be a problem.

I believe that as far as the sentencing is concerned, why, certainly, there are more than enough guidelines to ensure that any individual involved with the sentencing process will know the difference between right and wrong and will know the difference as to what constitutes an appropriate sentence. Our system, where you have the prosecutor, the trial counsel and the defense counsel, would ensure that.

And, of course, you have the third member, the judge, sitting up there and certainly with the three of them working, they should be able to come up with what is considered to be an appropriate sentence, and that is the system. It is a good system and it is working. It always has worked. When you add to that your appellate process, your appellate process, if there is a mistake made, it certainly is going to be picked up in that appellate process. When you consider the number of reviews that are going to be made on that record of trial, it would be most unusual for an inappropriate sentence to go unnoticed and to go uncorrected.

Mr. HONIGMAN. Thank you, sir.

Col. MITCHELL. General, with respect to the questions regarding the random selection of court members, is there any less requirement for the best qualified by reason of age, experience or judicial tenure and so forth with respect to a decision on the merit, that is the guilt or innocence of the accused on the sentence?

Brig. Gen. DEBARR. I think that is very important. I think that you have to have a true representation of your community and I believe the military system comes closest to having the nearest, truest representation on a court, of any court in the land. And the reason for it is because of the system that is in use.

Col. MITCHELL. So the blue ribbon nature of the court-martial in your view exists as much for the purposes of findings as it does for sentence, or even more so?

Brig. Gen. DEBARR. Oh, my, yes, certainly. The make-up of the court, as far as your senior members are concerned, they are generally parents and they have had experiences with their children. I think you need them to make certain that those lifetime experiences are brought into play. You have the junior members who are more inclined to be cognizant of the present generation. I just think that it is a good mix. It all comes into play as far as making a determination of guilt or innocence, which is most important.

Col. MITCHELL. Most management books, at least the ones that I have read, seem to look with much disfavor on the divorcement of authority and responsibility, whether it be in managers or leaders. In military literature there is an awful lot written about the absolute requirement for discipline or the instant response to orders on the part of the troops and the people in the society.

There is also a lot written about the only real purpose of military law, whether it punishes crimes that we might describe as civilian felony types or the purely disciplinary infraction type offense, is to maintain discipline, that the real interest as far as military punishing its own is concerned, the focus is on the maintenance of disci-

pline. When a person rapes in peace time, he is a potential war criminal in war and that is the real essence of the need for the military to punish.

The reason I mention these things is because General Day testified earlier that in connection with the subject of Military Judge sentencing, and he felt that it was a good idea to have the Military Judge sentence, and what he mentioned as being significant to him was that the Marine line commander appears to have a good deal of confidence in the, at least the Marine Military Judges, because those Judge Advocates go through a training process which is very similar, if not identical to the training process that the Marine Corps officers in general go through.

So my first question to you is do you think that all of the services should be required to have similar training for their Judge Advocates or at least those who are assigned to be Military Judges?

Brig. Gen. DEBARR. I like the system that the Marine Corps uses. It is a good system and it is a system which guarantees that the military lawyer understands the community, not only that, but he is really part of the community. He is a military lawyer and he is a member of a military organization and he is made to feel that. He is brought into the community, so to speak. And I always thought that it was a good system. Although I must say there were times during the Vietnam War and following the Vietnam War when we were short of lawyers that I was looking for ways of getting our lawyers into the system much faster. On balance, I determined that the system was a pretty good system.

It was a good system because, as I say, the individual really becomes part of the organization. As far as the other services are concerned, I would not be so presumptious as to make recommendations as to what the other services should do. I do not feel I am qualified to do that, in that I do not understand their needs as I understood the needs of the Marine Corps.

Col. MITCHELL. The implication I gathered from General Day's testimony was that perhaps the reason why there is some opposition to a Military Judge only sentencing on the part of the services is that there might be some latent distrust of Judge Advocates in other quarters because of the disparity, or apparent disparity might be a better way to describe it, in the accession process that the commander who views his discipline as being such an essential thing is unwilling to suffer that divorcement to a specialized community of lawyers, that he really does not have much confidence under his peculiar need to say jump and have the individuals involved.

Brig. Gen. DEBARR. I think education plays a very important role in this area and that the commander must be made to understand the role played by the military legal system, just as we expect the lawyer to understand the needs of the community, that commander must understand the needs of military justice and the requirement for due process and I always found that when the commander was made to understand what the system was all about that the system worked better.

I understood, if I am not mistaken, do you not send your commanders to Charlottesville for a course at the Army JAG School, a course in military justice?

Col. RABY. Yes, a solo course.

Brig. Gen. DEBARR. Yes, to make them aware of what the system is all about. I found that was essential and that it was very effective.

Col. MITCHELL. Two more quick things and I think that will satisfy my inquiry. In pursuing this same line a little further, I once had a Court of Military Appeals judge tell me or perhaps ask me to look upon his opinions with a certain degree of forbearance, while he was learning his job. He very candidly confessed he knew nothing of military law or military society or very little about military society and that if his opinions appeared to greatly fluctuate during his term of office, it was only because he was learning more as he went along and that proved to be a rather accurate assessment of his tenure on the court.

Is it a good idea to have people like that sitting at the top of a disciplinary system which is so interrelated to command? It is not quite like medicine or other specialties, but it is so integrated into the command concept, a group of folks who have, or let's say, from whom has excluded the very people who have the most experience in the area, specifically military lawyers. They are precluded by statute, of course, from sitting on a court of military review.

Is that a good idea in your judgment, should we have people sitting in the Court of Military Appeals who know nothing about the society that they are called upon to preside over?

Brig. Gen. DEBARR. Of course, the idea which was acted upon by Congress was to ensure that the military was completely divorced from that final review. I believe that the time has past where that requirement is necessary. If you were to increase the size of the Court of Military Appeals to, say, five members, I see no reason why perhaps one member could not be an individual who has had some past experience in military law.

There seems to be a suspicion that the military lawyer is somewhat different than his counterpart in the civilian community and that just is not so. I have found that since I have been out in the civilian world, working as a law professor, that really we are no different than other members of the profession, and that we are just as capable of performing legal tasks as anyone else.

We should not deny the Court of Military Appeals the expertise that is possessed by individuals who have been in the military chain and military law for a good many years. I would say that consideration should be given to making a change in that direction, however, having the majority of the members of the Court of Military Appeals non-military.

Col. MITCHELL. One last question then, one of the problems that I see in the current retirement system of the Court of Military Appeals is that really it has more to do, I guess, with the appointment process and not necessarily the retirement process, but they do interrelate in one respect. There have been instances where a judge comes on the court and he is somewhat of an activist and then he gets down to that point in time where he needs that reappointment in order to gain his retirement. There appears to be a shift in philosophy. He becomes more, or let's say less dynamic philosophically and then perhaps a reversion on the other end of the reappointment. Is that a very good whipsaw to place the Court of Military Appeals in?

Brig. Gen. DEBARR. Indeed, it is not and, no, it should not be. That is why I recommend that not only should you have a 15-year appointment but that the individual should be eligible for reappointment. I believe in complete independence of a judge. That judge must be independent and he should not be influenced in any way by the terms of his employment. His employment should be established in such a way that he does not have to be concerned about it. He must be independent and we must ensure that.

I think this Commission must, if there is any doubt or any feeling that that is not so, I would certainly hope that you would make recommendations to correct it.

Col. MITCHELL. What about the authority to appoint the Chief Judge, you have seen Chief Judges demoted and others put in their place. Is that also a negative aspect in your opinion?

Brig. Gen. DEBARR. We are part of the political system in the United States, and I do not know that the military is going to be in a position to dictate to either Congress or the Commander and Chief as to how the appointment should be made.

I do believe that so long as we are satisfied that the individuals appointed are qualified, as far as being lawyers are concerned and are qualified as far as the law is concerned, that that is about all we can ask. I do not know that we can go beyond that. I think that the political process that is involved in making appointments is one that I do not know that we should interfere with.

Col. HEMINGWAY. Thank you very much.

Mr. HONIGMAN. Let me ask just one question. In connection with your views that military experience should not be a bar to membership on the Court of Military Appeals, do you believe that a Court of Military Appeals judge should be an active, serving member of the military? I am distinguishing between somebody who has spent a large portion of his or her career practicing military law and somebody who would be currently, say, a general or a flag officer, serving in the military who was appointed to duty at the Court of Military Appeals.

Brig. Gen. DEBARR. I must confess I have not given that any thought, because it was so far removed from the present system. Other than permitting the appointment of perhaps at least one individual, if you had a five-member court, or one individual, if you had a three-member court, I do not know that I would go any further than that.

Mr. HONIGMAN. When you say appointment, do you mean the appointment of an active currently serving military officer?

Brig. Gen. DEBARR. Yes. I do not know that we should ever appoint to the Court of Military Appeals an active duty member. It seems to be contra to the present system and the present way the system operates.

Mr. HONIGMAN. Thank you.

Col. HEMINGWAY. Thank you very much for your time, General.

Brig. Gen. DEBARR. Thank you.

(Whereupon, there was a recess.)

TESTIMONY OF: COLONEL EARL E. HODGSON, JR., CHIEF JUDGE, AFCMR, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 29 JUNE 1984

Col. HEMINGWAY. Next, we have Col. Hodgson, Chief Judge of the Air Force Court of Military Review. Do you have a prepared statement?

Col. HODGSON. I have short statements as to four of the issues which you are addressing. I do not feel qualified to discuss the fair and equitable retirement system for the judges of the Court of Military Appeals. I do not feel qualified to discuss that. And I have no position I wish to state as to whether the Court of Military Appeals should be an Article III court under the Constitution.

First, let me say thank you very much for asking me. Let me also indicate, if you will, a disclaimer that I am speaking for myself and myself only. I do not speak for the Air Force Court of Military Review as a body and I have discussed some of these issues with other judges, but each judge has his or her own opinion as to these issues and on some we agree and on some we do not.

Many of the things of which I am saying there is a majority of judges that agree with me. But there are obviously shades of opinion as to exactly what it should be.

As to sentencing by Military Judge alone in noncapital cases, I support judge sentencing in noncapital cases. I say this, the reason being that I think judge sentencing would lessen the number of cases where the punishments are either too harsh or too lenient, both ends of the spectrum.

I was a chief trial judge in the Air Force in Europe and that was the 6th Circuit and that encompassed at that time Europe, North Africa and the Middle East. Any trial judge, and I am sure Col. Strickland may have said the same thing, can relate situations where the sentencing was just inappropriate, both ends of the scale, as I have said. I would like to just give one example to show what I am talking about, because I think it is very relevant to what I am about to say.

This was a drug case that took place in the same base, the same community, if you will, but with different members. The accused was charged in each case with eight specifications of drug abuse. In this particular case, if memory serves, it was use, sale, possession of heroin. In the first case, the accused was acquitted of seven out of eight. He was convicted of one allegation of use of heroin and was given a dishonorable discharge, two years confinement at hard labor, total forfeitures and reduction to Airman basic.

I also sat on a subsequent trial that began the next day. This accused was convicted of seven of eight offenses, which included multiple sales, use and possession of heroin. This accused was given six months confinement and hard labor with a reduction and partial forfeitures and no discharge.

Obviously, those two sentences cannot be justified on either end of the spectrum. One is too harsh and one is too lenient.

Col. HEMINGWAY. If I may interrupt you just a moment. What action was taken by the convening authority, if any, with respect to the first instance?

Col. HODGSON. I cannot say. I do not know.

Col. HEMINGWAY. Do you know if any action was taken by the Court of Military Review with respect to the first action?

Col. HODGSON. This was ten years ago. I cannot answer it. I do not know.

Col. HEMINGWAY. In your view should some action have been taken?

Col. HODGSON. Quite possibly, but I am doing this from memory of a case I sat on. I did not see at the time obviously the clemency report, nor was I aware of any Article 15 or prior sentences or anything else. All I am relating is the sentence amounts.

Col. HEMINGWAY. If you had had the power to suspend all or part of the first sentence, would you have done so?

Col. HODGSON. I will cover that, I think, in one of the questions, but in short answer to your question, I do not think trial judges should have the authority to suspend sentences.

Col. HEMINGWAY. Thank you.

Col. HODGSON. The Air Force has fewer trials than the Army or the Navy. A significant number of Air Force members who sat as court members just have no benchmark to judge what is appropriate in a particular case. I think this is particularly true in a guilty plea case, where the government's presentation sometimes consists of a stipulation of fact plus other written evidence.

I guess on balance, yes, I support judge alone sentencing. I realize, as did Gen. DeBarr, that there can be good and valid arguments made for both sides of the question, but I feel on balance that a trial judge, his training and experience and basically his judicial acumen balances in favor of a trial judge during the sentencing.

Suspension of sentences by trial judges or appellate judges on the Court of Military Review, I do not support this proposal. In my opinion trial judges and appellate judges are in the poorest position to determine whether a sentence should be suspended. The Commander knows the needs of his command and what effect the suspension would have on discipline. And the mission of the Air Force is his primary concern and he might want a punishment suspended solely because he needs that individual and if you go back and if you read the history of the code in 1950 and 1951, I believe Representative Larkin was asked about clemency, whether or not a commander, and I think the example he used, was could General Eisenhower during World War II just set aside a conviction because he needed that man for a dangeroud mission. And he said, yes, that is exactly what they had in mind with the power of the convening authority, to prove only what he considers appropriate for whatever reason.

Now, the Commander's needs for that individual could have absolutely nothing to do with the equities involved, the fact he needs them. I think the Commander is in a better position to determine those needs than is a trial judge or an appellate judge who basically does not have everything before him. He does not, maybe perhaps, know the man's record, his past record or past involvement, which may not be admissible at trial, so the trial judge would not know of it. It would not be admissible in the record. If it is not admissible in the record, then the appellate court would not be aware of it.

I guess the bottome line is in my view that the Commander is aware of curcumstances that the trial court and the appellate court know nothing about and I feel that the better course of action would be to leave to the Commander the sole authority to determine whether or not the sentence should be suspended.

As for tenure for trial judges and Courts of Military Review, I tend to divide this issue into two parts. I favor tenure in the strictest sense of the term for two positions, that is the Chief Trial Judge and the Chief Appellate Judge. I guess my suggestion would be that the appointment to either one of these positions should be until the appointee wishes to leave the position for whatever reason or mandatory retirement, and I realize this suggestion could be considered extreme. I offer these reasons for it.

I think it enhances the position of that particular office and the judiciary as a whole. And, second, it allows for some continuity, particularly for an appellate court. It allows at least the Chief Judge to give some guidance, direction and also perhaps keep from having to rediscover the wheel or rediscover fire. Because if you have a turnover every three or four years, then the same issues which come over and over and over, the same people—even though they maybe reported decisions, it is just that you are not aware of the background of how they were arrived at, what was the thinking of the judges.

Now, as to trial judges and other appellate judges, I would favor a fixed term of years for whatever would be appropriate. I think too long of time as a judge might adversely affect their career and opportunities for promotion and when I say adversely, I am talking about the broadening effect. As the witness before me previously said, give an opportunity to cover all the bases, sit in a number of chairs in order to enhance your own value to the service and your opportunities for promotion.

I would favor a fixed term of years for whatever it would be, three years, four years. As far as the trial judge is concerned, that could be a problem, because the Air Force, it is different from the Army, who sometimes sit at the same base and try all of their cases at one location, particurlarly in Europe and the Pacific and even in the United States to some extent, but our judges travel constantly.

One year when I was in Europe, I was TDY 192 days that year. I would leave on Monday, come back on Friday, get my wife to wash my clothes, press my uniform and leave the following Sunday afternoon to be at a trial beginning some place else. So there is a strain for the trial judge, particularly one who is married and with small children. I can understand how he might want to limit that to a fixed number of years.

With regard to confinement jurisdiction of a special court-martial to be expanded to adjudgments up to a year, I can see merit in that. I can also see that you might get sentences which would be in excess of six months, for offenses which you are now getting six months solely because of jurisdictional limitation. I can see Commanders just wanting to send to court a case, a drug case, for example, of a minor amount of drugs to a special court which had a sentence enhancement of up to a year, rather than send it to a general court, with all of the requirements of a pretrial investigation. And I do not think it would really have that much effect on the current appellate jurisdiction. The only concern I could see would be something similar to a general court, where you would get less—no general court is reviewed by a Military Court of Review if it is under a year or discharged.

That concludes my prepared statement and I would be happy to answer any questions you gentlemen wish to ask.

Mr. HONIGMAN. Sir, let me ask this question about the power to suspend a sentence. I think you very ably outlined the reasons why the Commander should have suspension power. What about sharing that power? Suppose the Military Judge has the power to suspend and the Commander also has the power to suspend a sentence, would that be in your view a workable system?

Col. HODGSON. No, it would not.

Mr. HONIGMAN. Why not?

Col. HODGSON. For this reason, as I previously said, the trial judge just does not have all of the facts. He is basically in an orchestrated situation where the accused counsel is presenting the accused in the best possible light, as well he should, and as I did when I was defending cases. There could be information which is not admissible, which the commander is aware of, which would adversely affect whether or not he wished to suspend it, and which the judge would not be aware of.

Mr. HONIGMAN. What sort of changes in the Rules of Evidence would be necessary to make that kind of information admissible through the advocacy of the prosecutor?

Col. HODGSON. I do not know if I can answer what you have asked without thinking of it longer. Possibly, if you had a complete hearing as to whether a sentence should be suspended. That would engraft onto the trial an additional period of time, additional witnesses and additional, I guess, period, which I do not think would be desirable at that time, particularly in a combat situation.

Mr. HONIGMAN. Do you have any sense of the percentage of cases in which the defense counsel seeks to argue to the Commander that suspension would be appropriate and the extent to which this constitutes a burden on the Commander's time?

Col. HODGSON. No, I do not.

Mr. HONIGMAN. Do you think that a concern about burdening the Commander with clemency decisions that could be made at a lower level or a different level by the Military Judge, would a concern for eliminating that burden in a period of war time be an argument for giving a Military Judge suspension power?

Col. HODGSON. It would certainly be an argument. It is my understanding that one of the reasons that judge alone sentencing came about was Gen. Westmoreland's position that this would be an opportunity to stop the drain of manpower on his Commander's sitting in the portion of it, if the option is refused. So, yes, there could be an argument made for that.

This would increase the Commander's ability. It would free him to command, but I think the countervailing argument is what I have stated, he is in a better position, and if the decision were mine to make, I would allow it to be kept in his hands.

Mr. HONIGMAN. In considering the appropriate sentence in a case, do you take into account your understanding of the prevailing view of the line community as to the seriousness of that offense and what an appropriate sentence might be?

Col. HODGSON. Obviously trial judges converse within a circuit as to what is happening at each base. The chief circuit trial judge knows what is going on at each base, because he dockets the cases, so he knows the types of cases that are being tried. Through his judges he knows basically, and he sees the reports of trial which the trial judge puts down, and he has some idea of what cases are being tried. We as judges, we are not cloistered. We know that there are certain problems, drugs, larceny, sexual assault. We know that these problems exist.

I would think that any sitting judge who sits in any community, be it civilian or military, has a feel for what the needs of the community are, just through his interaction with other people, his neighbors, his friends, the functions that he attends. I would think under those circumstances, yes, he has some idea of the needs of the community.

Mr. HONIGMAN. Do you think that the range of sentences imposed by members constitutes an important source of information to a trial judge as to the nature of the sentences that he should consider imposing in similar cases?

Col. HODGSON. That is a difficult question to answer, sir, and I hate to use the cliche, but it is almost like apples and oranges. Because the community, particularly in the Air Force, as I pointed out previously, the Air Force members sit so rarely, because we have such a small volume of cases compared to the Army, the Navy and the Marine Corps, that it is difficult to develop a background if you sit maybe once. The first time you sit, do you have any idea what an assault to commit rape should, an appropriate sentence should be based upon the total spectrum of what the judge tells you the max is and what counsel argues are needs of the individual played off against the needs of the community?

I guess, yes, obviously that would have some value, a considerable value, because it gives a sense of what the community thinks as to what it is. And something you mentioned or the previous witness or someone mentioned, something like jury nullification, if that is the term you want to use, as it would be applied to sentencing, sometimes you get a light sentence, because of the jury, although finding the individual guilty, it looks upon that as not quite as serious as I might as a sitting judge. I think that answers your questions, perhaps not as directly as you asked, but that is the best answer I can give you.

Mr. HONIGMAN. Do you have any views as to whether the Court of Military Appeals should be expanded to five or more judges?

Col. HODGSON. Yes, I do.

Mr. HONIGMAN. What are they?

Col. HODGSON. I think it should be expanded for the reason that too many times that I have seen in the past in my experience, that one judge is essentially the person who is controlling the direction of the court, that polarizes, and perhaps that is too strong a word, but there are judges who have definite views as to both sides of an issue and it is the judge in the middle voting this way this time and perhaps that way another time based upon the circumstances, literally controls the direction the court is going to take.

I would think if the court were expanded to five, you would not get these wide swings that you would get on reappointment or death or resignation or retirement of a particular judge. You would have a leavening, a leavening process by which the direction could be seen and perhaps practitioners, myself and other practitioners, could have some sense of direction of what the court is going to take.

Mr. HONIGMAN. Do you have any views as to how ably the Court of Military Appeals in general has taken into account the special needs and circumstances of the military in balancing those needs with the constitutional due process questions.

Col. HODGSON. In my personal view, I think they have done an outstanding job in doing it. Search and seizure questions, obviously when individuals live together on ships, barracks, the constitutional protection of search and seizure has to be looked at perhaps in a different prospective than it would be in an individual's home. I realize your room is your home, but there still has to be some balancing need.

Mr. HONIGMAN. A different privacy expectation.

Col. HODGSON. Yes. You do not obviously give up any rights or some rights perhaps you may give up but not totally. You may balance that to come up with what I consider to be a fair, equitable and fully comes within the due process of the Constitution.

Mr. HONIGMAN. In connection with our consideration of whether the Court of Military Appeals should

become an Article III court, do you have any views as to whether there should be an expanded jurisdiction of any nature of any subject matter accorded to the court?

Col. HODGSON. In what way?

Mr. HONIGMAN. I don't know. We have been talking about drafting—

Col. HODGSON. It would be difficult for me to see how the expansion of the subject matter—I suppose if there became an Article III court, then obviously the subject matter could be expanded, but under the present concept it is limited solely to military cases and they have no contracts or anything further.

Mr. HONIGMAN. Would you, considering the proposals have been made, for example, to accord subject matter jurisdiction over military contract disputes, over administrative discharge questions, do you have any views as to whether that would be appropriate or desirable?

Col. HODGSON. I started out by saying I have no views and now you are asking me do I have them. I realize that and let me see if I can answer. It is a very, in my view, a very complex issue. I have not studied the question. I have not thought about the question in depth. In deference to your question, no, I have no views on that subject.

Mr. HONIGMAN. Thank you very much.

Col. RABY. You indicated that you believe COMA should be five members and you mentioned the swing judge and how much power he exerts and influence. Do you believe that with the new Military Justice Act of '83, which now has direct petitions for certiorari to the Supreme Court, government appeals and a new manual which has a much clearer articulated death penalty procedure that the need for court stability is any greater than it was in the past, about the same?

Col. HODGSON. I would say about the same, because even though there are direct appeals both by the government and the defense on certiorari to the Supreme Court, I still think you need the Court of Military Appeals, it still occupies the highest court of appeals within our judicial system, and I think some, stability that a five-man court would give, would provide for that, even though you could appeal.

Col. RABY. Then you believe this position, the so-called Supreme Court of the Military remains intact?

Col. HODGSON. Yes, I do.

Col. RABY. And its pronouncements are going to have basically the same finality in reality as they did in the past?

Col. HODGSON. Yes, I do. I envision, this is me again speaking, I cannot envision a Supreme Court reaching down and taking military cases except on supreme issues that the due process would affect the very fabric of the Military Justice System.

Col. RABY. Would their decisions have a greater value as precedent in the long haul if they became a five-member court?

Col. HODGSON. I do not know. As an intermediate appellate judge, they would, of course, take the same precedence they have always taken, because we must look to them first for guidance and the fact we have five or three, I do not think would change my view. If they have spoken on the issue, this is what I must follow. I do not see how increasing it to five would increase my requirements that I follow what they have said. It would probably make it more stable in that I would not be concerned about what might happen two years from now if someone was not reappointed or left the court.

This may continue in the future to be the position, regardless of whether or not there is a judge who leaves.

Col. RABY. Based upon your own personal experience, including all of the records at trial, that you have reviewed and studied, your discussions with other judges, whatever expertise you have from whatever source derived, do you believe across the board that Commanders give fair and full consideration to the recommendations for sentence suspensions made by Military Judges?

Col. HODGSON. Let me tell you my—I have never been a staff Judge Advocate, either at a GCM or at a base, so I do not have the breadth of experience that perhaps yourself or other members of this Commission would have, knowing how the defense counsel takes it up to the Commander. Records of trials that I see probably do not include that in the allied papers. It comes to mind I do not remember any that I have seen where this would be included. It may have been done, but it just was not in the record of trial in the allied papers.

Col. RABY. I will phrase it this way then. One of the jobs of the Court of Military Review is to adjudge sentences appropriately. Is that not correct?

Col. HODGSON. That is correct.

Col. RABY. Has appellate counsel, to your knowledge, in the Air Force made any meaningful arguments that sentences are excessive and used as a part of their argument evidence that Military Judges in appeals recommended sentence suspension or clemency, for one reason or another, and that these recommendations were ignored by Commanders?

Col. HODGSON. I have seen recommendations by judges that it be suspended, yes. And I have seen appellate counsel urge that we, based upon the *United States* vs. *Clark,* exercise the power that Chief Judge Everett indicated how we could do this if we desired to do it. But I have never seen an assignment of error—let me put it, I have no recollection of seeing an assignment of error of which the contention by appellate counsel was that the Commanders have just totally ignored it without giving it any weight at all.

Col. RABY. When this argument arises that you should exercise clemency, is that quite frequent that that is argued or infrequently?

Col. HODGSON. We see all of the time on sentence appropriateness.

Col. RABY. Is it primarily argued then by appellate counsel as a matter of routine?

Col. HODGSON. No, it is not a matter of routine. I think appellate counsel picked those situations where they feel the sentence is inappropriate and they will argue that this is inappropriate. And in an inappropriate situation, we re-assess the sentence and find appropriate only so much as.

Col. RABY. What percentage of the cases where such appropriateness is argued, ball park figure, do you believe that a sentence assessment is necessary, that there was substantial—

Col. HODGSON. I honestly cannot give you that, because I do not know. I know during my tenure as Chief Judge, we have found appropriate lesser punishments in a significant number of cases, both, when it was raised and when it was not raised by counsel.

Col. RABY. Do you maintain that type of statistic?

Col. HODGSON. I do not think so. I can check with my commissioner, but to get it would probably require that we would have to go through every record of trial and look. It is not routinely kept.

Col. RABY. Have you developed a feel for the time you have sat on the bench as to whether commanders are substantially carrying out their responsibilities appropriately and approving sentences that are only appropriate or whether due to lack of expertise or whatever reason they are missing the mark? You must have a feel for whether you have to watch-dog this pretty closely or whether you have to intervene a lot of times and correct the sentences or whether by and large Commanders are on the money.

Col. HODGSON. I think by and large they are doing a conscientious job and if you are going to say on the money within certain parameters, then I would say yes. We see cases where the Commanders have lessened it substantially.

Col. RABY. Sometimes more so than you would have?

Col. HODGSON. In all fairness, that is correct, more than I would have under the same situation.

Col. RABY. Suppose we have a case where we have a soldier who really is worthy of a suspended sentence, based on your knowledge of the military, under which case or would it make a difference would he be most likely to receive an honest rehabilitative chance by subordinate Commanders, in the case where the Military Judge suspended the sentence or in the case where the Commander suspended the sentence?

Col. HODGSON. What you are asking is basically if the Commander suspended it then he would be more prone to the halo effect, as it was, because he thought the man was—

Col. RABY. Not only he but his subordinates.

Col. HODGSON. And his subordinates and he would be looking at it in a—I am searching for the word and I am trying to find it—in a more positive approach than he would if someone else had suspended it over his objection.

Col. RABY. What I am getting at, if you want to board a soldier out of the Army or Air Force or Navy or Marines bad enough or court-martial him bad enough it can be done. I think it is impossible for a person to not commit some infraction, be it judgmental or with apathy or something, if you follow the individual closely enough and put enough pressure on him, you can get grounds for their elimination if you are really after an individual. Now, there may be some exceptions to that.

What I wonder, if you have a soldier or enlisted person, let's use that, an enlisted person who is really deserving of clemency, if we place the sentencing suspension power in the hands of the Military Judge and he acts first, would his actions be more suspect, would he be treated as an interloper or would it not matter than if the Commander took that action? In other words, would it actually end up hurting his rehabilitative chances by having the judge do this?

Col. HODGSON. What you are saying is if the trial judge or the appellate judge had the power, that there would be a sense of confrontation between the command and the judicial structure, which might impact adversely on an individual who has been given a suspended sentence.

Col. RABY. That or that the credibility of the judge in this particular area is suspect by the line commander so that they would be less likely to consider the individual an honest rehabilitation candidate.

Col. HODGSON. I guess, I would like to say that hopefully the commanders and the judges both would treat each other as individuals who are honestly and fairly doing their job as they see it and would not let that affect their judgments. While they may not agree, they would give that individual the benefit of the doubt and say he is doing what he thinks best, we will give the system a chance to operate.

Col. RABY. But you did use the word hopefully. Now, is there some reason for that?

Col. HODGSON. Obviously, when you are dealing with personalities, you are going to have people who perhaps take an issue with I should have this power, why should you have it. I have stated my position. I think the Commander should have, not because I think the judges are going to unfairly do it, but because I think the conven-

ing authority is in a better position to make that judgmental call based upon all of the facts that he has available and which the trier or the appellate judge may not have available.

Col. RABY. Basically, the man does not go to work for the judge; he goes back to the unit.

Col. HODGSON. That is a good way of putting it, yes.

Col. RABY. You indicated on judge alone sentencing that by having judge alone sentencing this would reduce the extremes, the too harsh and the too lenient sentences.

Col. HODGSON. Inappropriate at both ends of the scale.

Col. RABY. Inappropriate at both ends of the scale. If the convening authority is doing his job the way it is required by law and if the Courts of Military Review or The Judge Advocate General under his Article 69 powers are doing their job as they have the authority to do, a sentence that is too harsh should be corrected and leveled out.

Col. HODGSON. That is correct.

Col. RABY. So the only type of sentence that could not be corrected then would be the one that is too lenient. In other words, the one that was overly favorably to the accused.

Col. HODGSON. Yes. Of course, that accrues to the accused's benefit and under our system that may be well the reason for allowing both ends of the spectrum.

Col. RABY. Just to give you an example, everybody has got their statistics, but before I do that, I want to go to one other thing. Do you agree that there are at least two purposes to military law, one, to get a just result, that is a just punishment of an infraction; and the second is the tempering of that justice if necessary to meet the needs of good order and discipline within the services to promote combat readiness. In other words, our's is not just a pure justice system; it also is a disciplinary system.

Col. HODGSON. The Supreme Court has said that we operate under a unique and different system of jurisprudence and our needs are different than those of a civilian community and they have made allowances and various decisions for those needs.

Col. RABY. That is really the reason we have a separate justice system or a need for one.

Col. HODGSON. That has been acknowledged, I think, by the Supreme Court in many decisions.

Col. RABY. With that background, let me ask, our statistics show, for example, and I will not bore you with reciting all of the statistics, but basically Army statistics show that the accused do use and opt to have their cases heard by and thus their sentences imposed by non-Military Judges in at least 40 percent of the cases.

Col. HODGSON. You mean with members.

Col. RABY. With members, trial members, which include all officer or officer/enlisted. Our statistics also show that the majority—that in these cases that courts with members are prone to adjudge confinement less often and discharges less often than Military Judges. Of course, what the statistics do not show is that because counsel are advising their accused carefully and the accused are electing their right to employ members in cases where there is more mitigation or whether this is due to just bad sentencing practice on the part of the court.

What I am driving at is you indicated that going to judge alone sentencing would certainly affect the extremes and those sentences that are too harsh that we can correct. We would be left with the too lenient ones. But it would seem like it would also deprive the accused to exercise the selection and have the benefit of his compassion by members of the court who it would seem would be uniquely capable, considering their blue ribbon selection, of determining just how much punishment is necessary to maintain good order and discipline.

Col. HODGSON. It is a valid position to support the continuation of the system the way it now exists. I grant that, that is a valid consideration, one which might be compelling, but I stated my point that I think—there are if memory serves about 20 jurisdictions, civilian and military, where the sentencing or some parts of the sentencing is left to the hands of the jurors. I think Virginia comes to mind as the first one, that the jurors in Virginia have an input into the system and I think Texas and some others, but there are approximately 20 if memory serves, plus our own. The federal system and the majority of the state systems still allow that into the hands of the judge.

Col. RABY. But none of those systems are unique and have the responsibility for maintaining discipline during times of war or have unique offenses, such as AWOL, failure to engage the enemy, spying, and I could go on.

Col. HODGSON. The point you make, Colonel, is a valid point and one which might very well be a telling argument for allowing the system to continue. It certainly accrues to the benefit of the accused in those cases. It is one that I do not happen to ascribe to, but it is certainly a valid one.

Col. RABY. I appreciate your candor and I really have no further questions. Thank you.

Capt. BYRNE. One of the things you can have maybe not accrue to the benefit of the accused when you have members sentencing can be a compromise sentence. In other words, if you vote for conviction then we will vote for a lighter sentence. Is that a possible reflection of the more lenient sentences?

Col. HODGSON. I do not know what you are referring to. I gather sometimes you see it in a case where the accused is found guilty of a lesser offense and gets a sentence, which you would think would be reserved for the

major offense, and you sometimes get the feeling that perhaps there was some compromise somewhere.

Capt. BYRNE. That is one of the reasons why the states have switched to judge only sentencing is that juries have also been doing that sort of thing from time to time.

Col. HODGSON. Captain, I honestly do not have a feel for that. I do not. I see examples of what we have just discussed from time to time, but as to how it is arrived at, obviously I have no way of knowing.

Col. MITCHELL. I have talked to a number of Commanders from time to time, including Air Force Commanders. They tend to suggest to me that they are not particularly in favor of having Military Judges do the sentencing and some of them have been quite candid in telling me that they really do not have enough confidence in the JAGs to transfer to those people the responsibility that they feel they have for the discipline of the organization, and while they have to live with the Code as written, they do not have to give up anything more.

General Day on the other hand, who was a Marine General, came in and testified earlier in one of our other sessions that he had confidence in the Marine Corps lawyers being able to accept that responsibility, and did not perceive any of the reticence to transfer sentencing authority to the Marine judges. When pressed on the point, he observed that it was probably the fact that the Marine lawyer goes through the same training cycle as the Marine officer or general assignment goes through and also moves in and out of line billets and lawyer billets alternately at his desire and opportunity through the course of his career.

In other words, what General Day was saying was he viewed the Marine lawyer was perhaps a little more socialized and accepted into the community than might be true of the other services. We have had some explanations or indication of the training that Judge Advocates go through in the various services. My question to you is, do you feel the same sort of perceptions from the Air Force side, A; and, B, if so, would changing the training requirements for access lawyers tend to offset this feeling of no confidence that seems to exist?

Col. HODGSON. The first part of the question I have not been aware of the Commanders expressing the lack of confidence in sentencing by a Military Judge. Undoubtedly it exists at places, but I am not aware of it. I attended the Air War College and came into contact with some two hundred and some odd Commanders, potential Commanders and staff officers in all four services. I was not aware at that time, nor am I now that there is a lack of perceived confidence in the ability of the Military Judge to pass what would be an appropriate sentence in a given case.

Having answered that way, I really am not in a position to say whether or not or how the Air Force should change its training programs in order to give lawyers, as you suggested, a greater feel for the community in which they operate.

Col. MITCHELL. You do not think then that those services whose positions are contrary to the notion of the Military Judge only sentencing, those positions are based on any reticence to trust the legal community with the sentencing decision.

Col. HODGSON. I do not know what it is based on. I know the position, for example, that the representative from the Army stated is a valid position and that could very easily be one. This one could be one by other Commanders who are reluctant to relinquish the present position they have to assist in the sentencing process, to take part in the sentencing process. They are part of the community and their views obviously should be heard and they are reluctant to relinquish that and I can understand that position.

Col. MITCHELL. If I can move into the area of suspension for a second or two. First of all, I have a little bit of CMR experience and I have found that usually by the time you get a case for review any real consideration for suspending sentences is sort of paled by age. The timeliness of it has sort of been lost in the process, and so we do not have that many that come along where that really seems to be the appropriate thing.

Col. HODGSON. Of course, our docket is so much smaller than yours that the time-span that we would get the case there might be a suspension, but your docket is so much greater than ours.

Col. MITCHELL. I guess looking at it from that prospective, we have to look more at the trial level as being where the real effect of this proposal is going to be felt if it is ever enacted. So I guess what concerns me a little bit is if you say the judge is going to have the power to suspend sentences irrespective of whether he does so in conjunction with the Commander or not, I remember as an old trial lawyer it was somewhat difficult to argue the needs of society and to articulate all the reasons why a person's sentence should be up to a certain amount, because there is not anybody in there as a live witness who could testify to those things who could make any kind of impression on the jury as to those things, and the judge, and here is the accused coming in there with all the "what a guy" evidence he can muster and his own testimony and other forms of evidence to let you open up him a little bit, but this live influence is wholly lacking on the other side of the fence.

Col. HODGSON. If I understand you correctly, basically what you are saying is that the trial forum might not be the time to get a consideration whether or not the sentence should be suspended, that there should be some

time for reflection and some time for study. Yes, I would agree with that, yes. I think that coincides to a large degree with what I previously said.

Col. MITCHELL. Do you think in that connection you could really ever have a Rule of Evidence which would allow it to take place in the trial arena itself that same thoughtful reflective thought process in deciding whether or not to suspend a sentence, given the peculiarities and the uniqueness of military life?

Col. HODGSON. Regardless of how the rules perhaps can be expanded to permit additional evidence of going forward, I still reiterate what I previously said that probably the Commander is in the best position to assess that individual's work and the needs of his command as to whether or not he wishes to suspend that sentence. I think the Commander is the better person to do that.

Col. MITCHELL. Does not the Commander often get into philosophical things that the rational legal thinker just has difficulty dealing with?

Col. HODGSON. I do not know about that. Most of the lawyers that I have come into contact with, particularly those who have had extensive experience as staff Judge Advocates understand very well the needs of the command.

Col. MITCHELL. What about the middle grade officer who is sitting as your trial Military Judge though? We use junior majors and lieutenant commanders.

Col. HODGSON. The present practice in the Air Force, the appointment of judges they have had general staff Judge Advocate experience. Yes, obviously as you get older, hopefully you become wiser and more experienced and you are in a better position to assess what is best for the community as a whole, plus that individual.

Col. MITCHELL. Should we then think about tightening up the requirements for selection for a Military Judgeship to begin with, even in respect to the issue of Military Judge only sentencing, that a more extensive background and type of experience might be helpful in better preparing or better ensuring that the Military Judge who sits is fully capable and socialized so that he can make the proper decision?

Col. HODGSON. I cannot speak for the other services, but within the Air Force the selection as a Trial Judge and as an Appellate Judge is made personally to The Judge Advocate General. I am confident he takes all of those things into consideration when he makes that appointment and that selection.

Col. MITCHELL. There has been a proposal by one of the individuals who has submitted written comments to the Commission that the Military Judge should be authorized to recommend suspending a sentence or part of it, but that the convening authority, if he decides not to go along with that sentence recommendation, would be required to state his reasons for not doing it on the record and that that would be reversed for an abuse of discretion.

Col. HODGSON. You are saying something like paragraph 85(c) of the Manual for Court-Martial, where it says that where the convening authority disagrees with the recommendation of the SJA as to what should be done that he must state in writing his reasons for disagreeing?

Col. MITCHELL. Yes.

Col. HODGSON. Of course, judges now, I see records of trial where judges recommend suspension. It is not a common occurrence, but in selected cases, yes, I have seen them.

Col. RABY. Pardon me, but I do think under the new manual, if my memory serves me correctly, that there is a deletion of the requirement for the convening authority to indicate in his action why he disagrees with the staff Judge Advocate.

Col. HODGSON. Yes, they have done away with it.

Col. MITCHELL. I think the system that was suggested though was not only that the convening authority be required to record his reasons for not following the suspension recommendation of the Military Judge, but that the decision of his be reviewed for an abuse of discretion.

Col. HODGSON. I do not view with favor that, because I think if you are going to—if in my view, as I have stated it, it is a function best left with the Commander, then I think it should be left with him and his decision to suspend could be based on a myriad of factors and I just think it should be left with him without any review.

Col. MITCHELL. Switching to tenure, you testified that you favor some sort of a tenure period for trial or Military Judges, in particular. That is the group I want to get at. I do not care if you have that period for a year or two years, three years, four years, I guess is what has been suggested. What is going to happen in a situation like we got into in Vietnam where we were into a sort of managed war situation and we were having personnel rotation policies of 12 months in the country and then back to the states and the turbulence that causes in reassignment. How are you ever going to hold on to a significant tenure requirement in a case such as that?

Col. HODGSON. My recollection is, the way the Air Force handled it—I cannot speak obviously for the other services—that our judges who tried cases taking place in Vietnam came down from Okinawa and Japan or from Clark where there was a judge sitting and came over and tried the cases and then he left, because obviously our number of cases did not even approach the magnitude of the Army, the Marines and the Navy. So the judges still had the overseas tour of three years as a judge and they still continued.

Col. MITCHELL. I think you need to break out of your Air Force parochialism for a second and realize that however true that may be for the Air Force, that there are some of us that are in there on the ground for a long time and we are subject to the same assignment policies that anybody else is. How is such an assignment policy going to square with the concept of tenure?

Col. HODGSON. I assume if it came to that, that might be left, as they many times do, on the Secretary concerned who may set the period of assignment. In your particular situation, your service could determine what would be an appropriate period of time.

Col. MITCHELL. Let me also ask in civilian life tenure is kind of an easy thing to understand, because you have a judge whose livelihood depends on his being a judge. He gets his pay that way. He has his title and potential retirement and so forth, all emanating from his position on the bench. It is considered expedient and appropriate to protect that individual in our society from the adverse public opinion or political opinion, if you want to put a slightly different slant on it, of any decision he may make, which would result, of course, in his losing his livelihood. In a military organization though, the Military Judge has his military rank and he has his military pay. He has his status as an officer and those things do not change no matter how bad his decisions may be or how much adverse opinion may be generated about any of his decisions.

So what is it that tenure really adds to the picture in the military society that mandates its implementation in the statute?

Col. HODGSON. First, as I understand it from what you previously said, Colonel, in the Marines it is somewhat common place for you to rotate back to the line after a tour of duty as a Judge Advocate. My recollection in the Air Force—I cannot ever remember in my tour of duty in the Air Force of a Judge Advocate going from Judge Advocate to line officer and back. We stay as a Judge Advocate. In that context, yes, perhaps if you rotate back and forth, perhaps tenure might not mean anything, but to me the designation of tenure lends status to the independence of the judge; I have been appointed, I may be removed only for cause. And it makes the judge for the time that he sits a, for lack of a better word, special person. He is a judge. He has tenure. He will stay in this job.

Col. MITCHELL. Is that going to get you any more judges, any better judges?

Col. HODGSON. Getting more judges determines how many more we get; whether or not it gets any better judges, I hope not, because I would like to think the judges we have now are good. But it gives those judges and the institution, not me, but the ones that follow me ten years from now, the ones that follow me 20 years from now, a judge, yes, I occupy a special position. I have tenure. I have been selected because of my honesty, my uprightness and my knowledge of the law to sit as judge for this period of time.

Col. MITCHELL. For a normal three-year tour like anyone else. And who really knows that? Only the individual judge himself. It would seem to me if he needs that for status, he has more problems than that can cure.

Col. HODGSON. I am not talking about the individual, Colonel; I am talking about the position. I am talking about the position of Military Judge. You remember when it was a law officer. You or I neither remember when it was a law member. I am talking about the position. The military justice within the military services has increased to the point where I think we are looked upon by the civilian community as being professionals in our chosen field.

I like to think I am a professional in my chosen field. And my chosen field happens to be criminal justice.

Col. MITCHELL. I just have a hard time understanding what tangible benefit there is to adding to—

Col. HODGSON. It does not pay you any more.

Col. MITCHELL. Maybe your concern would be more appropriately satisfied by having pro-pay for Military Judges.

Col. HODGSON. No, it does not pay me any more. It will not give me anything additional, but you hit on a word "satisfy," that is job satisfaction. You hit on a word that perhaps might lend it to that, job satisfaction, the fact that I have been recognized. When I say I, I don't mean me; I mean the position. The individual occupying that position has been recognized, that you are a judge. Judges have tenure. Why am I different from any other judge. The fact that I am in the military and a judge, why am I different from any other judge for this period of time?

Col. MITCHELL. It seems to me like we are just moving labels around and moving labels around.

Col. HODGSON. Perhaps.

Col. MITCHELL. If there were some need to have the tenure proposal, perhaps I could better understand it, but as of yet no witness has really come in here and articulated a tangible reason why the tenure proposal should even exist.

Col. HODGSON. Enhancement of the position, perception.

Col. MITCHELL. By whom?

Col. HODGSON. The general public at large.

Col. MITCHELL. I have talked to a number of enlisted people around the Washington area since this thing started and they do not even know what the word means.

Col. HODGSON. That is true, but I imagine if you went down to the Federal Bar Association and discussed the

word tenure of a judge, they would all know what you mean. We are arguing semantics, perhaps, sir.

Col. MITCHELL. I think words of art will always have meaning to those who are conversant with words of art. When we start talking about the general public, I do not think they are always as aware as we like to think they are of our own words of art.

I think that is all I have.

Mr. HONIGMAN. Let me ask one question. Sir, do you believe that a public who understood that a Military Judge could not be removed from his position as a judge because he has authored decisions unpopular with the Commander of the unit where he is located would perceive that judge as more independent and more prone to follow the dictates of his conscious than he might be without that protection of his position as a judge?

Col. HODGSON. Sir, that question lends itself to only one answer.

Mr. HONIGMAN. I am not sure whether to take that as a compliment or—

Col. HODGSON. The answer, of course, is yes. On a good day I can write an opinion that is going to antagonize both parties and I think I have done that in the past.

Col. MITCHELL. If you turn that around though, if the same people are aware of the Air Force retirement policy, don't you wind up at the same place?

Col. HODGSON. One is policy; the other is—

Mr. HONIGMAN. If it were a statute.

Col. HODGSON. Yes. If not statute, I am searching for a word and I can't find it, but it means permanence.

Capt. BYRNE. Let me give you the same question I gave to the Air Force personnel Colonel. You are assigned originally in August of '81 to a Military Judge position. If you had a guaranteed term of years, it would expire in August of '84, say, three years. What happens in the meantime if another position opens up and in order to get you trained for that other position, say, they want you to go to school, so they order you in, you are to rotate as of May of 1984? You have not completed a term of three years.

Col. HODGSON. That is a very valid concern and one that the former Judge Advocate General of the Air Force spoke to me about when I was in Europe, Major General Day, he pointed out that very concern when we were discussing tenure and he pointed that very thing out. He said, for example, a fixed term of office as a judge would exclude assignment to service schools, might exclude assignment to senior service schools, might exclude assignment which would be career enhancing and could do a number of things, and then I could not come up with a satisfactory answer, nor can I come up with an answer that assuages your concerns in the matter.

That is a valid concern and I cannot come up with an answer. I guess what I am saying is on balance I think the two, I still would favor some form of tenure with an escape hatch that I cannot write it.

Col. RABY. I have one final question. In response to a question from my Marine counter-part, Charlie, over there, you indicated that in regard to a convening authority when he has the power to suspend a sentence that you did not believe he should be required to place his reason on the record so that that decision could be reviewed for abusive discretion. You did not go into the reasons why and that peaked my curiosity a little, because, for example, in the area of sentence deferment—

Col. HODGSON. In the *United States* vs. *Brown?*

Col. RABY. Yes. It is not something I particularly like, but it is on the books and certainly that seems a less important consideration in many respects than the suspension thing in terms of actual effect and benefit inured by the accused.

Col. HODGSON. Of course, I interpreted the manual provision that said discretion meaning that exactly. But the *United States* vs. *Brown* changed that when the Court of Military Appeals said it was not unfettered discretion. It had to be obviously reviewable by somebody. I guess I am saying I do not envision that the writers of the Uniform Code in 1951 envisioned that so many things which they started out being left with the discretion of the Commander all of a sudden now became reviewable, deferment and what we are talking about. I just do not—I still reiterate what I previously said that this decision to my mind is best left to the convening authority and I guess I would not think that it would be in the best interest of the convening authority and of his function and responsibility to have his decisions on this subject to review.

I keep going back to an opinion of the Supreme Court of *Willoughby* vs. *Orloff,* where they said the courts are not to manage the Armed Forces. I would look upon this as a management of the Armed Forces and Courts do not need to manage. Let the Commander make those decisions that deal with his mission and to me this deals with his mission and should not be subject to review.

Col. RABY. Thank you. I guess just what amazes me the most is that some enterprising defense counsel has not jumped on Brown and already tried to raise that argument on sentence suspensions to COMA right now.

Col. HODGSON. I am sure they will after they read your statement. Thank you very much, gentlemen, for asking me here.

Col. HEMINGWAY. Thank you, sir.

(Whereupon, at 1:10 p.m., the hearing was concluded.)

PREPARED STATEMENT OF LIEUTENANT GENERAL JOHN R. GALVIN, COMMANDING GENERAL, SEVENTH UNITED STATES CORPS

Good morning gentlemen. I am Lieutenant General Jack Galvin, the Commanding General of the Seventh United States Corps, Germany. I am pleased to have this opportunity to present my views concerning proposed changes to our military justice system. Before addressing the specific proposals, it may assist you in weighing my comments if you are aware of my military background and the nature of my current command.

I have served in the United States Army for over 25 years, more than one third of that time as a commander. My combat experience includes service as a commander in the Republic of Vietnam.

I am currently a general court-martial convening authority and have been so for the last three years, first as the commanding general, 24th Infantry Division and then in my current position at Seventh Corps. I have acted as a summary and special court-martial convening authority and as a reviewing authority. I have been a court member but have never served as counsel.

Seventh Corps is the largest corps in the United States Army. It includes approximately 85,000 soldiers spread over an area the size of the State of Indiana. It includes most of southern Germany and boarders on France, Switzerland, Austria, East Germany and Czechoslovakia. Corps headquarters is located in Stuttgart, the capital of the state of Baden-Wuerttemberg.

The matters which are under consideration by the committee represent fundamental changes to the military justice system, a system which has served us well since the American Revolution. Although there have been numerous changes to the British Articles of War, each change was carefully considered with due regard for the benefits as well as the necessity of the change.

It is my view that the principal purpose of the military criminal law system is the maintenance of discipline on the battlefield. No change which detracts from that purpose should be adopted. But another factor which we in uniform can never lose sight of is the fairness with which our military justice system is perceived by the civilian community. Notwithstanding the voluntary standing army which we now maintain, we will be dependent upon the civilian soldier in any major confrontation. The treatment accorded the serving family member will be evaluated by the American people, whose support is, to some extent, dependent upon the perception that the soldier is treated fairly in matters of criminal justice. It is with these two factors in mind that I have evaluated the proposed changes.

I will now address the specific proposals which are being considered by this advisory commission.

Tenure for Military Judges

Military judges at the trial and appellate level are presently selected from a pool of active duty field grade judge advocates. The perspective and values of these officers are influenced by their experience as members of the military legal community, a community in which they live and work. The periodic exchange of judges and other judge advocates insures that the perspective and values of judges remain current. It is essential that military judges not be segregated from other army officers any more than is necessary for the independent performance of their duties. The current system of assigning a judge for a normal tour teaches that tenure beyond a specific assignment is unnecessary. Since there is no evidence that judges have been improperly influenced without tenure, it follows that tenure will not improve the impartiality of judges.

My experience with military judges, which is almost exclusively limited to review of records of trial, leads me to the conclusion that they are a dedicated, professionally competent group of officers. While an argument can be made that some form of tenure would foster an appearance of protection of the impartiality demanded of such a position, such an appearance would be more than offset by the loss to the Army of flexibility in the assignment process. The present system has worked well for 15 years. The authority of the judge advocate general to assign, appoint or remove army judge advocates is unquestioned. The protection of judicial independence is guaranteed by the command authority of the legal services agency over military judges. Field commanders may have occasion to complain about a military judge, but only the judge advocate general or his designee can influence a judge's career or assignment.

The benefit to be gained from tenure is the perception that will be fostered in the civilian community. Protection of the independence and impartiality of judges is something which is expected. This expectation can be met by insuring that military judges are appointed to serve for the term of their current tour, normally three years in the continental United States. Other protections, such as guaranteed selection for promotion, will not improve performance or impartiality and may have the negative effect of alienating military judges from other officers in the community.

Sentencing by Military Judge in all Noncapital Cases

The proposal to have the military judge impose the sentence in all noncapital cases is a proposal which has an element of appeal but which I believe should be rejected. I would expect sentences to be more consistent and appropriate if imposed only by military judges; however, court member duty, to include determination of an ap-

propriate sentence by officers and, where requested, enlisted personnel, is an important duty which benefits the Army as a whole. The fundamental fairness which is a characteristic of the military justice system is instilled in court members and they carry that concept with them from the courtroom.

The present system allows the accused an option in sentencing as well as in determinations of guilt or innocence. I do not consider this option to be a fundamental right, but adoption of this proposal would represent a change to the accused being able to select the forum which will determine the sentence. Such a change should not be adopted for any but the most cogent reasons. I find no such reasons. An accused who knows what sentence he might expect from a judge and then elects trial with members has made a rational, informed decision. The ability to make such a decision contributes to the perception of fairness of the military justice system.

Power of Suspension for Judges

I do not view the granting of suspension authority to trial or appellate judges to be an issue involving diminished authority for the convening authority. Rather, the central issue is who is best situated to make the decision. It is my belief that the limitations imposed by the military rules of evidence have the potential to deny to the military judge what may be critical information in this decision making process. Of course, the rules could be changed to remove this impediment, in which case, I would support granting suspension authority to trial and appellate judges. I do not believe court members should be given this authority if sentencing by court members continues to be an option available to the accused. In deciding whether to be tried by a court with members, the absence of suspension authority may influence an accused to elect trial by military judge alone. I do not believe that it would be appropriate to attempt to instruct court members in all of the ramifications of a suspended sentence, with which ramifications I would expect the judge to be familiar.

Expansion of Special Court-Martial Jurisdiction To Allow Imposition of Punishment To Confinement at Hard Labor for up to One Year

This would double the confinement provision currently in effect. The significant differences between a BCD special court-martial and a general court-martial, other than the maximum punishment to be imposed, is the requirement for an Article 32 investigation, number of members and delays between service of charges and trial. The Article 32 investigation is the military procedural equivalent to a grand jury indictment from which the military is exempted by the Constitution. While the Article 32 investigation may be a time-consuming procedure, it is an opportunity for both the prosecution and the defense to evaluate the evidence to be brought forward at trial. Although there may be no constitutional issues involved in this proposal, the appointment of an officer to conduct an Article 32 investigation in more serious cases allows both the Government and the defense the opportunity to weigh the evidence. This opportunity satisfies a notion of fairness which is essential for public confidence in military criminal procedures. If an accused is at risk for confinement for one year, a period usually associated with a felony conviction, the potential for such punishment should be balanced with a formal, thorough and impartial investigation.

TESTIMONY OF: LIEUTENANT GENERAL JOHN R. GALVIN, COMMANDING GENERAL, SEVENTH UNITED STATES ARMY CORPS, GERMANY, BEFORE THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION AT WASHINGTON, D.C. ON 19 JULY 1984.

Lt. Gen. GALVIN. Thank you Colonel Hemingway.

I had a statement that I wrote out so I could save your time and also I answered the questionnaire that the Commission sent and I believe you have both of those. I really have nothing more to add. I might add a word of background.

I enlisted in the Army National Guard in 1948. I spent two years as an enlisted man. I was a medic in an Infantry regiment. At the end of two years I took the examination through the National Guard for West Point and passed it from the State of Massachusetts. I went to West Point and was commissioned in Infantry in 1954, and I thought that might be of interest. Otherwise my career has been the normal career you would expect for an officer to eventually become a corps commander and I'm ready to answer any questions that you might have or do anything else that the Commission would like to do.

Col. RABY. I guess I've got the honor of leading off. General Galvin, I'm Colonel Raby of the Army Judge Advocate General's Corps.

Looking at your questionnaire and at your statement I notice that you indicated that there was one time that you were aware of when a military judge's decision was criticized. And then in answer 24, well the question was "Did this criticism impact on the Judge's subsequent decisions?" and you put yes. And I wondered if you could elaborate a little bit if you recall the facts as to what the situation was.

Lt. Gen. GALVIN. The judge in this particular situation had a difference of opinion with the President of the court over the uniform to be worn. The President wanted to wear, and I forget now which way it went, I think the President wanted to wear a blouse and the judge wanted to wear an open shirt. The President of the court was a Colonel who insisted on the fact that he had the responsibility for the uniform which in fact turned out to be true at that time. This was not brought to me over an argument about the uniform. It was brought to me about the judge through my JAG officer as a question of whether or not the President of the court should be removed because the judge had lacked confidence in him because of this difference of opinion. He felt that the President of the court would then be biased.

I made the decision that the President would not be removed since I didn't have any reason to remove him. He hadn't done anything except disagree with the judge which he had a right to do. So I said no, I would leave him on the court.

I got the word, whether the judge intended me to get the word or not, I did get the word through the legal channels, that the judge intended to remove the President from every court on which he sat. There was only one after that and the judge did indeed remove the President from it.

I know of no other proper word. He challenged him anyway. The President was not allowed to sit.

I elected also to complain at that point. I didn't complain to, it turned out that indeed the judge did what he said he was going to do and I complained through legal channels to The Judge Advocate General, and I really didn't expect an answer and I did not get an answer on that. I simply logged a complaint.

Col. RABY. That clarifies that I think. For me anyway.

I want to talk a little bit about your answers on the question regarding tenure. I notice in your statement you take the position in your statement that tenure is not necessary in your opinion for military judges and that it will not properly insulate them from command. It will not significantly insulate them from command influence.

Then in your questionnaire I notice you say on the question on balance, you favor some provision for guaranteed term of office for military judges, and you say yes.

To avoid any confusion, because we have interpreted tenure in the questionnaire to be guaranteed term of office it's your position that a judge should have a normal duty tour for the area rather than have it given some formal name such as tenure or just what is your position?

Lt. Gen. GALVIN. To go back to my questionnaire on that, Colonel Raby, you notice there is something that might be looked on as ambivalence. I said that I did not feel that tenure was necessarily warranted in order to provide objectivity or to provide an environment in which the judge was not unduly influenced by some outside effect. But I also said in the same questionnaire the perception that the judge could be influenced by a lack of tenure was a possibility.

I do feel that a judge should have a tenure in the military and it should be coincidental with his tour. In other words, if he goes to Germany for a three year tour, he should have a three year tenure as a judge. I would say, though, if we do that there ought to be a provision which allows for the normal sequences of events that occur in which a judge needs to be moved in less than three years because of a requirement to have him someplace else. And as long as the decisions to shorten his tenure or even to lengthen his tenure were the normal course of events and not, let's say, as a result of the pique of some commander or the whim of The Judge Advocate General or some other reason.

Col. RABY. So in other words, Sir, you believe that it should be a guaranteed term of office equivalent to his tour provided he could be removed for good cause basically. That includes military—like needing him in a critical assignment somewhere else.

Lt. Gen. GALVIN. Yes.

Col. RABY. Turning now to sentences judged by military judges, Sir, we've had some testimony before the Commission that some commanders felt that maybe the court members selected for courts aren't necessarily the brightest or the best in the command. In your experience as a commander, and I noticed you've been a convening authority on both special and general court-martials in your career, and of course you also have many subordinate commanders who exercised court-martial jurisdiction under you, what is your experience in your selection of officers to serve on court-martials? What caliber officers do we get? Do we get a mix of commanders and staff officers? Just what do you view the qualifications of court members who are ultimately selected for that duty?

Lt. Gen. GALVIN. As a commander I've always interpreted the selection of court members to include a mix and not necessarily to be the most experienced members, to use your term, the brightest and the best. I think that the level of selection should include younger officers and older officers. It should include enlisted members if the accused wants those up through within the law. In terms of brightness, I think it would be a mistake to overemphasize something like that at the expense of the mix, or else I would be unduly limited to let's say the most experienced officers I had, which is probably not

the fairest way to do this. Also we would be departing from the way this is done under the law in the United States in general.

Col. RABY. How much weight do you give to the judicial temperament of the individual officer you select?

Lt. Gen. GALVIN. Obviously I give weight to something like judicial temperament, but really, unless there's some salient characteristic in an individual, I don't find it's something that I'm constantly concerned about. I feel that the temperament of the average officer is what I'm looking for. I really spend more time making sure that I have a mix across the board of officers than I do trying to decide whether an officer's judicial temperament is correct for that court.

I guess if something like that shows up, it would be in the sense that there's been an aberration of some kind. Someone proves himself to be just not the person I'm comfortable with on the court. To tell you the truth, I can't think of any cases like that right now.

Col. RABY. If I understand your criteria, the law requires of course we select for court members those best qualified by virtue of age, experience, judicial temperament et cetera. And if I understand your testimony, your experience of years of command has taught you by the time an officer earns a commission he has a basic ability, proven ability by virtue of his commission, so that he is qualified to sit as a court member. But then it's a question of whether after the selection, if he shows that he's not fit you wouldn't hesitate to remove him.

Lt. Gen. GALVIN. That's correct. That probably would be a good way to put it.

Col. RABY. In regard to sentencing by judges, Sir, and as opposed to court members, in criminal law it's often said that there are at least three basic reasons for imposing a sentence on an offender. One is the doctrine of society retribution which perhaps some people look on disfavorably, but it is in essence when an individual commits a heinous crime, society as an entity has a right to punish that individual in retribution for his heinous act. Another is rehabilitation. One of the prime purposes of sentencing is to allow for rehabilitation of the individual so he can be returned, not necessarily into the military community, but returned to society at large as a good citizen. And then there is deterrence. There are two types of deterrence. Specific deterrence which is that punishment should be sufficient enough to specifically deter the individual accused from repeating his conduct. And finally, general deterrence that a sentence may take into account such factors as generally deterring others in the community from similar misconduct.

Do you have any opinion, say an accused goes before a court composed of a military judge and is sentenced by a military judge and he gets, for defense barracks larceny, dishonorable discharge and a year confinement. Another offender goes before a court composed of military officers for the same offense and gets the same punishment. Is there a perception of any sort in the military community regarding the sentences that would give one sentence, that is one imposed by the court members or the military judge, greater weight in deterrence? In other words, does the military community tend to respond more favorably in terms of being deterred when the sentence is imposed by a judge or is imposed by court members or is there no difference?

Lt. Gen. GALVIN. I don't think there's a difference.

Col. RABY. I notice you answered the questionnaire that you felt it would somewhat impair the preparation of junior officers for command if we switched to judge alone sentencing. So your experience has been that sitting on a court-martial is a valuable experience for young officers in learning the use of the system and its relationship to the maintenance of good order and discipline?

Lt. Gen. GALVIN. Yes, I think it's a very good experience for them.

Col. RABY. Today, comparing when you were a First Lieutenant and a Captain with current First Lieutenants and Captains, do you think they have as much experience as you did in military justice or less experience or enough, or do you have a feel for that?

Lt. Gen. GALVIN. I think they have less experience now and therefore that's one of the reasons I feel they need to sit as panel members. When I was a Lieutenant I could be a defense counsel, I could be a trial counsel, and those things kept me more into the Uniform Code of Military Justice as a normal run of the mill event for me.

In addition to the other things, an officer is still involved because he can be working investigations such as Article 32 investigations, Article 15 investigations, or other less formal associations with this kind of thing. And there are various other things as you know.

I would say to answer the question, an officer of my vintage as a young lieutenant had perhaps more interface with the judiciary system on a day to day basis.

Col. RABY. There are several different schools of thought regarding military justice. One school is that military justice is primarily a tool for the commander in the maintenance of good order and discipline. That's a purist view on one spectrum of the pole. Another purist view on the other spectrum is that military justice should be the equivalent of the civilian judicial system primarily to the protection of society at large and the military society in general from criminal misconduct. And it should be patterned after the civilian system.

What is your own personal view of the military justice system in relationship to the civilian system of justice?

Lt. Gen. GALVIN. The military justice system should be patterned after the civilian system as closely as possi-

ble. As far as I'm concerned the only reason it would not be patterned after the civilian system would be because to some degree the military environment, the military existence, military life, is somewhat different than the civilian existence, environment and life. And where those differences occur we need to look very carefully to see whether they warrant any kind of departure from American civilian justice, civil justice procedures.

Col. RABY. Sir, another thing I need some clarification on, on page 68 of your questionnaire when you're talking about military judges, I notice at one point you were asked the question whether or not judges should have a mandatory minimum sentence, that is they have to give a soldier at least a minimum sentence, a certain amount for a certain offense, and you answered no. And then on the question of sentencing guidelines for federal courts, you answered yes, that if Congress promulgates sentencing guidelines for federal courts should sentencing guidelines be extended to court-martial. Sentencing guidelines of course, are not as you know mandatory sentencing, but they are some pretty solid rules concerning what sentences should be suspended or how long offenders should be incarcerated for certain types of offenses which tends to cause uniformity in sentencing.

Do you see any problem with using a sentencing guideline say in combat or other situations where we have a lot of different and unique military offenses? Do you believe we can adopt civilian sentencing system which includes suspensions for first offenders, at least strong consideration for it and so forth, as effectively in the military as in civilian life?

Lt. Gen. GALVIN. That's really part of the previous question. Let me say in general first, that I would repeat that military justice is and should be patterned after civilian justice in the United States, and if there is no military reason to have a difference then there shouldn't be a difference, and if there is a difference there should be a military reason.

Normally we would sentence a person to the same degree of punishment for a crime in the military if the crime were the same as he could expect to receive in his civilian life. So if Congress decides to mandate certain things as far as sentencing is concerned, it should apply to the military as well as to anywhere else in the United States except if the military sees a reason and can show there's a reason to the Congress that it shouldn't apply.

So to take your case for example, in wartime should a soldier receive a greater punishment for rape than in peacetime, my answer would be no. And I think it's a very dangerous thing to say that the exigency of war change the military, change justice. I think we should be careful of that. There may be a case when it is true, I didn't say it is never true. I said we should be careful of it.

At the Battle of Concord and Lexington remember that the British officers finally had to aim their own weapons at the soldiers to stop a panic near Lexington. I picked a British case—

(Laughter)

Lt. Gen. GALVIN. Certainly the British law at the time probably did not allow you to shoot people in order to stop a panic. I think that there would be military cases where sentencing or punishment or action, legal action, might be different because of a war, but I think we must be pretty careful about how we do that.

Col. RABY. I notice in your questionnaire of the over 100 general court-martials and about 100 special court-martials you've convened in command, you've never once had a military judge recommend that a portion or all of the sentence be suspended. Is that correct?

Lt. Gen. GALVIN. That's correct.

Col. RABY. Obviously you didn't have an opportunity to act on such a recommendation. If you got such a recommendation from a military judge, based on your experience in dealing with the military judges, how important would that recommendation be to you in making an ultimate disposition?

Lt. Gen. GALVIN. It would be important to me. I would take it into account and make a decision.

I asked myself recently why we have not had recommendations for suspension and I need to look into that myself because it may be that defense counsels are not active enough in this area where they see a need to recommend this. It's something that I in my case have decided to look at.

Col. RABY. Because you mentioned that thing about the defense counsel that causes another question to come to mind. Of course there's not really an open door policy, but if the defense counsel has something to present, I assume that he can go to your Staff Judge Advocate and there's a method that that information can be brought to your personal attention in your command.

Lt. Gen. GALVIN. Yes, and it's often done. He can do that in writing or he can ask to come and see me and talk about it.

Col. RABY. I noticed that in your questionnaire you indicated that, and also in your written statement, that regarding military judges suspensions, you wouldn't oppose it and I assume that goes to your philosophy—civilian system, provided military judges could be given enough information to make an informed decision on suspension of sentencing, is that correct?

Lt. Gen. GALVIN. That's correct.

Col. RABY. What type of information do you consider important in this type of decision making?

Lt. Gen. GALVIN. Well, when we looked at what I know that the judge doesn't know there are things that I do know that the judge doesn't know because of a lot of

different things than just rules of evidence. It could be for example that I know of previous crimes of the same nature of the accused. Let's say he's found guilty of a crime. I might know of some of the same nature but they've been presented to me in a way that they're not admissable. That would be an example And there could be other things.

I think that normally it would be things associated with rules of evidence.

Col. RABY. So a commander may have access to such things as prior arrest records, counselling statements, and nonpunitive action like extra training, all the input from the NCO chain.

Lt. Gen. GALVIN. That's correct.

Col. RABY. That's the type of things you had reference to, not exclusively, but it's along those lines.

Lt. Gen. GALVIN. Yes.

Col. RABY. And I notice here how important a factor should manpower personnel requirements be when considering an accused sentence should be suspended, and you say not at all.

In making that statement, and that statement that we wrote in the questionnaire is pretty ambiguous. Suppose we're in a combat environment for example and an accused is convicted of an off-limits violation. Well, any type of offense of a military nature, maybe disobedience of an NCO, but not failing to engage in combat or something, and he happens to be an expert in photo interpretation or something over in your G-2 and we happen to have a need for him. Under those circumstances, would or would not his military job have a bearing on whether you suspend his sentence?

Lt. Gen. GALVIN. Well of course my answer is no and I'll tell you why. Let me elaborate a little bit. As a soldier I'm afraid of situations in which someone says because it is wartime things are different. I don't like that. I would like to stick as closely as possible, especially in the field of justice, to the philosophy that things are not different in wartime. A crime is a crime is a crime anywhere and the punishments for crime are pretty clearly set forth by the Congress. If you begin to say that because we're in the war we need to lift some of these things, the normal human tendency will be to lift other things too. And I think we should be careful of that.

Now it doesn't mean that there are not things that are different in the military. We always have to look at that. I think we can't be too careful of ensuring that we preserve the same approach to the question of justice and legality in wartime as in other times.

Col. RABY. One final question. What is your overall assessment of military justice as it stands at this point in time? Is it responsive to commanders' needs?

Lt. Gen. GALVIN. I think it is responsive to commanders' needs. I think it is also responsive to the needs of the soldier. I think it's responsive to the needs of the accused. I think it's responsive to the needs of the complaining witness or the complainant. I think it's entirely responsive. I think it's a very good system.

Col. RABY. Thank you, Sir.

Mr. RIPPLE. My name is Kenneth Ripple. I'm a Professor at Notre Dame University and a Staff Judge Advocate as well.

Returning to the question of the relief of a military judge, you indicated that you believed you ought to have at least the guarantee that if you were, for instance, sent to Europe for a three year tour that you would in fact be the military judge for that military tour barring unforeseen circumstances.

My question is, what kind of procedure would you foresee to change that track? Let's say, do you think it ought to be different than it would be for another officer who was sent to Europe and was given a particular assignment and that assignment was changed mid-stream because of military needs. Should there be a particular review of the decision to change the military judge's track and give him another job? Should somebody other than the usual chain of command make that decision?

Lt. Gen. GALVIN. Well I think that right now you find that those decisions really are not made within the local chain of command. They're made by The Judge Advocate General, and I think that should remain that way. To make decisions within the local chain of command has a danger of being perceived of or in actuality influencing the judge in the conduct of his duties.

Mr. RIPPLE. But you do think that leaving the decision to The Judge Advocate General would be sufficient? You don't see any need for any further review of that type of decision?

Lt. Gen. GALVIN. I don't think so because I think if an officer who is in that legal system, if the judge himself feels that something is wrong, he certainly has actions he can take to appeal the decision.

Mr. RIPPLE. One suggestion that's been made is there ought to be some formal procedure for this, at least some formal review procedure so it's simply not a question of the decision being made, even by a more senior judge advocate or a Judge Advocate General. It shouldn't be simply a personnel change, it ought to be a formal procedure. Somewhat akin to being relieved for cause.

Lt. Gen. GALVIN. I think we should be careful not to fix things that aren't broken and not to get too involved in these things. As it is, personnel matters tend to be very carefully looked at in all fields and decisions are not made easily to move someone from one place to another, for all kinds of reasons: family reasons, professional reasons, and so forth. I think we have enough checks and balances in our system and I think if you go to the

idea that the judge would have tenure, I'd say to make it simple and let's see how it works. It can always be changed later if a problem occurs, but let's not anticipate a problem that you don't really have.

Right now for example it almost works like tenure. A judge goes to Europe for three years or an officer in the JAG Corps goes there for three years as a judge. He normally stays as a judge and that's all there is to it. It's almost working that way now. This would be a very small change and I haven't really seen a lot of problems in the system now that I'm aware of.

Mr. RIPPLE. If I may turn to the question of sentencing, I really got quite a bit out of reading your statement, the questionnaire, and listening to Colonel Raby's questions.

The argument of course which we hear all the time for leaving the system the way it is is the line officer sitting on the court-martial indeed understands the exigencies of the military situation perhaps better than the judge. He understands the needs of discipline better, he understands the accused perhaps better than a military judge does. You indicated you don't believe that the junior officer today has as much experience with military justice as the officers of earlier periods. Do you think he has as much feel for the needs of the accused as he did in earlier periods? Do you think it's important in terms of the command function that there be that kind of input from the junior officer sitting on the court-martial as to what the appropriate sentence might be?

Lt. Gen. GALVIN. Well first, I think that the officer, the junior officer sitting there on the panel has the kind of experience that we need to understand the accused, to understand the overall totality of the environment, and to take that into account as he votes on a sentence in conjunction with the other members of the panel. Of course we have to remember that the accused has some options here. He can have the judge give him the sentence by simply electing to go judge only. He can also have his peers help with the sentence by electing to have, if he's an enlisted soldier, to have enlisted soldiers on that panel. So we already have a great deal of flexibility here in which if any accused, and with the advice of his counsel, feels that really it would not be appropriate or adequate or whatever for a panel to be involved in his sentence, he has a way to make sure that doesn't happen.

Mr. RIPPLE. You talked a bit in your statement about the perception of fairness in placing the sentencing function on a military judge. Do you think that's really a problem given all the checks there are on the sentencing function? In other words, in your command you might have different men sentenced by different court-martial and therefore indeed there may be some disparity in sentencing. But yet you see them all. Therefore you in effect act as a leveler and then the Army Court of Military Review has the authority worldwide to review those sentences and to exercise a certain leveling function if you want, in sentences. Given those built in checks on the system, is it really important that at the trial level, at the court-martial level, we worry about uniformity in sentencing?

Lt. Gen. GALVIN. The answer is no, it's not important. There will always be perception in the military and in civilian life that there is a wide variation in sentences that people receive for the same crime. The reason that perception will always exist is there is no such thing as the same crime and therefore, I'm not really concerned with this perception. It is just a fact of life. I would be concerned if we could somehow in a laboratory produce the same crime and then get a wide variation in sentencing. But that perception is not something, it's sort of something that people grouse about a little bit but it's not something that undermines the confidence in the legal system, in civilian life or in military as far as my own experience.

Mr. RIPPLE. If the Congress were to change the system for the military judge, had the authority to suspend a sentence would you want to have, retain the authority to overrule him? That is no matter what his decision was. If he did not suspend the sentence to suspend it. If he did suspend the sentence to overrule him and vacate his suspension. How would you view his role in those circumstances?

Lt. Gen. GALVIN. I don't like the idea of military commanders overruling judges. I think if you're going to do this don't do it in a way that provides a commander the authority to overrule a judge. My authority should be to complain and make a statement if I care to, that the judge has been incorrect somehow in appropriating these actions, and I already have that and I've exercised it once that we mentioned. I would much prefer to leave it for the reasons that I gave, and that is that I may know more about the case than the judge and that within the law, I may be able to make a better decisions about suspension than he can, given the information he would have available.

Mr. RIPPLE. Turning to the question of the increase in sentencing authority of the special court martial to a year, you express your views with respect to the needs of some of the pre-trial procedural guarantees quite well in your statement. I wonder if you could elaborate a little bit for us how you view that proposition and the military judge tenure question. Do you feel if in fact a special court martial is going to have its authority extended to a year, do you still feel secure in giving that decision to an untenured senior 03 or 04 military judge?

Lt. Gen. GALVIN. I think we should mirror the country in what we do. As a citizen I'm concerned if misde-

meanor and felony merge. I'm concerned. I think there is a misdemeanor and there is a felony and I think that they should be treated differently. When we begin to move toward, I think a very convenient if not entirely accurate way of looking at the difference between misdemeanor and felony, you can say one is something you can get a year or more for and one is less than a year, but I would prefer first of all to leave things as they are in the Army right now in terms of the special court-martial and the general court-martial. It's not so much the tenure of the judge that matters, it's the amount of pretrial investigation that goes on that I'm concerned with and so therefore I'd have to say that it's really not relevant to the tenure.

Mr. RIPPLE. You make that very forcefully in your statement, and a major contribution to our work that you do so because that is something that at least I had not entirely focused on I think up until this point.

General, I think that was all the questions I have. I appreciate very much your coming.

Mr. HONIGMAN. General, my name is Steven Honigman and I'm a private practice in New York City, and a former Navy judge advocate.

General, I think your written statement and your responses to the questionnaire are very clear as a position of your views on many of the issues that the Commission is considering and I guess I'd like to start with a more general question and that's whether there are any possible changes or revisions to the UCMJ that we haven't asked about that you have opinions about. Is there anything that we haven't addressed that should be changed?

Lt. Gen. GALVIN. I am happy with the UCMJ as it currently exists. I think the items that you are looking into are worth looking at. I don't have at this time any suggestions or opinions about change or other required changes.

Mr. HONIGMAN. One issue that we've been considering relates to the Court of Military Appeals and that breaks down into a couple of questions.

First if I may, let me ask whether you have an opinion as to whether the general trend of decisions of the Court of Military Appeals has been reasonably consistent and whether you feel that the Court of Military Appeals has done an adequate job of taking into account the special military conditions under which the code must operate?

Lt. Gen. GALVIN. I am of the opinion that the Court has done a good job. I think the decisions that the Court of Military Appeals has made in recent years show a keen perception of the military environment.

Mr. HONIGMAN. We have been considering whether it would be appropriate to increase the size of the Court of Military Appeals to five judges from the present three judge court. Do you think that such an increase in size would be helpful to commanders in the field in that it would increase the predictability of the court's approach to problems and reduce the possible swings in the court's philosophy that would result from the replacement of the single judge?

Lt. Gen. GALVIN. I think it would tend to do that, yes. I would agree that a larger court would tend to provide a more consistent response to situations.

Mr. HONIGMAN. As a commander would you favor such an increase?

Lt. Gen. GALVIN. Yes.

Mr. HONIGMAN. Let me turn to the question of suspension power that you've addressed in your statement. I see that you distinguish between granting suspension power to a military judge and granting suspension power to court members. Can you explain your reasoning for that distinguishing?

Lt. Gen. GALVIN. I think first of all as I said in my statement—

Mr. HONIGMAN. Would you like your statement?

Lt. Gen. GALVIN. No, that's all right. I know I said it in the statement. That in order to do this you're going to spend a lot of time instructing panels and you're going to get a lot of unpredictability here because in no way can a panel be expected to have as much experience in understanding of the whole legal atmosphere as the judge or the appointed authority can be expected to have. That's my primary objection to going that route.

Mr. HONIGMAN. Do you believe that the trial counsel representing the government could do an adequate job of bringing those conditions and factors to the attention of the members of the court?

Lt. Gen. GALVIN. I believe he could do that, yes. I think the fact that he brought this to the attention and the fact that they respond correctly is where the problem lies.

Mr. HONIGMAN. Do you think that in every case then the military judge, regardless of whether the initial sentencing decision is made by members, that the military judge should have the opportunity to consider suspending the sentence? In other words I'm concerned about a system that would seem to predispose an accused to propel him to elect sentencing by military judge because there in essence he has two chances. He has the chance of a lenient sentence in the first instance and he has the chance that a more harsh sentence could be suspended in all or in part, where if he goes to the court members that second opportunity isn't there.

Lt. Gen. GALVIN. I have not considered whether or not that would propel him to take judge only. On reflection, I really think that would not be a powerful factor. I think what is a powerful factor normally, and whether the accused selects judge only is what he and his counsel see as the past batting average of the judge, you might

say. That's normally what affects him most of all, whether he thinks that judge is a hard judge or a lenient judge in the particular kind of case in which he's involved.

Mr. HONIGMAN. That's true under the present system, but here you would be giving the judge an opportunity to do something favorable to the accused that the court members would not have a similar opportunity to do and that would be to suspend the sentence.

Lt. Gen. GALVIN. That's right. And as you know I don't believe the judge should be authorized and allowed to suspend sentences so I guess maybe I'm building my own particular situation. If the judge is authorized to suspend sentences then we have to look, as you suggest, at whether or not the panel should also be authorized. I would hope that neither would be authorized.

Mr. HONIGMAN. Let me turn to—

Lt. Gen. GALVIN. Excuse me. I do think, again, I forgot to add the reason that I brought in before and that is the amount of information available to the panel which would be the same information that's available to the judge, which would not be the same information available to the convening authority.

Mr. HONIGMAN. And I think in your statement you said that if there were an opportunity to make that information available to the judge then you would not be opposed to giving the judge that opportunity?

Lt. Gen. GALVIN. That's correct, and that would apply. As we said, we would need to look at that for the panel too.

Mr. HONIGMAN. If there were a system in which the sentencing authority, and let's assume that it were for the moment the military judge, had suspension power, would you favor retaining that power for the commander as well?

Lt. Gen. GALVIN. Yes.

Mr. HONIGMAN. How would you view, what sort of procedure would you advocate in that case for revoking a suspended sentence?

Lt. Gen. GALVIN. This is another problem of course. Any time that a sentence is revoked it should be revoked by the suspender, and if you have three different suspenders of sentences you're going to have a bad problem because first of all of course the panel will disappear. It will go to the four corners of the earth, especially in the military. Then the question would come as to whether or not the judge could be made available and so forth. That's the problem, I think you see what the problem would be.

Mr. HONIGMAN. Would it be possible though to say on the one hand if there's a judicial suspension regardless of who the particular individual is, if there's a judicial suspension you go to a judicial revocation procedure, whereas if there is a commander's suspension you go back to the commander? Could you distinguish between the two systems that way?

Lt. Gen. GALVIN. I definitely would distinguish as I had earlier. We need to avoid situations in which the commander reverses what a judge does, the judge's decisions. It's one thing for a judge to make a decision about a sentence and then for a commander to suspend a certain portion of that sentence. That's well understood for obvious reasons. But it's another thing for a judge to suspend a sentence and then a commander for example could immediately revoke it under that system, and that would not be a healthy judicial environment.

Mr. HONIGMAN. You've mentioned that there have been no instances in which the military judge has recommended that a sentence be suspended. Have there been instances in which defense counsel have made that recommendation to you?

Lt. Gen. GALVIN. As I said, there haven't been lately, and when I look at that I feel I need to look at this some more. One thing has been the defense counsels have taken different routes to arrive at this sort of thing. They have come to me maybe four cases, I guess what I'm saying is I don't feel the defense counsel right now feels muzzled. I'm not exactly sure why he doesn't come up with this particular approach, because defense counsels do come and talk about whether or not cases should be dropped. They talk about plea bargaining in cases, et cetera. They talk about whether a case should go to a certain type of court martial, and they appear to feel free to either come in person or add something in writing to the paperwork involved in this kind of thing. But in my particular case, at least in my experience over the last three or four years, there have not been occasions in which, there have not been recent occasions at least, in which defense counsels have recommended suspension to me.

Mr. HONIGMAN. You spoke earlier about the question of disparity of sentences and I think you made the very apt point that you never get quite the same crime in two instances and you never get quite the same criminal either. In reviewing the sentences that come across your desk, do you attempt, do you consider it part of your function to try to eliminate excessive disparity in sentences?

Lt. Gen. GALVIN. Excessive disparity?

Mr. HONIGMAN. Whatever word that might be appropriate, but when you see one sentence that seems to be out of line, is that something that you look for and seek to correct?

Lt. Gen. GALVIN. I'd have to answer that theoretically first and say I believe I should look for excessive disparity and correct it by suspension or some other means. I can of course elect to execute only portions of a sentence.

There have been times in the past where I have elected to execute only portions of a sentence and that of course is one of my options and that is something I think a commander needs to have because perhaps, well not perhaps, I feel that a commander's, if you take the understanding of the military community in its totality, I believe that the average commander and convening authority, the average convening authority, understands that totality better than the average judge. The judge is like any other member of that community. He is not as exposed to the constant comings and goings and situational things of that community in the way that the convening authority is. So there are times when there is an excessive disparity, that excessive disparity exists in the military and out.

Mr. HONIGMAN. In the civilian situation as well.

Lt. Gen. GALVIN. Yes.

Mr. HONIGMAN. Let me turn to the question of selection of members. You made the point in response to a question from Colonel Raby that it's your belief that by the time an officer earns his commission he is generally qualified to sit as a member of a court martial, and only if somehow in the event he proved unfit to serve you would remove him from that function. Is that a fair statement?

Lt. Gen. GALVIN. Yes, that's a fair statement. I would have to add to it that of course I take into account whether he's newly arrived in my command; if he is I don't want him immediately sitting because he hasn't had the time to get acquainted with the things I would like him to know.

Mr. HONIGMAN. How long a time do you think that would take?

Lt. Gen. GALVIN. A few months is sufficient. And there have been times when I've put officers on panels who haven't been there a few months but in my judgment they were capable of understanding what's going on in the command.

Mr. HONIGMAN. When you select members of a court-martial, do you only select officers, limiting ourselves for the moment to officers, who you personally know?

Lt. Gen. GALVIN. No, I select officers that I don't know. When I select officers, I am normally given a list of available officers and then I normally select across the board, officers of every rank. Normally a panel that I would select would have officers, would be likely to have officers of all ranks. As I said, I make certain assumptions. The assumptions are that the officers I'm selecting are professionaly qualified to do this, and after that, after professional qualification I look for a mix.

Mr. HONIGMAN. Would you feel that some system of random selection which did not involve your personal input into the final selection process from a roster of officers would be inconsistent with the proper functioning of your command?

Lt. Gen. GALVIN. No, it would not be inconsistent. It might cause other problems such as officers who are required to do certain other duties and they are randomly selected to do this duty. I think they would have to be, there would have to be other mechanisms involved in this and that might cause a lot more administration than we really need in something like this. I think the simpler we make these things, as long as we are in accordance with the law, the better off we are.

Mr. HONIGMAN. Do you perceive some inconsistency between your role as the representative of the military society in that you are the one that invokes charges, decides that the criminal justice system is appropriate in this case, and your personal selection, even if only from a roster of people that you don't know personally, but you personally select them to serve as the members, and do you think that the system would function in reality more fairly or in appearance more fairly if there were some selection process that didn't involve a review of names by you or by your representative but rather picking names out of a drum and then if there are military exigencies, picking a second name out of a drum instead?

Lt. Gen. GALVIN. I don't think that it would constitute a major difference in the way that things are done. First of all as it is now, as the convening authority in effect, I'm sorry, not in effect but in accordance with the perception, I select the panel, the defense counsel, the trial counsel, the place, et cetera. In actuality, I don't really select the defense counsel. I couldn't do that. We're seeing some anachronisms here. By the time that I "select the defense counsel", he's already been meeting with his, with the defendant for a long time. They've got a case and so forth. So I don't really select him at all. I don't select the trial counsel. I select a panel only by as you say naming, picking from a list of names, some of whom I know, some who I don't know, making the assumption that if he's been around the command a while he's qualified to do this and if he's an officer he understands how to do this.

I feel comfortable, by the way, as an interjection, on that part of it. I feel comfortable because when I look at how juries are selected I think I'm doing, I have a lot more selectivity and I get a lot better quality jury as a panel than the average jury because I'm selecting all college graduates, 85 percent of them with Master's degrees, or 50 percent with Master's degrees, because some of the younger officers don't, et cetera, et cetera. But I don't see any problem, I don't personally see any problem in having someone else select the officers that will be on the panel as long as the qualifications are met. I don't see any problem in someone else selecting a defense counsel, the trial counsel, someone else already se-

lects the judge. I don't care whether they select the place. None of that necessarily has to be the convening authority. But you see, it's just like I am the ranking American military man in the German state of Baden-Wuertemberg and Bayern. It's sort of like being the governor. Somebody has to sign the paper, and we need, there is a simple bureaucratic requirement for paperwork to flow. If someone can think of a better way to do it and it doesn't cause any more administration, that would be fine. What we're talking about really are things that should have nothing to do with the justice in the case. In fact, they don't constitute an interjection of the convening authority in an improper way. Whether there is a perception of that otherwise, I don't know. Where there's a better way to do it, if there is, it makes very little difference to the Uniform Code of the Military Justice.

Mr. HONIGMAN. Is there a particular enlisted grade to which you would accord the same presumption, that if a person has reached that particular grade they in essence demonstrated that they're qualified to sit on a court-martial?

Lt. Gen. GALVIN. I would say in my selection of enlisted men to sit on a court-martial I take that into account. I normally select relatively senior enlisted men because I want to make sure that the experience is there.

Mr. HONIGMAN. This may be just a difficult question to quantify, but can you give us some idea of how much of your time you devote to military justice matters?

Lt. Gen. GALVIN. I would say that I devote a daily portion of my time which in the administration, that is the paperwork part of it, it probably amounts to half an hour or less. Maybe 20 minutes. However, certain cases themselves can occupy much more time as I feel the requirement to read the case and so forth. So I would say in the take-home part, and in the discussions with my Judge Advocate General officer who represents me as a staff judge advocate, in my discussions with people accused under the uniform code and so forth, takes much more time. The people part of it probably takes two to three hours in a week. And then there are some times it simply takes all day.

Mr. HONIGMAN. General, you've certainly come a long way and I think your testimony has been very helpful to us in our deliberations.

Thank you.

Capt BYRNE. General, my name is Captain Byrne.

Going back in your testimony and discussing sentencing guidelines, let's say that you had a barracks larceny and let's compare that say with a civilian larceny, say a college dorm larceny to get the closest parallel. Would you consider that, say, a college dormitory larceny of a roommate's clock should be equated to the same kind of sentencing guidelines as you would have of a barracks larceny from another service member?

Lt. Gen. GALVIN. No, and that brings up the part, Captain, that I discussed. It's a difference in environment. There is a need in the military that doesn't exist at the college and that is a need for cohesion. We all know that soldiers risk death in combat for many reasons; patriotism and many others. But time after time we've been told by scientists and by soldiers and by everybody that soldiers risk death in combat for their buddies. So anything that steps in between that cohesion that soldiers feel for each other at the lowest levels is very dangerous to the completion of military missions. It's a threat that we have to be careful of.

Now we can't be paranoid about it either, but there certainly is a difference between a larceny in a college dormitory and a larceny in a soldier barracks. There's an undermining of my ability to accomplish the mission and I have to take that and the U.S. Congress has to take that into account.

Capt BYRNE. Thank you Sir. I have perhaps two other questions. Have you been provided with the facts and issues underlying Article III status in retirement for the Court of Military Appeals?

Lt. Gen. GALVIN. I am generally aware of that Article III status. I'm not sure I know everything there is to know about it.

Capt BYRNE. Would you have addressed those issues if you had been provided with a questionnaire similar to the one that you received on the other issues?

Lt. Gen. GALVIN. I feel or felt anyway, I think I still do feel, that that's really beyond my competence. I don't know enough about that area and I would prefer not to address it.

Capt BYRNE. But assuming that we provided you with information upon which you could look at all the variables—

Lt. Gen. GALVIN. I might have then wanted to address it. I don't know for sure.

Capt BYRNE. Thank you Sir.

Col. MITCHELL. General, I'd like to put a little more flesh on your testimony that you sort of view the civilian and military justice as sort of being the same game given some I guess practical reasons for differences in the military environment. Some commentators in the past, writing about the comparison about civil and military law, have recognized they both have the same objective, to provide for the common security and they also say that the elements of this objective are the same, but in the military society they're reordered.

What I'd like to do is quickly go through this and get your reaction to it.

First on civil justice, the first aim is to protect the society and the state from the effects of anti-social behavior of individuals and groups.

The second aim is to protect the rights of individuals and minor groups of law abiding people from their own less law abiding neighbors, and from the unfair practices of the state itself.

And the third aim is to define and control the mechanisms for the orderly and equitable retention or transfer of property rights and the uses and expenditure of common resources.

In the military code these commentators claim that the order of these elements are changed in priority. The first aim in the military code becomes concern with the safeguarding of the state from enemies, both internal and external.

The second aim becomes the careless management of the state property and military resources.

And the third aim, while viewed as important, is subordinate to the other two, and that is the protection of individual rights.

Now do you agree with these observations or do you have some differences with them?

Lt. Gen. GALVIN. I have some differences with them.

I think the United States as a society, and it has certain sub-societies one of which is the military society, but it has a lot of other sub-societies also. These sub-societies Colonel, all have certain tendencies as to—grouping. Any grouping tends to feel itself special. Any grouping has a tendency to develop its own jargon, for example. I'm sure there's a Ford Motor Company jargon. There definitely is United States Army jargon.

A grouping then tends to develop its—and various other things. You have a plebe—at West Point and it's very strongly supported. If you go to Paris Island, there's a certain—that will be involved.

Some of those things grow out of two necessities, that that particular sub-group in the society has, and some of them grow out of a natural human tendency to stylize. We need to be careful of that in our sub-grouping in the military. We need to make sure as far as possible the military reflects American society. It cannot reflect American society in every way because it has a different mission from American society in general. But to try to theorize to the point of deciding whether or not within our grouping first of all that we somehow line out what justice means in America and make it into four or five categories and then say that these categories of course apply to the military but in a different order and so forth to me is not only—but it's dangerous.

What we need to do is to say piece by piece within the American judicial system, is there anything in the uniform code or is there anything in the American code of justice which would inhibit accomplishment of military mission. There definitely are things that would inhibit this. That is the reason for the Uniform Code of Military Justice, to show that we wouldn't need this if there was nothing different in military life than there is in civilian life. So I would say I don't agree with the categorization that you postulate there, but I do entirely agree with what I think is your thrust and that is that life in the military services and the environment of the military services requires a uniform code for military justice.

I would temper what I said about disagreeing. It's not so much that I disagree. It's that I have to put a lot of thought into those categories. First of all, are the categories correct to start with, the initial category? Second, is the reversal—change in the categorization correct for the military? That's a very deep question and I would be happy to answer it in writing if you'd like me to, but I need more time to think about that.

Col. MITCHELL. One of the problems in dealing with the military code I think at least from my perspective, is to determine what the starting point is. Do we begin with an assumption that everything civilian applies unless we except it out even though that assumption may carry with it a horrendous tooth to tail ratio problem for military forces, or do we begin with what may be perceived as the overall requirement to accomplish the mission and sort of draw a baseline of hardness and then deviate from that only with very firm justification for so doing. A lot of where you wind up in respect to a given issue depends on which avenue I think you're going to follow.

Do you have any thoughts about that?

Lt. Gen. GALVIN. Yes. The essential question is whether you're going to take the Napoleonic approach or you're going to take the approach under which American law is currently constituted. American laws is experiencial. It is inductive rather than deductive, and I think it's good that way. And so therefore if I understand your question, I think that we ought to approach it from the point of view that we approach all law in America and that is we start with what's given today and if it isn't broken, we don't fix it and if it's broken, we fix it. And by broken, it would be if it's under challenge. And as I see the situation here, in the commission there are some things under challenge. But I would hesitate to approach the answers to those challenges is a Napoleonic deductive sense. That is trying to go back to some original source point and to see it deductive from there.

I think that the reason for this commission is that it is essentially inductive and it essentially takes the point in time where we are now because it won't be the same point in time a year from now and it won't be the same Army or the same United States, and we constantly

have to adjust from a given position with some course corrections. But I don't think course corrections in any way implies that there's something wrong with the vehicle to start with.

Col. MITCHELL. Do you view discipline as being the absolute essential that has been written, well Patton is probably the most noble general to have made such a statement, and others. Do you view it with the same degree of in factness that they did, or do you not see discipline as being such an essential thing?

Lt. Gen. GALVIN. I don't view discipline as George Patton did, if that's what you mean. I would have, I think I would have recognized the soldier case as a psychiatric problem rather than a discipline problem which he apparently didn't or he elected not to. There are many other things in my readings of Patton I would deviate from his particular view of discipline.

At the same time, I think discipline is of utmost importance in the military service.

Col. MITCHELL. What about the connection between authority and responsibility?

Lt. Gen. GALVIN. You have to have the authority to carry out responsibility.

Col. MITCHELL. It seems you're rather comfortable though with, I don't want you to interpret what I'm saying as being of any particular opinion I have, but some people would argue even in management of American corporations, that the divorcement of responsibility and authority is an undesirable thing to do. You appear in your comments to be rather comfortable with divorcing your responsibility from the conduct of war and the discipline of your troops and the authority to accomplish that in as much as you give the authority to do that to military judges, military lawyers and civilians in the Court of Military Appeals.

Lt. Gen. GALVIN. I think you entirely misinterpret my position. I think you're 100 percent in error as to my thoughts about authority, responsibility and discipline and probably about armed forces in general. Let me try to state it succinctly.

I believe that I should have the full authority to do what is my military responsibility, but I am accountable to the United States Congress. The United States Congress has the authority to raise and support an army. I'm accountable to the President of the United States. And there's a third group of people that I'm accountable to. I'm accountable to the judicial side of the house also.

Though we break authority in the United States down into three parts, and I have to understand those three parts as a commanding general, and I think I do. I understand that I have full authority to do things but I do not have absolute authority. That authority is reserved by the United States of America that gave me my commission. The President. Even the President doesn't have absolute authority. He can even be removed for an undo exercise of his authority. I'm in the same situation.

Whether or not I would desire to have absolute authority and equate that to an absolute respect for discipline is a question that could come up and if a commander did that, we have ways in the United States to make sure that he doesn't stay in command too much longer, even if it happens to be the President.

So I think that your question tended to some degree, and I certainly don't want to overstate that and maybe I already have, and if I did so I apologize. I think it tended in some degree to equate things that I don't consider to be identical and that is discipline, authority and responsibility.

Col. MITCHELL. So you don't see what others may see as being a wholesale shift of authority from a commander to some entity which is not responsible to military authority, that is the court-martial business essentially to the legal community. You don't see the same problem with it that others might see?

Lt. Gen. GALVIN. I think the current code of military justice is a very fine code. It allows me every last drop of authority that I should have. I have all the disciplinary tools that I need. There is nobody, I command 85,000 people. There isn't a soul in those 85,000 people that does not have to obey my legal orders and I'm fully capable of issuing those orders and I do so every day. And I have never, I guess the last time I felt my authority was challenged was when I was a 2nd Lieutenant and it got challenged a couple of times then. But it hasn't been challenged much since then.

I would say I understand also what you're saying. I know that there are a lot of officers in the service today who feel that the Uniform Code of Military Justice is perhaps too lax, but there are a lot of officers who don't feel that it's too lax, and I happen to be one of those.

Col. MITCHELL. Getting into more specific areas of your statement if I might. In the question relating to the suspension power, you indicated in your way of thinking the manpower factors were really not that important a consideration in deciding whether or not to suspend an accused's sentence. The question I have is have you ever in your career been through what for lack of a better term I'll call a purge where the Armed Forces, or one or more branches of the Armed Forces have indulged in a policy of ridding themselves of the nonperformers and trouble-makers and so forth?

Lt. Gen. GALVIN. I have been involved in that. I have been in an Army where that has happened several times. I wouldn't call it a purge.

Normally it's at a relatively low level of action. In other words we have a reduction in force for example and it might reduce 1,000 officers from the Army, but it hasn't been a large thing. Well, I'm not sure exactly that

purge would be the word because there are a lot of meanings in the word purge that wouldn't quite apply. But I understand what you mean and yes I have been involved in those.

Col. MITCHELL. If I could have you just dream a little bit. If you're in the middle of one of these purges and the law changed whereby you're now required to follow a military judge's decision to suspend a sentence, in other words a military judge has that authority given to him, you are on the one hand separating perhaps under adverse conditions a number of people in the command who have committed much less serious offenses than the one you're considering from the court-martial area, and yet your policy directive forces you to rid the Army of these people. But you're also forced at the same time to retain this other more serious offender on active duty because a military judge recommended suspension or he decided to suspend the sentence.

What's your feeling about that problem, or is it really a problem?

Lt. Gen. GALVIN. I would say that there are certain times when I am unhappy about rather bureaucratic approaches to the judicial system and I could name some of those. Some are some that I've created myself. But I would say that we, perhaps contrary to the perception of people who write things like military justice is to justice and so forth, perhaps contrary to their perceptions we many times lean the other way and I would almost say sometimes military justice is to justice as classical music is to pop. Because I think we get overly involved. We create our own arabesques of justice of the administration involved.

For example, Army Regulation 635-100 provides for separation of officers from reservists for a variety of things. There are three boards that are required there. Beyond the commander's decision to separate the officer, he then has to go to three boards before that even leaves the Army. It's that kind of thing that I think is wasteful of time. But it's a genuflection on the part of the Army to the society at large to try to show that indeed we really are attempting here to be as just as we possibly can. I think sometimes we get into justice squared, cubed and the fourth and fifth power, and I'm not sure that's good. And that does create anomalies. It creates anomalies, the one that you describe in which I might have to let an officer go from the Army because professionally he is one point below some other officer and we're in a reduction in force. Whereas, well I can tell you in this case, I am keeping an officer right now because, although he admitted to a homosexual act with a soldier, he convinced the board that, since that was an isolated act and not characteristic of him in general in his life, that he obviously was not a homosexual and therefore should stay; that any rule that has anything to do with homosexuality shouldn't apply to him.

So on one side I'm splitting hairs like that and on the other side I'm getting rid of officers I would like to have. But those anomalies, that's a construction. Your construction of that is in itself only a minor anomaly. It doesn't necessarily cast any light. I think again one of the things about justice is that you consider justice case by case, not compared to what. Just like I can't compare two sentences and philosophize about those because there's too much involved to try to do that.

Col. MITCHELL. That's a problem that's probably unique to the military. Is that a reason why or another reason or a factor in determining whether or not the military judge should be given suspension power? Maybe if this problem exists the commander should retain the power to suspend and the judge only have the power to recommend.

Lt. Gen. GALVIN. I think anything that we do which puts the commander and judge at loggerheads or has the potential for doing that, is the wrong thing to do. I think it should be very clear in what the judge's powers are and what the commander's powers are and where it's not we should make it clear.

In my opinion the commander, that is the convening authority, should be the suspending authority for the simple reason that he knows more about the case than the judge does. I guess the average person would think that the judge automatically knows more about the case than anybody else. No, the judge might know more about justice than anybody else supposedly, but he doesn't know more about the individual there than anybody else.

Col. MITCHELL. If I might change over to the expansion of the court-martial jurisdiction to one year, I believe it was in your questionnaire, you indicated that you thought the sentences would get somewhat larger. I should rephrase that. That the cases which now go to special court-martial would probably get somewhat larger or heavier sentences if the jurisdiction of limitations were increased to one year. Why do you think that?

Lt. Gen. GALVIN. The cases which now go to special court-martial would get larger sentences?

Col. MITCHELL. Yes Sir.

Lt. Gen. GALVIN. Well I think it's obvious if the special court-martial were able to give sentences up to a year, it would give sentences up to a year in some cases, so therefore obviously the average in the long run would be that cases that went to special court-martial would get longer sentences than they do now.

Col. MITCHELL. Even if they were no more severe a case than—limitation?

Lt. Gen. GALVIN. I think more cases would be referred into that arena.

Col. MITCHELL. I think the question presupposes that they would be the same cases. The point of the question I think was, at least in the questionnaire was, if we simply increase the jurisdiction limitation of special courts-martial to one year, would that increase by itself without regard to new cases coming into that forum that previously would not have been there, 'cause an increase in the sentences judged in cases now going into the special court-martial?

Lt. Gen. GALVIN. Of course that's only an opinion and I'm not sure that I view that question with all the importance that might be given. My own opinion would be just simply based on human nature, that if there were leeway to go to a year in a sentence that in some cases judges would or panels would, either one, and there would be a growth in sentences. I think there would. However remember that the points that I make in saying we ought not to do this really have to do with the amount of pretrial investigation. That's where I'm coming from.

Now at the same time I'm also coming from another point and that is what is done in the United States judicial system ought to be done in the military system unless there is some reason to do it some other way.

Now if in the United States judicial system we go to a longer sentencing for misdemeanors than we have in the past, and basically what you're talking about is special court-martial, not counting BCD specials, with special court-martial versus general court-martial, you're sort of in the parallel of misdemeanor to felony, and I think we ought to try to balance that about the same as it's balanced in the overall American system. And if they tend to make a change then I think probably the UCMJ should make a change.

Col. MITCHELL. Moving on to the question of tenure if I might, I think if a military judge is guaranteed a normal tour, you say three years for the sake of argument, in his billet, that a commander who views this individual as being a loose can and after he gets on the street should have mechanism by which he can legitimately complain to higher authority about the performance.

Lt. Gen. GALVIN. Yes, and he does have that already.

Col. MITCHELL. Some might say that under the statute as it's written and it's by no means been determined absolutely so, but by the way the statute's written, it may not lawfully be the case. If it turns out once the Court of Military Appeals decided that issue, if it should be decided, and the commander is then left with no mechanism under the Uniform Code of Military Justice to complain about the performance of the judge, would you then still hold on to a feeling that the judge should have this guaranteed term of office?

Lt. Gen. GALVIN. I think we want to be careful about building mechanisms if we don't need them in there. We already have a mechanism in the service where if I don't like what an officer is doing, I can complain about it, even if he isn't in my jurisdiction. It runs from everything. If I see an officer out here on the street and don't like what he's doing, I have mechanisms already that are there. They're just there because the military is what it is. If I don't like what a judge does today, all I have to do is call the Judge Advocate General and tell him so and he will probably take some action. And if he doesn't, I can do other things. I can go all the way to the Chief of Staff of the Army or the Secretary of Defense. There are all kinds of ways.

I guess what I'm saying is, if it is decided to do the tenure thing, then don't come up with a whole lot of formal mechanisms of how tenure is going to be decided and how tenure will be changed, how commanders can complain. All those things exist. They're just the ordinary way of doing business in the Armed Forces and will take care of most of that.

Col. MITCHELL. You indicated in your questionnaire also that you considered duty on the court-martial for a member as being as important as your combat operations functions. Could you elaborate on that a little bit, or does that say it all?

Lt. Gen. GALVIN. I feel that the duty is as important as the daily operations. Combat operations is another matter. If I said it's as important as combat operations, I guess I would have to correct myself and say that in time of combat I would probably not take the combat commander out of an attack someplace to put him on a panel. I consider it as important as daily peacetime operations and those include training and maneuvers and some things like that.

My method of operating is to tell commanders the names of officers that I am considering for selection to panel and those commanders then can come back and appeal that selection by saying he needs to go do something else. And basically this is only an administrative thing and I might have overdone it in my answers or you might have overdone it in your questions. That is the questionnaire might have overdone it. Questionnaires are always written by anonymous people.

Mr. HONIGMAN. General, you know the definition of a camel is a horse designed by a committee.

Lt. Gen. GALVIN. Well, this camel questionnaire, the thing is, I set up a panel and I don't want that panel disturbed if I can help it, so therefore first I set it up and then I ask the commanders is this okay? They say no, I take into account what they're telling me. Then when I have the panel I have some more rules that say don't

come in and ask me to get this guy off just because his mother-in-law is visiting or something else, because it isn't going to work. Because I don't want turbulence on panels.

So I guess that's what I meant when I answered that question.

If the true meaning of the question was, as I gathered from your thrust, where do I place the importance of military justice, I place the importance of military justice very high. If you say to me do you place military justice above the military mission, I think you're asking an interesting question. Do you place your code of ethics above the military mission? I think you had better. Do you place your own understanding of your character above the military mission? I think you better. There are some things that come before the military mission.

The first thing is a question of whether the military mission is correct. We've had enough experience with that in recent years to realize the military mission can be put in quotes, it can be put in old english letters, it can be put in a lot of things. Be careful of that mission. Is this something that every time every sergeant gets an order he has to say to himself, are my ethics, is my character in question at this point? No, but it should be a natural thing that without even thinking we recognize right from wrong.

So I don't know what the thrust of that camel question was but I can't answer the question, I guess is the real thing. I don't know what it means when you say to me do you put questions of military justice above combat considerations or something. I really don't know what the answer is. That's the best answer I can give you. I think there are some things that come even before the military mission. Maybe there are some things that come before life itself. I'll tell you that I would sooner give my life in a military mission than I would give my sense of ethics.

Col. MITCHELL. I think as the last question I'd like to ask you, whether you think in considering all these proposals that we should give pretty serious consideration to the tooth to tail ratio, the administrative requirement for whatever might be decided as you evaluate these different questions.

Lt. Gen. GALVIN. I think we have to consider the tooth to tail. I read that thing that said there were more Lieutenants in the Marine Corps as lawyers than there are as—I hope that's not right.

Col. MITCHELL. Not exactly, but I think it's close.

Lt. Gen. GALVIN. If it is close we might have a problem.

I believe, and I agree with you on this point, that we do tend in the Army, and I don't know about the Marine Corps and the other services, we do tend in the Army to be overly administrative, to be overly bureaucratic, and we tend to respond, perhaps superficially, to what we perceive to be requirements of our civilian leaders in terms of, say, military justice. We go out and create three or four boards where we don't need them and we do a lot of that, and if that's what you mean by tooth to tail I think it is. We need to look at this and make sure that in anything such as, say, the deliberations of this commission, that tooth to tail, our administration, bureaucracy is the best word I think, should be eliminated as far as possible for UCMJ. Where we don't need it we shouldn't have it. And I think that because you pass through three boards you may in fact be undermining the justice system because if it takes six months to do that after a man has been accused of something or we've decided he has to leave the service, then that's not good. More should be left to commanders on that kind of thing and if they can't make the right decisions then the Congress should get rid of them.

Col. MITCHELL. Thank you, General.

Col. HEMINGWAY. If your schedule permits, would you like to go on?

Mr. STERRITT. Mine will take about five minutes.

My name is Christopher Sterritt. I'm from the Court of Military Appeals and I'm also from Massachusetts.

I wanted to comment on the—discussion you engaged in with COL Mitchell. It's my understanding, I mean just to clear up, apparently you were speaking on different levels. It's my understanding that the autocratic theory of military discipline was rejected by the United States Army as a matter of policy at the turn of the 20th century, and that since that time there has been a theory of what is called management discipline and in fact discipline is now defined in terms of voluntary submission to orders in the Army regulations I read. I don't know if they clear up the question where we're coming from, but that's just one thing I point out.

The only question I have with respect to the substance of these provisions is with respect to suspension power and I notice your statement speaks in terms of the information decision or basis upon which a decision can be made and for that reason you support its retention in the convening authority.

Looking at it from a slightly different aspect and assuming that informational basis is the same, do you see any other problems resulting with the person being returned to a unit under a suspended sentence which might have to do with, well which is different from the civilian situation. In other words in a civilian situation a trial, a person is suspended, he doesn't go back into the environment, the immediate environment of the witness' and potential victims or people who may have a grudge against him, or have some interest in the proceedings, whereas in the military he might be returned to the very environment in which the crime of which he was con-

victed was committed and I wonder if that would make a difference?

Lt. Gen. GALVIN. I think I see your thrust and I think you're leaving something out. You have a hidden assumption and the assumption is that the suspension somehow means that he got less than what he deserved and now he's going back into this environment. He's going to go back in the environment in many cases anyway. You're not going to normally suspend, whether or not he's discharged from the service, but what you're going to suspend normally is incarceration of some kind. So if that's what you suspend, then whether he goes back or not is the same.

The other thing is, if he goes back into the environment you would have to assume that if justice works the suspension is correct. In other words, I would suspend not for any reason except that I know something more about this case which I would then make available to everybody who was concerned about the case. In other words the publication of the suspension down through the command chain would also show why it was suspended. It was suspended because although the judge gave this sentence or the panel gave this sentence they didn't understand this factor.

So theoretically at least, of course it never works as a theory, there wouldn't be any reason for the environment to be any different or hostile to him or whatever else, I wouldn't think.

Mr. STERRITT. My final question would take that one step further. You spoke of mechanisms in the service. Is there a mechanism that you would know that someone after he received a court-martial sentence, let's say no suspension at all involved, he served and he's brought back to his unit and the commander could say I don't want you back into my unit and he takes steps to have him transferred somewhere else?

Lt. Gen. GALVIN. If a man receives a sentence which means incarceration—

Mr. STERRITT. Or he's convicted of a crime of some type, receives a sentence and serves it and now he returns to his unit from which he came and the commander of the unit, does he have a mechanism for transferring him out?

Lt. Gen. GALVIN. Yes, he can do a lot of things. He can simply say I don't think it's a healthy environment for him to be down here. I'd like to have him transferred to another company. This is a command decision. He goes to his next highest commander and talks it over and they decide what to do.

Normally a man who receives a sentence doesn't go back to the same unit. He falls into the normal replacement chain and is reassigned someplace else. He may ask to go back to his unit. His commander may ask to have him back. It may have an effect that the commander wants to have.

Mr. STERRITT. So there is a certain flexibility already in the system with respect to dealing with someone after his sentence.

Lt. Gen. GALVIN. Yes there is. In fact I think that each time, if I can offer a suggestion, each time that you attempt to build a mechanism you need to look carefully to see if there is an informal mechanism that exists already that's healthy enough to take care of the problem, and then we can cut down on a lot of the administrative things.

Mr. STERRITT. Thank you.

Capt. STEINBACH. I'm Captain Bill Steinbach. I think we've turned most of the rocks over once maybe twice here. At the risk of being a little bit repetitive I'd like to go back to the tenure or assignment tour length for military judges.

I think one of the main bases is the issue of command, the issue of appearance of command influence. How would you define command influence?

Lt. Gen. GALVIN. First of all, I think there's a healthy attitude right now and a healthy environment and there isn't much command influence. But it actually does exist out there once certain commanders through frustration or other things attempt to influence things they ought to be out of and not into. An authoritative commander on occasion will feel that he has somehow been shackled in the execution of his duties and he will take actions that unduly influence other people in the whole justice system. I'm not sure, did you ask me for a definition?

Capt. STEINBACH. I was wondering how you would define it especially with respect to a military judge. What influences could be brought?

Lt. Gen. GALVIN. I think they range all over the place from very subtle influences such as social hints that he's too hard or soft or something, normally too soft of course. All the way up to attempts to have him removed unduly, that is without sufficient reason. I would think that all of those are attempts to influence the judge.

Capt. STEINBACH. In your statement you made the comment—independence and partiality of the judges—Do you see where the removal of the judge is something that has to be protected but a lot of the rest of the independence and impartiality goes along the same lines with the personal ethic that may be the character of the judicial—individual who will or will not yield to these social hints he's being too lenient or something like that?

Lt. Gen. GALVIN. I think that what we have right now is that there is influence on the system. There is undue influence now and there are occasions of that. But it is very rare that that influence in my opinion, it's very rare that that influence is felt by a judge, by a Judge Ad-

vocate General officer acting as a judge. I think judges in my opinion, when I talk to them, they appear to me to be quite independent of influence. I think the judge would be the first one to come up on his next higher and say I'm feeling undue influence here. I'm uncomfortable about this influence and I'm feeling, anyway that's my view of that.

The cases of command influence are not that kind normally. The command influence cases are when commanders tend like any other human being, to force their opinions about things, and by the way the higher up you go the more you voice your opinion of course. However, that's made up by other factors. You tend to listen to other peoples' opinion less so it all works out.

Commanders sometimes intentionally, mostly unintentionally actually, voice these opinions where they should not, and that's where most of our command influence in my experience comes from. Commanders saying if I had sat on that panel, I would have done this and that. That's dangerous because then the junior officers say, oh now I see what to do. There's a difference there between a commander making sure that his officers are professionally qualified in the field which he needs to take great interest in, and the necessity for him to avoid the tendency for him to influence their opinions on different cases.

Capt. STEINBACH. Is it possible that there is more attention being devoted to the perception of command, especially the military judge, than the actual existence of it?

Lt. Gen. GALVIN. It is quite possible. In recent years I cannot think of one case in which one officer or anybody else has even discussed the matter with me. I've had lots of involvement in command influence. I have had not one single incident in the last 20 years of even hearing in the grapevine or somewhere that a judge has been unduly influenced.

Capt. STEINBACH. Thank you very much.

Col. HEMINGWAY. General, thanks very much for your time. We appreciate your appearance here this morning and for your patience with our questions.

Lt. Gen. GALVIN. Let me make a concluding comment.

I think that other things have been brought up today besides the few questions at hand and that's the nature of such an inquiry. I'd like to say, to clarify the point that I feel very strongly that there is a difference, an environmental difference between the Army or the Armed Forces and the civilian society. That's why the Uniform Code of Military Justice for example, you have things such as conduct unbecoming an officer. Perhaps that's the best example.

Those things are fully understood by the average American. The average American knows that if he goes into the Armed Forces he goes into a world that is different. He expects that world to be different. He fully understands, the thinking person fully understands why that world is different. He knows the things he will be called upon to do will be different and therefore he is fully ready to accept that the system of justice will have differences also.

He thinks everything will have differences and he's right. There are things that you can do in civilian life that really have very little import, and the same things done in military life are very important.

You can lie in civilian life, and in fact there are many occasions on which it's more or less expected when you think about it. But you can't lie in the military, not even about little things because if you do you undermine confidence. There's no need for that confidence, I don't have to have confidence in my next door neighbor, but I do have to have confidence in my corps commander on my left. And if I'm a private soldier I have to have confidence in my soldiers. You do have to have what we discussed before, the feeling of cohesion. You do have to understand that you may be called on to give your life and that if so, if that's demanded, it must be given. That is perhaps the single most important difference from civilian life and Armed Forces life. You're called into a position of danger, positions in which every fiber of your existence tells you to go away from there, and yet you know that you have to stay, and those are the things that the Colonel summed up as discipline and there is no way to run a military service without discipline. And embodied in that discipline is this recognition of the difference, and therefore there's a vital need for something like the Uniform Code of Military Justice.

But there is also a vital need for the understanding of that code by every American citizen. And the easiest way to get that understanding is to show that the code is actually the American legal code with certain adaptations to take into account the reality of the military service and that can be the only reason for something to be in the code.

We have to be very careful about what those adaptations are because also in the military, the military is a dictatorship and our society lives in a democracy, and there's a big difference there. And so the commanders in the military go through a lifetime under a dictatorship in which they, at least locally, are the dictators. Therefore these commanders always have to balance that environmental situation out with the realities of being an American. And in fact where there is a higher value in American society, then the commander has to recognize that. After all, we base our judicial system on the system of values. And so what does not change going from a civil society to a military society is the system of values.

So you see they fundamentally come from the same place. That's why if a military order or a military legal action or action in a legal environment tends to undermine that system of values, then something is wrong. That's what I'm really trying to say. I'm not as much perhaps a flaming liberal as I may appear to be, but I'm trying to be a reasonable man. I'm trying to recognize that I have a lot of power and that I'd better exercise it well. And when it comes to a question of that exercise of power one of the ways to find out whether I'm exercising it well or not is to see if it fits within the Uniform Code of Military Justice. That's what makes the code important; the understanding of that code cannot be simply within what I mentioned as our sub-society. The code is not a military jargon. The code has got to be completely understood by the average man on the streets of the United States of America. And so that's why I say and you see in my questionnaire, that given the exigencies of the military service we have to approach the daily run-of-the-mill American system of justice as closely as we can.

It was a pleasure to be here with you, and I hope that I have been able to contribute something to your deliberations as a commission. Anyway, thank you.

Col. HEMINGWAY. Our next witness is BG Moore, a former Assistant Judge Advocate General for the Navy for Military Law. Welcome, General Moore. It's a pleasure to have you here. I think it might help enlighten the commission if you'd give us a little rundown on the background that you had in the service before you get to your prepared remarks.

TESTIMONY OF: BG RICHARD G. MOORE, USMC (RET), BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 19 JULY 1984

Brig. Gen. MOORE. I basically spent 27 years on active duty doing nothing but practicing military law. I spent the first 13 of those years which was the time it took me to go from 2nd Lieutenant to Major, Charlie thinks that's slow, I spent those 13 years doing nothing but being a trial defense counsellor and literally, I spent almost every day in the courtroom either prosecuting or defending cases. And then as you all recognize, the system is such that you don't try many cases after that point. You move into more administration and I ended up I think being a Staff Judge Advocate of every basic major Marine Corps Command, Marine Corps Air Wings, Marine Corps Divisions, Marine Corps Air Stations, Marine Corps Bases. My last tour in Okinawa I was simultaneously the Staff Judge Advocate for every Marine command on the island which included the Marine Corps base there, the Division, the Wing and the MAV.

I have been the Deputy Director of the Judge Advocate Division and as you say, I ended up as I retired being the Assistant Judge Advocate General for Military Law.

Basically the two areas of which this committee might be interested is the Military Law Division, Code 20 of the Office of the Judge Advocate General of the Navy was under the—for military law. Captain Byrne can tell you a little bit about that. He was there at the time.

Also one of the responsibilities of the AJAG was the additional title of Officer in charge of the Navy-Marine Corps Appellate Review Activity, so the responsibility also included the entire administration of the Navy-Marine Corps Appellate Review Activity.

And then I went to work which is where I now am, practicing civilian law. That in a nutshell gives you a little bit of my background.

Perhaps to simplify whatever contribution I might be able to make to this committee, I've taken a questionnaire which I got from Captain Byrne which is being sent out to the field, so you can follow along if you like. It's the general-special court martial convening authority's military justice questionnaire. And I thought to look at that and give you some of my thoughts with regard to the questions posed in that questionnaire, rather than the questionnaire directed solely to lawyers, because I think some of the concepts in the questionnaire that went out to general-special court martial convening authorities perhaps are philosophical in nature and hopefully I can give you some of my thoughts on the philosophical as well as the practical aspects as I personally saw them.

With regard to the issues that you are considering, one of the things in terms of philosophy that you, I think, need to know about my philosophy is how do I look upon the function of the military justice system because you need to know my biases and my—in that regard.

I don't think anyone who knows anything about military justice comes into it without certain biases and certain prejudices and certain philosophies about what it should do and how it should work. I will simply pose to you what I think are kind of commonly accepted. The duality of what a system of civilian justice should do and the first aspect of that duality is the question does it work to protect society against the deprivation of lawless individuals. And secondly, does it work to protect the individual against deprivation of his life, liberty and property by arbitrary action of the government or organized society? It must also include that duality. It must, I believe, go on however to include a third prong and that third prong is perhaps best put by this question, does it provide a system of government and discipline with adequate and effectively applied sanctions to assure the ac-

complishment of the mission of the Armed Forces of the United States.

I feel very strongly about that and I feel very strongly that any desire to change, modify, improve the system of military justice cannot be undertaken with out due consideration for the three of those prongs, and the third prong of course is a recognition which I think we all recognize, that the Supreme Court of the United States has also understood and that is that the system of government which we have as a—system of government includes the military. We are part of that, we are not separate from it. But on the other hand, we exist in a military society.

The thrust of military justice, therefore, must take into regard and consider fully its impact on that military society and the role and function of the military within the broader framework of our government.

Enough on that but I think you need to know that so that when I say something you understand that I am considering those things.

First of all let me tell you some of my thoughts and some of my philosophy about guaranteed terms of office for military justice. I understand that this committee has perhaps selected the term "guaranteed terms of office" or phrase "guaranteed terms of office", rather than tenure because of the definitional differences in the two and I understand that and I accept that.

Basically I will start out by telling you that I recognize that there are significant concerns in this area when I say to you that I on balance, am opposed to guaranteed terms of office for military judges. I don't say so from a closed mind standpoint, from the standpoint that there is nothing to be said for the proposition of guaranteed terms. There certainly is. All I'm saying to you is that I will give you my basic philosophy first and then give you some of my thoughts.

On balance, weighing the arguments pro and con and weighing the considerations as I see them, I think it would be wrong to go to guaranteed term of office of military judges. Overall, I think the key to military judges, doing what we want military judges to do, is to select the right judges. That means that there has to be a system and there has to be people who are looking at that as a key. How do we select military judges? I don't care what system you have, whether you have guaranteed terms of office or absolutely no guaranteed terms of office and removal at caprice or whim or will, if you don't select good people you're not going to have a system that's going to work and is going to produce "justice".

On the other hand, whether or not you have guaranteed terms of office, if you select the right judges to start with, given the proper career development, educate them, you're going to have justice dispensed, whether you give them a guaranteed term of office or whether you have the basic right to remove them at will. That career development is another key I think beyond selection because once you've selected an individual who has the qualities that you want in a judge and I won't bore you with those, I think those are fundamentals that we all have in mind, you must give that individual a proper career development that's separate and apart from education. And by careful development I mean an opportunity as a military officer to progress from whatever grade the individual is selected as a military judge, let's say the 03 level, senior 03 level perhaps 04 level, junior 04 level for a special court martial judge, to the senior 05 or 06 level for a GCM judge. You've got to look at the potential for career development. Are you going to kill that man or woman's career by selecting them to be a military judge, and you've got to make sure that you don't.

Basically I think a guaranteed term of office would go a long way to diminishing the opportunity for a full career for a military judge. And you have to recognize that unlike the system of selection, employment for want of a better term of judges in civilian life, particularly let's say at the federal trial level, we're looking at an Article III judge who is removable only for improper conduct. We expect that judge to be there basically for the entirety of his professional career after selection. Even at the state and municipal level, we expect our judges sent to the bench, and leave in most cases a successful law practice, to remain there if not for life, for a significant period of time.

We cannot and should not expect that to happen in the case of a military judge and I think it's foolish to ask a senior 03, junior 04, upon being selected to be a military judge, to say to himself or herself, I am now a military judge for the rest of my military career, whether I like it or not. I've been selected, I've been annointed, I've been given this wonderful honor, I now have no choice. I must do this for the rest of my career. Obviously, I don't think, and I recognize we're not saying guaranteed term of office means to the exclusion of anything else, but that's one of the problems because if that individual says I want to be a military judge and I want to be a good military judge, but I also want to do other things because ultimately I want to be a flag general officer, if that individual at any stage of his or her career is saying that, and if you put that individual on the bench and leave him or her there for a protracted period of time, it is simply my personal opinion that that individual will never reach flag or general officer grade period.

I cannot say that strongly enough. I feel very strongly about that and I think that's unfair, and I don't think we should ask anyone to go into that situation. Nor do I think it enhances military justice to do so. Nor do I

think it's necessary for the dispensement of justice in the best and fair sense. I think there must be something other than a guaranteed promotion, however. I don't think any society and I don't think military society in particular, nor do I think—judges in a military society, deserve to be promoted simply because they are lawyers or simply because they are judges, or simply because they are in a situation where we want to protect them from the—of criticism and the only way we can do that with the selection process is through guaranteed promotion.

What we want are the best possible military lawyers, we want the best possible military judges, and we don't get that except by selective process.

I would absolutely be totally opposed to any guaranteed promotional system, not so much that, well let me back up or rephrase it. It does not in my opinion guarantee objectivity, it does not in my opinion guarantee protection against the possibility of command influence. Command influence both from senior lawyers and command influence from commanders because obviously any of us who have been around military justice for awhile need to look at command influence in both of those areas. It does not do that. What it guarantees is that you're going to take an individual and make him a senior military lawyer whether or not he has the capability or she has the capability of performing at the level and that's nonsense because ultimately the system of justice is going to suffer for that. You have to look at better alternatives and you also have to look at more than guaranteed terms of office because once again, the key to this is the character of the individual who is sitting on the bench. You have to look at education and in my view you have to look at education and guarantee education in two areas.

One is the law. The law is dynamic and is changing and all the wonderful terms that we use which are true, and we have to ensure that our judges are given the time and the opportunity to keep up with those changing and dynamic developments of the law. Military law is a specialty but it's not so narrow a specialty that at some stage of our careers we learn it all and never have to go back and continue with what our civilian brothers call continuing legal education or the continuing education of the bar or any of those terms. We have to do it and we have to ensure that military judges have not only the opportunity but are urged to take advantage of this.

Okay, enough on that. That's education in law.

We also have to guarantee that military judges are just as educated about the society in which they are functioning. Okay, how do we do that? That's a problem because let's face it. Even at the level of the circuit judge, and I'll speak simply from Marine Corps experience. We'll put a circuit judge on the west coast to service all Marine Corps commands on the west coast. That individual will probably be based at Camp Pendleton. He or she is going to have to travel to every major Marine Corps command on the West Coast. There is no way unless some effort is made that that individual, even at the level of experience, knowledgeable, superior performing 06 is going to have the grasp of the society, the society meaning the commands in which his decisions must be implemented, unless something is done to educate him about what is going to be the impact on my decisions, and going down the road a little bit, if we go to something by military judges only, the impact of my sentences.

So I think education, and I won't go on with this except to say, has to be bifurcated, education in the law and equal education in the impact of the decisions, not just sentences, but to all decisions of the military judge. Nor do I think conversely in good conscious can a military judge make a decision particularly about sentences, unless he or she understands fully that society and the inter-relationship between the individual before him or her and that society.

And so that brings me perhaps to the last part of that, education is a continuing education in sentencing. All of us have seen efforts in that regard. You've got a special trial judge's academy, college in Reno, Judge Tim Murphy who I think most of you know has done yeoman work in the area of sentencing seminars and educating judges, both military and civilian and how to sentence. I still don't think from my perspective, and remember from my perspective I retired in 1981, so a lot has gone on in that time that I'm not aware, but I still don't think we have done all we can or all we should do to ensure that our judges are educated as they should be continually in how to sentence, nor do I think that the civilian judges do any better in that regard. In many cases they do not do as well, but that's a feeling of society, but it's one that we have to focus on.

Those are my preliminaries. I think if we take care of those fundamentals, then the question of do we need guaranteed terms of office for military judges are now perhaps get put into better perspective and from my standpoint the answer is no we don't need to do that. Because I think what will happen is this if we do. First of all, you cause, as I mentioned earlier, a problem in a promotion, both incentive to officers and the practicalities of promotions for those officers. You are not going to have full careers for military judges if you give them guaranteed terms of office in my opinion. That's basic. I don't care what you think. I'm satisfied it just won't work, and in the long run that's destructive to a cadre if not a full group of functioning and efficient military judges. I'll talk a little bit about what I think of Courts of Military Review in that regard. I'm going to lump

GCM judges and special court martial judges together in my philosophical discussion of this. I'll set aside in a minute the CMR judges and get back to that.

One of the questions, question 33 on page 6, is "Do you think that in any event, whether you had a guaranteed term of office or not, there should be a probationary period?" and my answer to that is absolutely. Absolutely, fundamentally. I don't think there is any way that you can select a young man or young woman, particularly the first time, i.e., the special court martial level, I don't care what their background, I don't care what their credentials, I don't care how impeccably they've performed as a prosecutor, as a defense counsel, as a reviewing officer, as a legal assistance officer or any combination thereof, that you're going to guarantee that once that individual ascends the bench they're going to dispense justice, and I'm not talking about being a judge for the prosecution or a judge for the defense. I'm talking about being a judge in every sense of the word. You've got to have your probationary period to determine whether that individual is suited, not only from the society's standpoint but from the individual standpoint, because some people simply can't take the responsibilities nor function well with the responsibilities of being a judge, and many judges have left the bench deliberately for that reason. They ought to be given the opportunity to do that, but by the same token we need from a command standpoint, a supervisory standpoint, the ability to remove a judge during a probationary period when he or she is not performing. You've got to have that. But that's regardless of whether you go to a so-called tenure or guaranteed term of office.

About CMR judges, CMR judges is in a sense in a slightly different category. Almost invariably they are going to be a success, with a few exceptions. You're going to take perhaps a few senior 05s, but for the most part we're talking about 06s. At that point that individual is going to certainly have an idea whether they've got a reasonable shot of a flag or general officer rank, putting them in a position as CMR judges for a prolonged period of time with their consent, I don't see a problem insofar as the impact on promotion. As a matter of fact, there's no question that selections have come in all of the services to flag and general officer rank from those who have performed at the CMR level. Not because of their performance per se as CMR judges, but because of the totality of their performance throughout their career, which is again why I say that totality of that performance has the, the opportunity for that has to be given to a military lawyer who is looking for a full career, but I see nothing wrong with allowing an officer who says I am willing to stay on the bench at the CMR level for the rest of my career, with allowing that to happen, but I think that's an action the individual should have. I don't think it should be forced upon the individual.

I see a great deal of stability to the decisional aspects of CMRs by having judges there for a period of time. I know there is in this room, there are in this room, two people who I know have performed at that level. I think their views would be invaluable as well as many others who have served at the CMR level as to what are the advantages to the overall stability in decisions at a Court of Military Review level by leaving judges on for more than "one year more than a normal tour", and I'm not sure that we can really define normal tours.

I on balance would say basically this, and I'll leave it. At the CMR level I would allow an officer at his or her option to remain for whatever period that officer wished to remain as long as the service was satisfied with that officer's performance, and I would look for incentives to leave judges on the CMR a long time. I don't want to say prolonged because I think on balance you're going to have a better decisional effect by having judges who are experienced and who are on the bench at that level for a prolonged period of time, unlike my views about guaranteeing trial judges a prolonged period on the bench.

Okay, sentencing by military judge alone in non-capital cases. Some of the factors that are listed here on page seven in favor are that also—jurisdiction use judge alone, is that an argument?

In my opinion, absolutely not, and the reason I say that is let me go back just very quickly to what I consider to be the duality of the concept of a civilian justice system and the military justice system including the third leg, and so simply because civilian judges impose sentences I do not feel that's persuasive one way or the other. I don't think it's a plus or a minus, but I don't think it's a legitimate argument that should carry much weight in terms of whether we should go to a military judge alone in sentence. So you know where I'm going to end up. I will tell you that on balance I favor that the sentencing by military judge alone, but I don't favor it because all civilian jurisdictions do this.

A second argument set out the potential argument, the trial is more expeditious and error free. It may be slightly more expeditious, it may be slightly more error free, but if the military judge is making rulings on all issues of law whether or not he sentences or she sentences or whether the court sentences is not going to significantly add to the expeditious error free nature of the trial assuming that you have a contested case where there are going to be findings by the court. Obviously when you don't have a contested case, where you don't have court members present at all, either for findings or sentence, certainly you have an expeditious and error free trial, but that's because you are dealing with the military

judge alone from the inception of trial on through. However if you are not, then I think that is not a weighted argument.

Military judges possess more expertise in sentencing. I agree with that on balance. Again, I agree with it only if you crank in what I think we ought to do to ensure that military judges ultimately have that expertise. The thoughts I have about selection and about education, et cetera. And the rationale, because they're exposed to a large number of cases their sentencing would be more rational. Nonsense. I think that's a poor word. That simply exposure to a large number of cases makes sentencing either rational or irrational. More equitable and stable? Perhaps. There's no question in my mind that we try the majority of our cases at the special court martial level for many reasons which we all know.

So purely and empirically, the majority of our sentences are special court martial sentences. But let me just compare the general and special court. It has been my experience over the years that court members are not and cannot and never will have the overall experience with the sentences, one after the other, for the same kinds of offenses, and even in the same commands that military judges will have. I don't think there's any way. And the reason for that is when I first started practicing military law we used to have perhaps as many as four to ten cases a day. Those were in the days that if an individual was UA for more than 30 days it was almost an irrebuttable presumption that it was desertion and so of course we had huge trial mills. As a result we had permanent courts and I think many of you with some gray hairs in this room have seen that kind of thing happen. Hopefully it will never happen again, but with permanent courts you had those who sentenced with considerable experience, every bit as much experience as a military judge could possibly get. But you don't have that today for this reason. In my opinion, military commanders select court members primarily because those court members are available. They do not in my opinion, despite what some of the critics of military justice say, ignore the best qualified criteria, but they do look first to whether their command is going to function if officer X is going to be on a contested trial that they understand is going to last for two weeks and they need officer X in an operational capacity and that's not only perfectly proper, I would be disturbed if a military commander ever made any other decision. So I think primarily we must look at why should an officer be selected to sit on a court martial and recognize that a military commander is going to take from the pool of officers which he has available, and usually in my experience it would happen this way, even at the GCM level.

The call will go down to an individual unit and say nominate so many officers, and you take from this pool of individual units, nominating officers, a pool from which you would then go to the convening authority and say okay, everyone here is available you select those you want. And the selection was made, then that court would sit for a designated period of time and of course now you're able to delegate the authority to excuse. That relieves the poor commanding general of the battalion or regimental group, wing commander, of a lot of problems. But the point is, you're getting a mix of officers who maybe in their entire careers are going to sit on a half a dozen courts, and there is no way that an officer even of the grade of 06 sitting on a general court martial who has perhaps in his entire career sat on a half dozen courts or even a dozen or even two dozen courts, he's going to have the expertise in sentencing, setting aside for a minute an understanding of the society and the impact on that society, the impact on the command and the needs of the command. Setting those aside there's no way that that officer, even in the grade of 06, is going to have the ability that a military judge will have based on the number of cases that seem to be consistent in sentencing.

Now the other aspects about which I talked, I—those in terms of what I consider a necessity to give our military judges that understanding, that that senior 06 has who is a commander of the society in which the sentence will be served on the individual and the inter-relationship between them.

So I don't think it makes sense to say even senior nonlawyers sitting as members of a court will ever have in present day military society the ability to be as consistent with sentences as a military judge.

Now when you get into such things as is a military judge any more able to award a sentence than a group of officers whether at the special court martial level or whether at the GCM level, perhaps you're getting into matters that we can never assess. You don't start out with the presumption that all lawyers are better able to sentence because they're lawyers than laymen, given the same facts. At least I don't. And I don't think the fact that we have a lawyer sitting on the bench means per se that that lawyer is going to be fair, that per se that lawyer, that judge, is going to be better able to sentence given the same education, training and background. But we don't have that same education, training and background to give that to our judges. The judges ultimately ought to do the sentencing.

Is it going to impact in any way on command or the interrelationship respective of commanders vis a vis lawyers or commanders, vis a vis the military justice system to "take away the opportunity from court members to sentence"?

In my opinion it will not. I don't feel from my prospective background and experience, and one of the

things that I think most staff judge advocates that I've ever met do, is to have a very full understanding of how their commanders feel about such things. It is my perspective that it will not impact in any of those ways adversely by saying to nonlawyers, guess what, you guys can no longer sentence.

There will be those who may grumble a little bit but on balance I do not think that that will be a long term adverse reaction.

One of the other things, and I'll leave this and move on, are we giving up something in the training of officers and understanding of duties of command? Nonsense. I don't think sitting as a member of a court martial is a major part of the training of an officer. I think it is absolutely essential that every officer understand the military justice system, that every officer understand what goes on in a court martial, how a court martial functions. But sitting there for three weeks as a court member does not in my opinion per se greatly enhance the training of fine officers.

I felt and still feel when non-lawyers were trial and defense counsel that they gain a great deal from that. They gained an insight that they could not possibly get and never do get, from simply sitting as a court member. Those days are effectively gone and I don't long to bring them back and I won't touch that but I will simply say, I would say differently if you were saying to me could we keep on training non-lawyers as trial and defense counsel, and taking that away, did that take something away from the ability of a non-lawyer to ultimately function as a commander. My answer is yes it did. There is no question about that in my mind. But taking away the opportunity to sit as a court member per se does not in my opinion mean that we're going to end up with line officers who are less able to function as senior commanders.

The panoply of questions on the top of page eight I've covered before with my views at least as to the inner relationship of military judges and their knowledge of local military events.

Disciplinary impact of their sentences on commands, et cetera. Interestingly enough, perhaps interestingly enough, I do not feel that many court members today have any more understanding of the actual impact of the sentences on the command of which the accused is a member than do military judges because often you're talking about officers, particularly at the GCM level, not coming from that individual's command, in a large base or station. Many officers do not understand from another Squadron, from another Battalion or another Regiment don't understand what is necessarily going on and are the problems in an adjoining small unit. They do understand, however what is going on on that base, that station, and in many ways those officers have a better understanding than do military judges. That to me is not an argument in favor of saying retain authority to sentence on the part of court members. That's an argument of saying educate our military judges so that they have that understanding and in my opinion that education is both practical and feasible and necessary.

Hopefully I've given you my thoughts and my experience on how convening authorities select court members. Some of the questions on page nine, some of the questions on page ten, I don't have a number, I'm assuming it's page ten, questions 51 through 57, change to military judge alone deprive an accused of a substantial right. No, I don't consider the fact that the accused has an option to select whomever in his or her, the accused's opinion would impose a more lenient sentence is a constitutional right or even a substantial right, so I don't think that the elimination of that is an elimination of a substantial right.

The impact on combat operations, I'm not sure that I understand the question, however I will simply say that Colonel Mitchell has probably given, along with Captain Byrne, as much thought to this particular subject as any two officers I know and I would simply defer to both of their expertise in that area.

On page 11, the question 58, deprivation of an option to elect sentencing deprive the command of any important powers. No, I don't think so. I don't consider sentencing to be a fundamental command power and perhaps I'm dealing with words, but I'm concerned with the impact of sentencing on the command but I don't think that's a power of command, to sentence. I think that's a power of the justice system and I think the concern in the justice system is to find the sentencing authority that best serves society. I don't think that's a command power.

Do I favor reduction of commander's responsibilities and corresponding authority concerning military justice matters? That's a broad philosophical question. The answer is no I do not but I think where the military justice system is today is where it should be at this stage with many improvements to be made, but I think we are foolish if we ever in any way jeopardize or take away from a commander's responsibility and a commander's authority because the minute we do that we severely impair the function of a military society to perform its mission.

What do I think about random selection of court members? I am adamantly opposed to random selection of court members for this reason. Despite the fact that this is how it's done in civilian society, I don't think that's an argument for random selection of court members. I have never found in my particular career, and I obviously can speak only for myself, I have never seen or even heard of a system by which random selection of

court members is going to improve the objectivity or desirability or ability to set judicially of court members. It furthermore has an enormous adverse operational impact. There is no way that a command can function knowing that at any time we are going to throw numbers into a hat and randomly select court members who may be sitting for prolonged periods of time when their particular expertise is needed in a command, nor is there any reason for it.

If you're talking about, the only time that random selection of court members would be, would make sense to me is if you have command influence so rampant that you've got to get the convening authority out of that selection of court members. In my opinion I feel very strongly about this. I have never seen that happen, and having never seen that happen I don't see any reason to go to a system that would have an adverse effect on the convening committee.

How about mandatory minimum sentences? What do I think about those? I think that's a legislative function that should be exercised only when you have an empirical basis with the legislature saying to itself, we've got a problem with certain offenses, whether they're drug offenses, whether they're UA offenses, whether they're premeditated murder, whatever it might be. And if anybody in our society, military or civilian, commits that offense there must be a mandatory minimum sentence and we want to do that for a variety of reasons. Deterrence, whatever. Simply getting people who commit those offenses off the street for a minimum period, to warehouse them, and we think that's in society's interest regardless of whether they're rehabilitated. All of the factors that might go into a mandatory minimum sentence. I don't feel that that legislative function should ever be exercised unless there has been an empirical demonstration to the legislature that it is necessary for that particular offense to remove any offender without regard to their personal characteristics or any extenuation or—that might be attached to that offense to remove them from society for a mandatory minimum period. If you don't have the empirical basis and evidence to demonstrate that's needed then I say it's wrong to do it.

You ought to have a window that gives the sentencing authority whether it be a military judge or court members, sufficient tools to deal with whatever offender is before that sentencing society. If you have that, if you have that window then let the sentencing authority exercise his or her or collectively its, speaking of the court, sentencing authority and discretion within those floors and ceilings, depending on all the factors that a sentencing authority ought to look at. So basically I'm opposed to mandatory minimum sentences, et cetera.

Do I think a military judge ought to be permitted to send a case to members for sentencing at his discretion? No, I think the society should select who society believes is the best sentencing authority and then stick with it. If you select military judges because you think military judges are better able to sentence, then do it. Don't let each military judge make up his or her mind as to whether in this particular case I'll send it back. I think the decision needs to be made not by anyone else except legislatively or by society.

Sentencing guidelines for a federal court, should similar guidelines be extended to courts—I don't have any real problem with sentencing guidelines except that I don't think from what I consider to be the fundamental differences in the civilian society and the military, that sentencing guidelines for federal courts can be adapted or should be adapted to military court martial. I have no problem in my mind saying yes, I think it might be helpful to have sentencing guidelines for military judges, not because the federal courts have them and certainly not a wholesale adoption of federal courts—guidelines.

If I'm getting long winded say thank you, we'll ask you questions later.

Suspension. Power of suspension for both military judges and courts of military review. I'll try to treat them separately because I think they're apples and oranges in some ways. Basically I have trouble in my own mind coming to a conclusion as to which is best. I still find myself listening to what I consider to be powerful arguments on both sides and this idea of whether there should be suspension authority, particularly at the trial level, I have less problem with suspension authority at the CMR level, but I find myself torn. I'm not going to come on and say I've got a clear cut, overwhelming abiding faith in suspension but on balance, I feel that there should be suspension of sentences by military judges at the trial level. On balance I do not think that there should be suspension of sentences by courts of military review.

Okay, I won't spend a great deal of time here except to give you some of my thoughts in this regard and then we'll move on.

The real problem with sentencing right now in my view is I feel, at least as of the time of my retirement in '81, I felt we were not giving our military judges or our court members, but I'll just talk about military judges because I think they ought to do the sentencing, enough information. Those I recognize are philosophical problems in terms of how much do you give a military judge? I find a real problem in practicality in simply adopting on a wholesale basis the civilian system of saying well in every event before we impose sentencing we will give the sentencing authority a full written, presentence report. I find tremendous practical problems in whose going to do it, what's going to be in there, what's not going to be in there, and even more important, I'm

concerned about the time that a full pre-sentence report would take. Civilian society has that time and has the luxury of that time. I don't think a military society necessarily in many instances has the luxury and I wonder, particularly in a combat situation, a necessity, not desirability, but the necessity of stopping everything while we prepare for this particular accused a full pre-sentence report that gives me, well I've got misgivings.

However I do feel we've got to give judges more information for sentencing definitely. How we do it is a different matter. And I won't spend any more time on it other than to tell you our system isn't going to work as well as it should in terms of fair and equitable sentences, both from the command standpoint and from the individual standpoint and so we reach that point of putting it in the hands of the military judge, more information.

Right now there is no question that commanders have more information about any accused than the military judge ever has and small unit commanders have much more information than GCM authorities have. Hopefully GCM authorities will get most of that information but usually get it in a conclusionary manner, simply by calling the small unit commander and saying before they decide to exercise clemency, I'm not talking about matters that are outside the record and shouldn't be considered, I'm talking about purely in the exercise of clemency. But I don't think that will change.

Back to sentencing. I think a military judge is faced with two problems, and I'm not sure whether a system could change to do this, but first of all you have the problem of appropriateness. Let's take the basic problem of suspension has always been not should I suspend a month or two of confinement or should I suspend reduction in grade. Those are, in individual cases those are important factors. On the collective basis the important factor is suspension of a punitive discharge. And so let's look at the collective factor of should or should not we suspend a punitive discharge by the military judge.

The real problem seems to me is what's appropriate? If we have appropriate, three things, now we have two. Either no discharge is appropriate or discharge is appropriate. If we crank in the third that the military judge must determine that a suspended punitive discharge is appropriate, then I would say yes. Let's give the military judge the authority to avoid that as purely inappropriate sentence. It seems to me, however, that it's very difficult for a sentencing authority or a military judge to differentiate in his or her mind the factor of if I impose a suspended punitive discharge am I doing it because it's an appropriate sentence or am I doing it because I want to exercise certain inherent clemency powers which I think a judge ought to have? Maybe we're arguing, or I'm talking about how many angels stand on the head of pin. But I find intellectually a sharp differentiation in the concept of awarding an appropriate sentence, i.e., a suspended punitive discharge. From the concept of the military judge saying I'll award what I think not only is appropriate but I also think that I want to exercise some clemency. Maybe there will be many here who will say well that's what appropriate means.

If you don't take in the factors that compel you toward clemency then you haven't awarded appropriate sentence. I won't debate that with you except that I find a difference in my mind.

If there were any way to articulate this then I would say that I would not want a military judge to suspend a sentence for clemency purposes. I would want a military judge to suspend a sentence because that particular sentence was appropriate while in that judge's mind an inappropriate sentence would be either no discharge or an unsuspended discharge.

At the basis of one of my problems with this whole area and one of the reasons I have problems with this is I feel ultimately there is no one in the military society better equipped to determine from a clemency standpoint as well as an appropriate standpoint once a sentence has been imposed at the trial level, what should be done with an accused than the commander, because the commander has got to look at and must be allowed to look at two things: the impact on his command of having this individual back in the command which is wholly aside from the impact of that sentence on other members of the command, and wholly aside from the third factor of what is best for this particular individual accused. All three of those factors are of extreme importance and a commander must weigh all of these in determining in that commander's mind what to do with the sentence.

We're not talking obviously about taking away any of those authorities, we're simply saying, or powers or responsibilities, I know we're talking about do we add one by allowing a military judge to suspend a sentence, but I'm saying that basically I don't feel that because a commander has those responsibilities and authority and I think must have that responsibility and authority, that that takes away from the necessity to also give the military judge the ability not to wrestle with his or her conscience to the point of saying, God, I don't want to impose this. But if I don't, at least it's better than no discharge at all. But what I really want to do and the only fair thing is to impose a suspended discharge. And anybody who's ever sat on the bench in the military I know has gone through that many times. Now that's an agony that I don't think should be placed on a military judge, not because if you can't stand the heat, et cetera, but because I think that's a tool, a proper tool for sentencing that should be given to a military judge. But I think we have to equally ensure that none of that impinges on the

ultimate command responsibility to be able to ultimately determine do I take this individual back into my command, what do I do with the impact of the sentence on my command and what do I do with this individual because there is no way we are ever going to give that military judge the same understanding of an accused that a good commander has of that individual accused.

Okay, how about CMRs? The difficulty I have with that is this. I am in no way saying judges on the Court of Military Review are unable to determine appropriate sentence. Far from it. What I am saying is that it's extremely difficult, not impossible, but extremely difficult, for judges on the Court of Military Review to understand, fully understand an individual, an impact on that individual or even the appropriateness of a sentence based on a cold record of trial. They are particularly, also in my opinion, unable to fully grasp the impact of a sentence on the command, I'm not talking about military society in general, but on the command or the problems or the plusses of returning an individual to duty. Again I'm focusing purely on the suspension of punitive discharges. That's compounded by the fact that we now have something called appellate leave and we have individuals who are sentence to discharge for the most part out on appellate leave and we're talking about involuntary or voluntary appellate leave. We have in that situation an added factor. The total disruption to that individual of being pulled out if that happens, of civilian society, back into the military. Of course you can say well we solve that by giving him the option.

Well if you're truly going to determine an appropriate sentence at the CMR level and say based on this record I think a suspended discharge is appropriate, how do you get all the information about what is going on with the individual on appellate leave and crank that in? On balance, you could do all these things. I don't think you will, and as a consequence I don't think that the Court of Military Review is going to be or will be equipped to make those decisions about suspension of sentence and I don't think we should give Courts of Military Review that authority.

Who do I think should vacate suspensions? I think military judges ought to vacate suspensions based on the presentation and recommendation to them of the command. I think basically whether or not an individual has committed certain acts or omitted to do certain acts that are sufficient to justify the vacation of his suspension should be triggered by the commander. I think only the commander needs to make and should make that determination of do I take some action to cause a vacation of sentence, but I think it's important to have a military judge do that normally, in a normal situation and that's the kind of structure that I would favor.

Do I think a special court martial sentence of one year is a big factor and should we go to it or not? My own personal view is I don't think changing a special court martial jurisdictionally to allow the jurisdiction of the period of confinement from six months to a year is probably going to have a great deal of effect. I recognize that there are those who disagree violently with that. True enough, we send most of our cases to special court martial now which is as it should be. The difference between six months and one year is not in my opinion a difference which would cause commanders who would otherwise send a cause to a general court martial to say oh, thank goodness, I've got this option of another six months jurisdictionally to the special court, therefore I'll send it to the special court. I just don't think that's going to happen. That's a purely absolutely, totally subjective conclusion on my part for what it's worth. There it is.

On to some things if we went to a one year special court martial that I would want to see. I would think that if you're going to have a one year special court martial I would want to have a military judge there. Otherwise confinement should be limited to six months. Again, purely a subjective conclusion. The same thing is true with the lawyer defense counsel. I would like to see lawyer defense counsel if you're going to have confinement at one year or BCD. I don't really find it significant to say well it's a wonderful thing we'll do, we're going to add a five day waiting period instead of a three day waiting period. I don't think as a practical matter the way courts-martial cases are prepared and developed that it makes a hill of beans whether we're talking about a three day waiting period or a five day waiting period, nor do I think it's significant that we're going to have or should have a court-martial composed of five members as opposed to three.

I understand that there are intellectual debates that can be had about that. As a practical matter, I don't think any of those things are of any great practical concern.

Now do I think there's going to be under referral of cases if we increase jurisdiction of special courts martials? Obviously you know my answer already, I don't think so at all. I don't think it's going to reduce the number of GCMs nor do I think it's going to mean under referral. I don't think most responsible commanders are going to say boy that extra six months is going to make all the difference in the world and I'm going to take this premeditated murder case now that I can possibly look at the imposition of one year if I feel he's convicted and that's an appropriate sentence, and that will make the difference and therefore I'm going to start sending all of my really serious felonies that otherwise I would send to GCMs to special court, I'm absolutely and totally unpersuaded that there's any great chance of

that happening and if it does, so what, because if you're going to have a system by which commanders make the prosecutorial decision rather than lawyers, and as far as I'm concerned, I think we're in deep trouble as a military society if we ever give the prosecutorial authority to anyone but commanders ultimately, beginning with all the safeguards that we now have, that is if the staff judge advocate says look Mr. Commander, you don't have a case, that kills it, and that's the way it should be, but that initial decision should be with the commander. So should the commander determine at what level, what forum, this case should be. And if a commander in his judgment wants to send a serious felony to non-judicial punishment for disposition, I would say let him.

Now if you're a senior commander and you see that happening and you think this particular individual who does that is no longer responsible and should no longer be in command, then you remove him. But you don't change the system and say oh my God, that's an under referral and therefore it's a deficiency in the system. It may be an individual failing of a particular commander, but you deal with that and you have a system of dealing with that.

So I would always let the commander exercise his discretion and his authority to send an offense to whatever forum is available to him. And I would never preclude, this is question 105 page 19, I would never preclude by statute or regulation the commander from sending any offense to trial by special court martial.

Okay, so much for the questionnaire. Now I'll tell you my views on the two issues that go to the convening of supervisory authority.

My thoughts about an appropriate system for CMA retirement, well there are a lot of factors, a lot of expertise that I'm sure this committee needs to call upon, none of which resides in me and I can only give you some general thoughts that I had. As long as we have a three member court of military appeals and as long as we have a 15 year term so we get into a minute, should we have such things as Article III or Article I status and what are the impacts and what difference would that make a little bit later. But starting with the premise of 15 year terms which we now have rather than the old, unfilled, I think it's absolutely critical that we look at having in place a retirement system which is not going to turn people away.

I thought about how to phrase that because that's how I feel. I don't feel that the retirement system should be the carrot by which we drag people otherwise reluctant to sit on the bench at the Court of Military Appeals. I think that we should not have a retirement system that would impel an otherwise anxious and highly qualified judge at the Court of Military Appeals to say thank you very much, but I must look elsewhere because my responsibility is to my family and to myself, are such that I cannot afford the sacrifice of sitting on the Court of Military Appeals. So it may be in the view of some the half empty or half full cup. I don't think so. I feel very strongly that if someone wishes to come and sit on the Court of Military Appeals and that someone is qualified which is an entirely different, which is entirely different to sit as a judge on the Court of Military Appeals, then that's what we need to look at first.

Then we need to determine that we don't have something in place that's going to drive him or her away.

Would the 15 year term drive him or her away? Hopefully not. However that's something, wholly aside from the Article I, Article III issue, and wholly aside from lifelong tenure, that I think needs to be looked at. Again, not from terms of the carrot that brings the judge to the Court of Military Appeals, but a danger area that it may drive him or her away and that is this: Any fair evaluation of what the Court of Military Appeals now does has to come down with the conclusion that it is a narrow practice of law. I find in my own case that since my retirement in 1981, I've probably learned more about the practice of law than I ever dreamed and that's wonderful but I practiced as all of you did who are in the military, a very narrow specialty. So does the Court of Military Appeals as the jurisdiction is now constituted.

If you take from civilian life a sitting jury, a practicing attorney, regardless of how broad their practice has been in the past, and for the sitting jurist, no matter how broad the practice of the court, and say for the next 15 years you're going to do nothing else but practice the narrow specialty of military law and you take someone, I notice that Walter Cox who has been nominated by President Reagan to be the next judge is now 41 years old. He'll be 56 years old if he serves his 15 year term. I don't care what that attorney did before, I don't care how broad the practice, if at age 56 he or she walks off the bench of the United States Court of Military Appeals and says I'm not dead professionally and I don't want to stop practicing at all, I'm ready to go on with another career, I don't care whether he or she leaves the bench at 15 years at age 56 as with Mr. Cox, voluntarily or involuntarily, I'll set aside for a minute whether that judge seeks or does not seek reappointment. At age 56 after spending 15 years in a narrow practice of military law I don't think there's anybody in this room who has any delusions about the fact that that individual is going to go out and pick and choose through dozens and dozens of offers from prestigious law firms, that individual is not necessarily going to be attractive to academia either because academia legitimately is going to want someone with a broad background. They may be able to walk out and go into academia if they have been a successful professor before, and can rely upon that to say

I'm still viable as a successful professor. But to say take me into your university and have me teach law students simply because I spent the last 15 years practicing on the bench on the Court of Military Appeals, does not to me mean that they are going to be or should be attractive as a member of the faculty of a premier law school. And I'm certainly not going to be attractive to the prestigious law firm or even a non-prestigious law firm because the practicalities are, you come with us if you bring a name which will attract clients.

Now if you've been chairman of the commission X and every practitioner in the world knows you and we specialize in this, you may not be a great lawyer, but you're going to go into a prestigious law firm and you're going to find a place and you're going to be happy practicing law. If you have a broad specialty or a particular specialty let's say in tax law, you may not bring client one, but if you go to a law firm and they know that you're good as a specialist in that field, you're going to be attractive.

If you walk into any law firm and say I'm bringing General Motors as my client, they're going to take you.

Okay, what does all of this mean? This means that one of the problems that any individual who ascends that bench has got to think about, wholly aside from pensions, wholly aside from what is my retirement pay going to be, if I don't want to retire, what am I going to do when I leave the bench? Do we put that individual in a position where they are not unemployable but not too attractive to any part of the profession of law to which that individual may want to look after leaving the Court of Military Appeals? I think right now that's a problem. I don't think it's a problem for a lot of judges who have sat on the Court of Military Appeals. A lot of them have left before their terms have expired. Some will go back to academia, some are ready to retire, that's fine. But I don't have any answers, I wish I could say gee, here's the problem and here's the solution, but I think we are short sighted in this committee, and this committee needs to look at what can we do in this area not to turn people away because they would look at this from the same standpoint and say hey I don't want to walk out at 56 when I can practice law for another 20 years and suddenly not be too attractive to anyone except hanging out my own shingle and that's fine if that's what they want to do and that's what they may have to do. And I think we need to look at that and I think we need to find a solution to it if we can.

In my opinion, the solution is not to make Article III court, and I'll get into that in a minute.

Okay, how about the money from the standpoint of retirement per se? Again, from my standpoint of don't drive people away with it. I looked at something with, or something that says basically this, the current American Bar Association Journal lists for example the current salaries as they will be on the first of January '84 if the four percent pay raise goes into effect for the judiciary. And as I'm sure you know, the Chief Justice of the United States will make $100,700; the Associate Justices will make $96,700; the tax court, because we're always looking at the tax court, the tax court judges will make $73,100; and the judges on the Courts of Appeal and the Court of Military Appeals will make $77,300 per year.

Okay, that's interesting only from the standpoint of what does that mean in terms of retirement? Well it means that if a Court of Military Appeals judge who has no prior additional service which now qualifies beyond the Defense Authorization Act of '84 which as you know essentially says to the Court of Military Appeals you get the same retirement benefits as members of Congress under the Civil Service Act, that means this. Okay, that judge, no prior additional service, comes in now after January of '84. Let's assume that that $77,300 stands as their pay, finishes the full 15 year term, can retire with an annuity of 37.5 percent of judicial pay when he or she reaches age 62. That amounts to as I calculate it, $28,987.50. So basically we're saying, okay, because our main concern has always been what about the judge who leaves after 15 years? Are we driving him away by saying your retirement is not going to be too good?

That judge with no prior qualifying service is going to walk away after 15 years, again looking at age 62, with $28,987.50. So the question I suppose is is that such a pauper's amount that it's going to drive people away? Recognizing again under the Act that there are the one-sixth and one-twelfth of one percent per month factors that diminish if you retire before the age of 62, etcetera. So that will draw that down.

I don't know the answer to that except that I would suspect that the current system is not so bereft of appeal that a pension of $28,987.50 which is the minimum, is going to drive qualified candidates away. I would think that this committee may want to recommend perhaps that that may be a little low and maybe should come up. Only if it feels that for example the fact that the Tax Court plan is the one that should be adopted. The reason obviously Congress didn't adopt the Tax Court plan so far and push to this committee the task of coming back to Congress and saying tell us whether or not the Tax Court plan is really necessary, and the reluctance I think Congress had is gee, maybe it's too good. Maybe it's more than we really need.

But whether in terms of basic fairness it's too good, I ask perhaps the committee to look at this. If indeed Tax Court Judges now get $73,100 or will as of the 1st of the year, and Congress saw fit to already say well, at the level that you perform services to society judges of the

Tax Court, we think your salary ought to be $73,100 a year. But at the same time Congress says, but you judges on the Court of Military Appeals, we think in view of your service to society we want you to be paid $77,300. I find it a little inconsistent and a little illogical for Congress to say but we're going to give to the members of the Tax Court X amount of retirement and then say to the Court of Military Appeals, members of which it pays at a higher rate, but we don't want to give you as generous a retirement system as we give to the Tax Court members, I'm not saying whether it's fair or whether ultimately in the best of all possible worlds that's the way it ought to be for both the Tax Court and the Court of Military Appeals. I won't address that. All I'm saying is as long as the Tax Court retirement is where it is and as long as the Tax Court judges are being paid less than the Court of Military Appeals Judges, I don't think it's very logical or very fair to deny, quote, unquote "deny", or not give to judges, at least the retirement pay that Tax Court members get.

Okay, enough of that. I simply leave with you my thought is don't drive them away. But don't use it as a carrot to bring them.

How about my thoughts about Article III status on the Court of Military Appeals? I can understand, and I got a copy of Judge Everett's speech in Maxwell which he addressed to some extent, and I know Colonel Hemingway, I will get a copy of the letter he sent to you and excerpts of that speech had that's what I'm looking at. And I looked at some of the thoughts that Chief Judge Everett expressed in that speech to Maxwell which expressed some thoughts he—expressed in some period of time. I can absolutely understand and applaud the motivation of the Chief Judge or any judge in the Court of Military Appeals saying by golly I want this court to be an Article III court and I want it to do more things than it does now. I would be disappointed with the caliber of any judge who wasn't thinking that way, who was not at least concerned. And I don't in any way say that from the standpoint of thinking, well this is an exercise in empire building because I don't think that's what motivates the chief judge. I think what motivates the chief judge is an opportunity to do something more and I think that's all to his benefit and all to his credit. As I said, I would be disappointed in the chief judge if he was not looking for that opportunity. I think that's one of the factors that makes him a good jurist and hopefully he won't change. Whether or not he gets Article III status or whether the Court gives him that status, but there are factors which compel me to believe it is not in the best interest of the country to have an Article III court.

First of all as I read and I'm not—Yale Kamisar, Jesse Choper or even a quasi-expert in constitutional law, but as I read Article III it seems to me if we're going to have Article III courts it means we're probably going to have the ability to remove judges therefrom, only when their "good behavior" no longer exists. If that's the case, I'll be at the Congress with its authority stemming both from Article I and Article III to establish inferior courts, inferior to Supreme Court and therefore other than a mandatory jurisdiction which the Constitution sets up can determine what jurisdiction those inferior courts will exercise including Article III courts.

Aside from that we've got the problem of do we want to have a system where three judges are basically the Court of Military Appeals on a lifetime basis? That would solve the retirement system because you would have built into Article III judges an already retirement system. But I'm going to set that aside. I don't think we do. That is in no way a criticism of anyone who has ever served or is serving on the United States Court of Military Appeals. I simply feel that as long as you have a three member judiciary, and I right now don't feel that that ought to be changed, and I've spent a lot of time as Captain Byrne knows, looking at all the proposals to change the structure of the Court of Military Appeals to some larger membership. I just don't think that's justified right now for a lot of reasons.

Perhaps if the case load ever got to that point, yes, but right now I think the three members are the way the Court of Military Appeals ought to be. I don't think that putting those judges there on a lifetime basis is good for the system.

I think that there is too much danger of the impact that the Court of Military Appeals has on not just the system of justice in the military, but and not just the ability that an Article III court might otherwise have to declare an Act of Congress unconstitutional, but the philosophical swings that occur and have occurred in the court and probably are going to occur in the future. There's nothing wrong with it. That's fine. The differences in the personalities, the interpretive impact that those personality and philosophical swings can have on all of military society is so great, unlike the impact of any other inferior court in this country, that to put three judges in there and lock them in for a lifetime is not in the long run I think a good thing.

And this is wholly aside from whether the philosophy of those judges leans towards an accused or leans towards the commander. I think 15 years right now is where the term for the judges should be. It allows both the individual judges to determine after 15 years do they want to stay or do they want to get out or do they want to go on to other things or whatever. It also allows the President to decide whether it's in the best interest in his role as Commander in Chief. It's in the best interest of

military society to reappoint those judges, and I think that's on balance a good system.

To lock them in for life risks too much and it risks too much for no good reason.

Okay, what could an Article III Court of Military Appeals give society, both the broad civilian society and the more narrow military society? Not a great deal in my opinion. I look at some of the arguments and I recognize they're put in very brief form, that Chief Judge Everett made in his Maxwell speech, he said, well one advantage of the specialized court that Dean Grizwell and others pointed out, it eliminates the possibility of conflict among the circuits with respect to certain nations and thereby reduces the occasion to grant—because such a conduct—and this again is assuming you give a broad jurisdictional base to the Court of Military Appeals.

Then he says, "So therefore we don't have a conflict if the particular kind of case is considered only by a single Court of Appeals". If that's an advantage you don't have to create an Article III Court of Military Appeals. If indeed Congress has the authority with regard to inferior courts to determine the jurisdiction thereof it would seem to me that Congress could select any circuit court to determine that certain issues about which it did not with to have conflict among the circuits, that those issues would go to a single court. That court doesn't have to be the United States Court of Military Appeals. There's no reason that the Court of Appeals from the Federal Circuit could not be designated to do exactly the same thing.

I don't find also that there is necessarily any great expertise on the United States Court of Military Appeals and I say nothing with regard to the three judges who are there now.

With regard to matters other than military justice. The Chief Judge talks about by golly, our court could take on such things as the review of administrative discharges. Well, I think right now we've got a pretty good system to review administrative discharges and we don't need to impose that in the negative aspects of an Article III status on the Court of Military Appeals for this reason. Basically when you're dealing with administrative discharges you go into court on two jurisdictional bases. You go in under the Tucker Act or you go in on the federal question. One of those two, without regard to remedies that might be because these are basically not jurisdictional statutes or remedial statutes, whether you go in under the Mandamus Act or the Administrative Procedure Act or so forth.

As you know if you go in under the Tucker Act—District Court. Everybody, when you're over 10,000, and it doesn't take much in terms of an allegation under an improper administrative discharge that you have lost pay and allowances, it doesn't take very long and it doesn't take very much before that amount is over $10,000. District Courts do not under the Tucker Act have any jurisdiction. That's all in the United States Claims Court. That's the only forum in which you can bring a Tucker Act action when the amount in controversy is over $10,000. So you've got a single court already established that has a tremendous amount of expertise. Judges who have spent literally years dealing with these precise problems already in place. I don't see any reason to suddenly say therefore there is a binding need to have the United States court of Military Appeals take on these cases.

Now how about the federal questions that are involved in a wrongful administrative discharge? We have both District Courts and we have the normal Courts of Appeal who every day the judges there who every day deal with fundamental federal questions, not just those attached to whether a discharge has been wrongful or not, but to all other aspects of cases which go before those judges.

Now I don't feel that it's necessary to get into the relative ability or expertise of judges in the Court of Military Appeals vis a vis federal District Court judges or other judges sitting on Courts of Appeal, but it just seems to me that there can't be made a case that there's going to be such a great extra repository of expertise in the Court of Military Appeals to deal with the federal questions which arise in wrongful administrative discharges vis a vis the ability of the Courts of Appeal already in place and the federal District Courts already in place that we should mandate that all of these cases come to the United States Court of Military Appeals.

And finally, even from the standpoint of the individual, much less the individual or civilian practitioner that he or she selects to represent him, if you're sitting out on the West Coast and you've got a Tucker Act problem, assuming it's under $10,000 or if you've got a federal question issue dealing with a wrongful administrative discharge, you don't have to come to Washington, D.C. and spend the enormous amount of money that that takes and hire an attorney in Washington, D.C. to represent you. What you would have to do, the only forum available to you was the United States Court of Military Appeals, you can walk out to the nearest United States District Court with an attorney hired from your home town and you can sue the federal government.

It just seems to me an argument cannot be made persuasively that there is a need in this society to redress any wrongs simply because wrongs may be militarily related or have military law, not military justice but military law, a broader term in my opinion. Military law aspects.

That's all I have to say.

Col. HEMINGWAY. Before we take any questions we'll have about a five minute recess.

(Whereupon, a brief recess was taken.)

Col. HEMINGWAY. Steve?

Col. RABY. Actually, General, I have no questions.

Mr. RIPPLE. I have just one if I may. Or perhaps two, if I may.

General, with respect to the question of command influence, I was struck by your comment that command influence can exist not only with respect to the military judges' relationship to the line but also his relationship to the JAG Corps itself.

Brig. Gen. MOORE. But you have to remember I didn't say JAG Corps because the Marine Corps doesn't have a JAG Corps. I'm talking about the other—

Mr. RIPPLE. The military establishment, whatever it might be.

Assuming that the commission would decide that the military judge does need some protection, assuming that arguendo, I presume you feel that it would be inadequate if that protection were simply a protection within the JAG Corps since he is susceptible to pressure within the JAG Corps as well, or within the JAG establishment as well.

Brig. Gen. MOORE. I don't think that there is going to be any greater or less potential for let's say a senior military lawyer who wants to or would like to attempt to influence a judge. To attempt to do that, because the Judge is guaranteed to sit on the bench for X number of months or X number of years, or whether the Judge could be basically there for a tour and gone. I think furthermore, that the Uniform Code of Military Justice as well as the basic integrity of the system that I know is already in place to protect against both command influence of the military commander if it should be attempted to be exercised against the judge or by a senior military lawyer. And I just don't see if by protection you mean that's going to ensure that this will never happen or there is protection against it by leaving a judge in place for a period of time, no. I think if a judge is on the bench and he's guaranteed to be there for let's say five years and the committee determined that five years is an adequate period of time or a desirable period of time and no one can remove that judge other than say at his own option, because if he doesn't leave this position in September his kids aren't going to get in school, his five years won't run out until January, and if you mandate that he stays there for five years you create a problem for him which you don't want to do. So obviously you build in, even with a system of five years on the bench, you've got to have some leeway so that you don't impact on the individual.

But in my opinion that doesn't protect against let's say that military judge being approached by, let's say he or she is a special court martial military judge of the rank of Navy Lieutenant or Captain in the other services, and let's say a full Commander or Lieutenant Colonel, other military lawyer, it may not be someone for whom he works that approaches him, and says you know Judge, that has to be one of the worst decisions that I've ever seen in your evidentiary ruling in the case of United States vs. Jones; or I have found Judge in reviewing the sentences that you've been imposing over the past six months that you obviously don't understand either the society in which you function or your responsibilities as a military judge, if that's going to happen, that's going to happen whether the judge is there for five years or not. And the rightness or wrongness to remedy the impact or nonimpact on that judge, it seems to me is not going to be greatly influenced by the fact that judge being mandated to sit on that bench for X period of time. If you want to get at that, if you perceive that to be a problem and you perceive that you've got to do something about it, it seems to me you're simply saying that the Judge will remain under any circumstances for five years on the bench, is not the solution.

Mr. RIPPLE. Permit me to clarify the question a bit because I find one of the hazards of being on the commission here is you forget that one witness hasn't heard the other witness' testimony and you carry on conversations with different people at different parts of the day.

One of the suggestions which has been made is there ought to be a fixed time which would be coterminous with the regular military tour for a military judge and he ought to be assigned shall we say as one witness said this morning, for Europe, three years as a military judge. That's his assignment and yes, he ought to remain in that assignment subject to removal for an effective cause.

And the next question is, who ought to be able to remove him for cause? And the answer we get from some witnesses is well the Judge Advocate General could do that and that is sufficient protection if the Judge Advocate General of the military service makes that decision.

But in light of your comments, the Judge Advocate General Corps establishment also exercises or can exercise more appropriately command influence on this person. I wonder if that is the appropriate safety valve?

We did have one flag officer testify before us who is senior to any Judge Advocate General and who quite bluntly stated to us that if he didn't like what a judge, what a two star general did. He had people on top of that he could go to.

If we assume, assuming arguendo we need protection for the judge and that's still an open question, I want to emphasize, but assuming we answer that in the affirmative, is it appropriate to put that power in the JAG or do we need to put it in someone else? Do we need to

put it in a Secretary of the military department? Does he have to approve a removal for cause of a military judge?

Brig. Gen. MOORE. In my opinion, no. If you perceive that there is a fair risk that any Judge Advocate General in any service would, the potential for lack of integrity would be there, then I would say yes. But that is to me beyond my personal comprehension based on the totality of my experience. That is so beyond by comprehension that I don't want to say that it's foolish because from an intellectual standpoint I never find anything foolish, but from a practical standpoint I find that to be absolutely incomprehensible, totally incomprehensible, and you can't and shouldn't, if you start out with that, if you accept arguendo, the validity of what I say when I say that that's incomprehensible, then you certainly cannot have a system in which you are going to impose day to day decisions about the transfer of individuals at the secretarial level. The secretary is hopefully charged with responsibilities that he ought to be exercising on a much broader scale than day to day decisions about assignment of military judges. Even removal of military judges. And I have no hesitancy whatsoever in saying that the present system should we have a military judge who would engage in some kind of misconduct that would require his removal that the current system is more than adequate to take care of that and I would have no hesitancy in allowing that decision to be made at the level of the Judge Advocate General in the case of military judges assigned to the office of the Judge Advocate General. No hesitancy at all.

I would not have any hesitancy based on again, my own experience in having circuit judges make those decisions, and I think if we feel that there is a problem in the integrity of circuit judges, and I would not have that individual being a circuit judge. I think I would personally trust the system without any hesitancy to allow those decisions to be made at the circuit judge level.

In terms of removal for other reasons, I think even if you went into a system where you for a normal tour, the real problem is what is a normal tour? It's like saying what is the prime rate of interest. If you look at it very closely there is no prime rate of interest. You have to define it much better than that and there really isn't any normal military our unless you start out by saying I define normal military tour of being a tour of three years. That's fine, if you want to do that.

You ought to have a system which tries its best to leave a military judge in place once he or she is assigned for a normal tour, i.e., for a period of at least three years, absolutely I agree with that. No question about it. You don't have a good functioning system of justice or a good judiciary if you are willy nilly leading judges around. Nor do I think judges should be moved merely because either commander or a senior military lawyer is displeased with a particular result that might occur in a particular case.

I don't have any problem with that because I am satisfied that the system in the Navy and the Marine Corps is such that no military judge is ever removed for those reasons, and I'm satisfied with that.

I can stop as of my personal experience and say as of '81 that was—

Okay, but you also have to have a system that allows flexibility in terms of assignments and that is so-called transfer of the military judge other than after an expiration of time except for cause. Suppose, for example, the Marine Corps has a Circuit Judge, a full Colonel in place and in this judge you have a great deal of confidence. The judge is doing a superb job. But it just so happens that you've got to have a Colonel on Okinawa as the Staff Judge Advocate for the 3rd Marine Division. And that's a tremendously responsible job and you don't have anybody else available except at the grade of Major or below.

If you have a system where you can't move that particular Colonel who is the ideal person to put over there as the Staff Judge Advocate, then you have cut your own throat and you're foolish to set up a system that allows that to happen.

So even if you set up a system whereby you mandate by legislation or regulation the term of office for a military judge, you've got to allow flexibility for these kinds of things to happen. You also have to say to yourself before you mandate a term of office, if the motivation of that is to protect military judges from command influence, you have to be satisfied empirically that there is such a risk of command influence or its presence has been demonstrated to you, that it is necessary to impinge upon other personnel considerations and therefore the greater good is to impinge on those personnel considerations in order to set up these protective laws. But you don't set up these protective laws unless you're satisfied that it's necessary to do so which in my opinion does cause an adverse impact somewhere else.

Mr. RIPPLE. Turning then if we may to another area you addressed, the area of the United States Court of Military Appeals. In light of your comments that the judges, the present judges and past judges, and you emphasized this was not an adverse comment and I respect that, do not necessarily come to the court or have any great expertise in military law, and given the fact in your judgment it would not be prudent to enlarge the court given its current case load beyond the three members, I would be interested in your comments with respect to the proposal which circulated several years ago of in effect collapsing the United States Court of Military Appeals into the United States Court of Appeals for the federal circuit.

In other words, giving the United States Court of Appeals for the federal circuit appellate jurisdiction over the CMRs.

Brig. Gen. MOORE. One of the things that you have to ask I suppose is whether or not there is a desirability to have even for a 15 year term, a court composed of civilian judges. I'm contrasting that with the courts of the military review are composed of military judges. And if you say there is, fine, there's no difference with the civilian component of a Court of Military Appeals or any Court of Appeals, whether from the federal circuit or any place else.

Okay, then you would have to say to yourself, is that desirability to have a body of expertise in these judges, expertise in military justice? Well, if you took an ordinary court of appeals, whether it's for the federal circuit or elsewhere and you said to the Chief Judge of that circuit, you're going to take on another responsibility, it happens to be the review of courts martial that used to be basically jurisdictionally handled by the Court of Military Appeals.

Now you can do one of two things. Theoretically he could set aside three judges and say you three judges from this day henceforth will hear nothing but cases coming to you under the Uniform Code of Military Justice and you will in effect act as the Court of Military Appeals.

Well that's fine, if you take three judges and that's all that they do, just as that's all that the Court of Military Appeals did. My question would be number one, what have you gained? And you said well we gained $77,000 per judge times three and that's a significance together with the court staff and we've abolished the building and we've ended up with the same thing. Maybe you have. But what you've also done is if you do that you've also taken three judges away from all their other duties and I'm presuming that you've got three judges not extra on the Court of Appeals for the federal circuit, but you've got three judges who are handling a full case load. So therefore if you do that aren't you also going to continue to handle that same case load that the Court of Appeals for the federal circuit has, have to have three judges on the other end. So basically what have you gained? I'm not sure you've gained anything.

On the other hand if you say well don't worry about that, we're not going to do that. We're not going to isolate three judges on the Court of Appeals for the federal circuit, we're going to let everybody take their turn as they come along, and we think without adding any extra judges by doing that everybody taking a crack at these military cases, that we probably won't have to add extra judges, we won't have to add extra staff from a purely economic standpoint we can handle the extra case load.

Obviously I can't answer that, it's something only the Chief Judge can answer. But assuming that could be done, have you gained or lost anything? Well you may have gained something economically because once again you saved the salaries of the three judges on the Court of Military Appeals, the staff, the usage of the Court of Military Appeals building if you don't use it for anything else. But have you lost anything? In my opinion you would have lost a great deal because even though judges may come to the Court of Military Appeals without a great deal of background, I think Mr. Cox, according to the small article that I read which is all I know about Mr. Cox, spent at least six or seven years as a Judge Advocate. We all know the background in terms of his interest, experience in military law that Chief Judge Everett had before he came to the Court. Others have come to the Court with absolutely no military background experience. But while they're there they spend a great deal of time due to primarily two factors: One, their own efforts; and two, the efforts of the military, to understand as much as they can about military society. And I have seen every single judge with very very few exceptions, and every judge who is now on the court including Judge Cook who just left, spent an inordinate amount of time going out to the field, talking to commanders, and making an absolutely total effort to really understand not only the nuances of the intellectual side of military law, but the society that law is going to impact upon.

There is no way in my opinion that that would be done as a practical matter by any stretch of the imagination by all of the judges of any Court of Appeals. They couldn't do it. And yet if you're going to take and say well you can't isolate three judges on the Court of Appeals on the federal circuit, we're going to let all of them do it, to get that same understanding which the Court of Military Appeals has ultimately got of military society and military problems, the impact of decisions as well as the not inconsiderable expertise in military law as a specialty, there is no way you're going to do this.

Now does that mean that there's a loss there? I think there's a tremendous loss there. You're going to have cases handled intellectually, truly intellectually by individuals who are not experts in military law, who will not profess to be and probably won't be because they have too many other cases and responsibilities. I think they will from an intellectual standpoint, they could handle them adequately. But why go to handling cases adequately even from an intellectual standpoint in a specialty when you're having cases handled on an expert basis now? And what you really would lose is the ability of those judges on the Court of Appeals for the federal circuit to ultimately become what—judges become knowledgeable about the military society in which their decisions will impact. For those reasons I would say I

would think it is not in the best interest of our society to take that proposal that you have given me and follow through with it.

Mr. RIPPLE. Of course on the other hand you would gain the following: One life to ten year protection for judges since they would then be Article III judges. You would also gain a certain amount of broadening of their judicial perspective since they would be exposed to other matters.

Brig. Gen. MOORE. You mean from their personal standpoint, a broadening of their professional horizons?

Mr. RIPPLE. No, as judges. In other words they would sit not only on the Court of Federal Circuit but by designation on the other circuits and they would certainly see a broader base, or broader scope of the judicial matters including other criminal law matters.

Brig. Gen. MOORE. Sure.

Mr. RIPPLE. And I think certainly one could argue that you would also, that they would also partake more fully of the collegiality of the American judiciary and of course enjoy the protection of the judicial conference in the United States. So as a follow up, I would appreciate your thoughts as to those factors.

Brig. Gen. MOORE. I'm not so sure when you say the protection as Article III judges, I'm not so sure that is a significant factor. Do you mean to imply by that that not having that protection somehow influences the current Court of Military Appeals?

Mr. RIPPLE. The President of the United States can't relieve somebody as a Chief Judge in the Federal Circuit.

Brig. Gen. MOORE. But do you feel there ever has been or that there is a fair risk that any judge now sits on the Court of Military appeals and is concerned that because he or she doesn't have life tenure that their decisions would be influenced by that?

Mr. RIPPLE. I think the argument at least is, and of course I'm trying to probe these arguments rather than take a position, I want to emphasize that. The argument is with respect to their retirement for instance, the judges of the U.S. Court of Military Appeals had to go hat in hand to Congress and Congress has not asked this commission to look into it. If they were Article III judges the Judicial Conference of the United States which is not an entirely political impotent body as we have found out recently, would have represented them in the matter.

Brig. Gen. MOORE. But assuming as a result of this committee's work and Congressional action, assuming that a fair and adequate retirement system is in place, again from my perspective, not to put them off from the job, assuming that's in place, or assuming the Tax Court retirement system is simply adopted, do you think at that point, and maybe it's not fair to point at you as an individual, to say do you think that maybe perhaps it's better for me to say, is there a fair risk at that point if that's done, that we, this committee, the Congress, should have to be concerned that we have individuals who are going to sit on the Court of Military Appeals with insufficient integrity that they are going to be influenced in their ultimate performance by the chance of being reappointed? Do you really think that's a fair risk?

Mr. RIPPLE. Again, I'm simply trying to probe arguments that are being made here and I think that argument has been made and I think that's one of the reasons why this commission was given the problem.

There is a concern that the current retirement plan of the USCMA may indeed affect judicial independence.

Brig. Gen. MOORE. But isn't the answer, if that's the problem isn't the answer something to fix that? And I think there are many ways of fixing that retirement problem. If you then assume arguendo that that retirement problem is fixed and that then is no longer even a potential factor, even a consideration that ought to be raised, are we then in a position or are there any other factors assuming that after 15 years of the most horendous decision in the opinion of the President of the United States by this Judge on the Court of Military Appeals, that under no circumstances would the President ever reappoint this judge and the judge knows it. But he's got or she has an adequate retirement system so it's immaterial whether or not he or she is going to be reappointed. And you set that system into place. Are there any other factors which the committee is aware of that would influence the potential integrity of that judge to act vis a vis an Article III? In other words is there a necessity other than, or a perceived necessity other than in the area of the economics of retirement that would mandate a so-called protection of the Article III lifetime tenure as opposed to 15 years? Is there? I don't know. I'm not aware of any in my perspective that I've seen. I wonder if the committee is.

Mr. RIPPLE. I think the other arguments which were made go more to the quality of the judicial product than they do to the question of—

Brig. Gen. MOORE. But is quality of judicial product a necessary predicate of an Article III judge vis a vis a selection process which guarantees you, whether you put that judge on the bench for 15 years or for life, isn't the address of that problem an address of the selection problem in the beginning? And if you have an adequate, good, effective selection process aren't you going to guarantee yourself, ourselves, judges of the quality that we want, whether for 15 years or for life on the Court of Military Appeals?

Mr. RIPPLE. I think that's consistent with our mandate we need to investigate. Thank you very much General. I might say it's a pleasure after all these years to meet

you. Way back when you were a Staff Judge Advocate with the Marine Division, you had a case of mine in which I was appellate defense counsel in which you did better by my accused than I did. After all these years it's a pleasure to meet you.

Mr. STERRITT. I only have one question.

You spoke about the suspension problem in returning the individual to the command in reference to who ends up with the actual suspension power. Are we talking about a suspension problem or a suspension of the sentence in terms of as we normally understand in a criminal proceeding, or a personnel decision when we talk about returning to the command? They're not necessarily one on one are they?

Brig. Gen. MOORE. Far from it, absolutely not. No question about it. I'm saying that the matter is perhaps more complex and I think clearly more complex in a military society than it is in a civilian society because perhaps to a great extent although certainly not entirely, in a civilian sentencing decision in terms of parole, probation, or even the initial or subsequent suspension of a sentence it's certainly saying to the individual you're no longer incarcerated, you're now free to go. That individual is free to go out and sleep on a grate if he wants in the city of Washington, D.C., or free to reenter society in any way including in a criminal way or productive.

But we as a society are not necessarily impacted immediately by the return of that individual. In the military society there is a very immediate impact by the return of an individual to a command, whether it's the same command or a different command. And I think it cannot, that impact cannot be ignored.

That is not to say that if it is appropriate for this individual to suspend any part of the sentence, whether we're talking about suspension of reduction in grade, suspension of or forfeiture of pay, suspension of confinement or ultimately the major sanction, the punitive discharge. That's not to say that simply because it might be unpopular or it might be uncomfortable for his command to have him back, if it's appropriate as his or her sentence to make that suspension it ought to be done.

But I think as part of the process the impact of this individual's ultimate sentence on the command, on the society, by that I mean how it's perceived by others and the ultimate effect on morale and discipline of either individually or cumulatively of the knowledge of the sentence, that has to be a societal concern, a military societal concern. Also it has to be concern of what do we do with this individual when he's returned to military society because he does not have as a civilian does, the opportunity to opt to be nonproductive. If we're going to return him to duty we insist that he be productive or we eliminate him in some other way either punitively or administratively. We insist upon him being productive and we say to ourselves there ought to be some indicia probabilities of productivity before we make that decision to return him to command.

Now we may decide for this particular individual we don't want to return him but we think it's inappropriate to give him a punitive discharge and suspend it so what we may end up doing as you know is to say so we either suspend the discharge or omit it entirely and subject him to an administrative discharge process because we don't want him back. That can be done.

But from a purely personnel standpoint, not just utilization of this man in a particular field, but the overall personnel impact of taking this man back and trying to do something productive in the system or be productive to the extent he can in the system, I agree with you it's a totally different consideration than what's an appropriate criminal sentence for this individual.

Mr. STERRITT. Once a man is sentenced to court-martial is he still attached to his unit or is he severed from that?

Brig. Gen. MOORE. He's not automatically severed, at least in the Marine Corps. He's not automatically severed from his unit simply because he has been sent to trial or has been tried. Obviously the ultimate decision is going to be made upon if he is sentenced to confinement, where is he going to serve the confinement. And if he's not going to serve the confinement at the local command then he may be transferred elsewhere and this varies wherever, as you well know.

Mr. STERRITT. Thank you.

Capt. BYRNE. General, I notice when you covered the first issues you covered you used the questionnaire we sent out for commanders. Then you later switched in addressing Article III to a speech that Judge Everett gave down in Maxwell, a few pages.

Do you believe a similar questionnaire, similar to the one in which we address the other issues, would have been useful to you in formulating your responses to the commission insofar as Article III and retirement are concerned with a similar kind of effort would be put into it?

Brig. Gen. MOORE. Very clearly, because I think what the questionnaire did for the other issues, and it's clear to me somebody put a considerable amount of effort into formulating those questions, not just in formulating the "principle arguments" or principle contrary arguments, but in also formulating those questions. I think what those questions do is to cause the reader and the answerer to go through a considerable analysis of the problem and I think that is extremely helpful, would have been extremely helpful to me.

Capt. BYRNE. Thank you.

Col. RABY. I have a couple of questions, General.

In your testimony earlier you talked a little bit about military judges, or you talked a lot about them and

whether they should have discharge suspension powers. In talking about that you talked about the appropriateness of sentence and I want to clarify for myself whether you were implying that if military judges were given discharge suspension powers they might be more apt or might not be affected in certain cases to give discharges when otherwise they would believe it inappropriate?

Brig. Gen. MOORE. I don't think so. As a matter of fact I think right now there are some judges who go through the internal agony of saying to themselves a discharge is appropriate in this case, but not an executed discharge. In other words, I as a judge feel for this particular offense that for me not to award a discharge would be inappropriate, but I don't want to see in this case, this particular accused, have an executed punitive discharge. Under our current system what all judges do is they impose a discharge and make a recommendation to the convening authority and then sit back and hope.

I don't think so, in many cases, well not many cases but in some cases a military judge will impose a punitive discharge that he or she doesn't want to see executed only for the rehabilitative impact that that may have if that discharge is suspended, feeling and rightly so, that the incentive that that suspended military discharge, punitive discharge has, is a very important factor or would be an important factor not only in the sentence but in the rehabilitative efforts that should be directed toward this individual. So I believe in regard to the imposition of an otherwise inappropriate sentence that what appears to be an inappropriate sentence on its surface is in a number of cases adjudged by current military judges because they feel they have no other choice. It's a better option to do that and make a recommendation which they hope will be followed by a convening authority than not to impose it at all which in their view on balance is less appropriate than the alternative.

Now obviously if they have the authority themselves to select that third or middle ground, they can do that and they would characterize that discharge as a suspended discharge right off the bat. So there wouldn't be any chance that as the judge perceived it this individual should not be sentenced to a punitive discharge, there would not be any chance that a convening authority or supervisory authority would simply say I'm sorry, but I'm going to ignore that, thank you judge. And the individual ultimately getting an executed discharge which the judge did not want to see happen. I think there would be less chance of that.

Col. RABY. Military judges you indicated should normally have the power to vacate suspended sentences under your scenario. I've got a little concern. My experience has shown me in some instances the harder it is or the more procedures that are involved in vacating a suspended sentence the less likely it is for the commander to suspend it initially. Do you foresee any danger?

Brig. Gen. MOORE. That's a problem, and the other problem which I did not get into is the whole philosophical problem of continuing jurisdiction. I feel very strongly about this. I don't feel there should be continuing jurisdiction for military judges.

So my scenario, I won't get into that or we'll be here all afternoon, but I'll simply say that my concern that a vacation should occur before a judicial officer, i.e., a military judge, does not mean in any stretch of the imagination that I mean military judges should have continued jurisdiction but that they should be appointed and they should be authorized for the specific purpose of taking a particular case in which a commander says, all right, I'm satisfied that there is in my mind probable cause to believe that Lance Corporal Jones with his suspended sentence has done something that I believe should cause his suspended sentence to be vacated.

I philosophically would like to see the decision to vacate or not vacate made by a judicial officer, but not—and solely upon the recommendation of the commander. The commander has that ultimate prosecutorial authority. Prosecutorial in the sense even of the quasi-prosecutorial aspects of vacation.

Col. RABY. I assume from your remarks you're thinking though of something like a parole revocation hearing type of format. In other words there would be no need to place a decision in a judicial channel?

Brig. Gen. MOORE. Yes.

Col. RABY. From your remarks I got the feeling in regard to the retirement issue and the retention of good judges, you seem to imply that you believed it was more important to look at how judges are appointed than to their retirement system. What do you think about the manner in which common judges are appointed, or maybe I should rephrase that. How should common judges be selected in order to best suit the needs of the military justice system?

Brig. Gen. MOORE. I wish I had a magical answer. I will simply say that the current system could stand some improvement. Not because of the products of the current system but simply because of the selective process. I may be perceiving this totally let's say without benefit of the facts and I recognize that, but it seems to me there is a potential under the current system for a powerful member of Congress to almost impose his or her will upon the selection process. I think that from a process standpoint as a rule I don't think that should happen. I don't think that's the best way to select judges. However, I also recognize that happens in the selection of both federal trial judges and federal appeals court judges.

Under the best of all worlds I would like to see a committee selection process and that has a lot of pitfalls

and a lot of problems and I recognize that. But I think if you have a committee that, whether you compose it of X members of the military, X members from civilian life, all members appointed by Congress, however you would devise a committee, and again I don't have any clearcut answer of this as the constitution of the committee, so many members from academia, etcetera, however you do it I think a committee process by which candidates, a number of candidates are nominated, whether they are nominated through the process of their Representatives or Senators or whether they're nominated through the American Bar Association which I personally would prefer. However the nominees are garnered, there would be a recommendation from the American Bar Association.

I think a more professional and in-depth method of selection is needed. I don't purpose what that method should be, but I am somewhat, in fact I'm considerably concerned about what I perceive to be the current method of doing it which I think is based purely on politics and that may produce the best qualified individuals, that's wonderful. But if it does it's a matter of pure chance.

I think a more rational, more professional selection process is absolutely needed.

You might ask me whether I think as part of that we should automatically exclude either active duty or retired Judge Advocates from the process. I would like to say that I think either active duty or retired Judge Advocates would be wonderful judges of the Court of Military Appeals, but I recognize from a purely political perception standpoint that would never fly, so I wouldn't even begin to propose that, but I do think part of the selection process should look at long range qualities and should look at some degree of initial experience in military law and I don't feel that should be the overriding consideration because I firmly believe the qualities that a judge should have, whether the Court of Military Appeals level or any other judicial level are much more important than necessarily some experience with military law.

But I think a total lack of military law experience, while not disqualifying, should cause a little pause in the selection process.

Col. MITCHELL. I guess we might as well beat this retirement business to death a little bit.

You made a remark in your statement that if I understood it correctly suggested that you felt that the biggest problem in the selection process for a Court of Military Appeals judge had to do more with the scope of the jurisdiction, or did I misunderstand that? That the narrowness—

Brig. Gen. MOORE. Oh, I know what you mean.

Col. MITCHELL. The narrowness of the legal expression inherent in the Military Court of Appeals—

Brig. Gen. MOORE. I don't say that's a big problem but I think it's a very practical concern from the standpoint of an individual. Let's say that the President of the United States came to you and said I'm ready to nominate you to be a judge in the Military Court of Appeals and you're at age 40 or 45, and you said to yourself, all right, I'm going to be there for 15 years, and assuming you're not concerned about appointment or reappointment, you're simply concerned that at some point after that 15 year period you're not going to spend the rest of your life as a judge in the United States Military Court of Appeals, if you at age 40 to 45, and I'm assuming somewhere in that age bracket is where probably most of the nominees are going to come, they may be a little older which kind of eliminates the problem because if you bring a 60 year old to the bench and he's there for 15 years or she's there for 15 years, you're not looking at necessarily a long second career. But if you take a young person at roughly age 40 and put them on the bench for 15 years and then say at age 55, now go do something else in the practice of law, then I think it's foolish for us to expect that that individual is going to walk off the bench at age 55 after spending 15 years in a very narrow specialty and be able to pick and choose the role of continuation as a lawyer in civilian life, and find that their career has been absolutely, totally enhanced by 15 years in a very narrow specialty. I don't think that's going to happen. In fact I think it's—

Col. MITCHELL. Is that an argument then for expanding the jurisdiction of the Court of Military Appeals?

Brig. Gen. MOORE. No.

Col. MITCHELL. You can make it more attractive by increasing its jurisdiction.

Brig. Gen. MOORE. No. Because I think on balance, logically it's an argument, yes. Let me back up, yes, logically it's an argument. But I think then you have to balance all the factors we've kind of gone through before and on balance I would say it's not the persuasive argument.

Col. MITCHELL. In connection with the argument of putting the Court of Military Appeals business into the Court of Appeals somewhere, D.C. or elsewhere, do you see any real value in having judges that sit on military cases come from a background of broad exposure to other problems that you find being resolved in the Courts of Appeal or not?

Brig. Gen. MOORE. You're talking about not in any way expanding the jurisdiction, you're talking about simply a review of courts martial?

Col. MITCHELL. I'm focusing in on the judge himself. If you had to shift the military business into the Court of Appeals then you shift gears and you pick up a judge

whose experience based on history is considerably different from that of the people who normally sit on the Court of Military Appeals. They're involved in contract disputes and all kinds of stuff that comes through the federal system.

When it comes to resolving intelligently and understandingly a problem of military justice, does that sort of background really help any?

Brig. Gen. MOORE. It doesn't hurt. It's not a negative. But I don't feel that it's a positive either. In terms of solving, if you mean looking at a case and saying what principle of law do I apply here, that's only part of the process that I think an appellate judge goes through. Part of the process also is with all the constraints of whether any appellate system should or should not be done, findings of facts at the trial level and looking at the jurisdictional exercise at the appellate level being primarily one of law.

But looking at the entire record of trial and understanding what went on and what occurred, I think it's not helpful. It's not harmful but it's not helpful to simply have that perspective that any Court of appeal would have. I don't think it's a plus, I don't think it's a minus. But if you're saying would it be helpful, no it would not be helpful.

Col. MITCHELL. Do you perceive a difference in attitude in the civilian world as opposed to military justice system? For example superficially at least it appears that perhaps the military system is more spring loaded to appeal than is true of the civilian world. We have—and all these things where we virtually beg an individual to appeal even a guilty plea, lay down and die case.

Brig. Gen. MOORE. We have not had enough experience now to see whether—

Col. MITCHELL. No, while the civilian courts don't seem to be that enthralled with the idea of a string of appeals of relatively minor cases, you can look at things in the broad perspective of federal court system and the fact that mainly with special courts, small sentence.

Brig. Gen. MOORE. You don't need me to answer that. You know the answer.

Col. MITCHELL. Turning to the question of tenure and your observation that you believe that education and training is probably the most important aspect of a quality bench, that tenure really doesn't help that much.

Brig. Gen. MOORE. You forgot selection.

Col. MITCHELL. What about operational education? One of the comments that was made by General Day when he testified was that he felt more confidence in Marine judges—consequently willing to support the notion of a judge only sentencing because he felt that Marine judges were better trained and better grounded in Marine Corps society and operational matters than might be true of the other services.

In the context of an educational program for judges to be selected or to be continued, should operational training also be made available to them?

Brig. Gen. MOORE. As far as selection is concerned, I would not focus upon an operational background as being an important selective factor. I would consider that as part of the education and training of a judge and understanding of the operation of the military in which he is functioning. Of problems involved in operations? Sure, that's part of the broad general background and I think it's essential. I certainly agree with General Day. The problem is I don't have any way of comparing that with the other services so I won't even touch that.

Col. MITCHELL. You seem to be moving now also toward the independent judiciary, independent defense services, some services have that already. Who does the operational planning for military judge support?

Brig. Gen. MOORE. When you say operation, you'd better define that.

Col. MITCHELL. We're going to go to war tomorrow. Who's involved in contingency planning and if so what expertise does that individual have to bring to contingency planning?

Brig. Gen. MOORE. I think that is part of the overall service responsibility in which lawyers are functioning. That needs to be cranked in, but that's a problem that I think is resolved, if for example the Marine Corps General Donovan walking down the hall and saying I'm looking ahead and I want to make sure that something is in place to take care of this housekeeping and that's really what we're basically talking about.

Up until now as you well know, the Staff Judge Advocate is part of the normal command of the Marine Corps, so therefore he has all of those command resources. If you separate all of that and you set up a structure separate from command, then there has to be simply some long range planning. So you've got a—not only to live, but in which, to have a court martial you've got a box in which you have pre-packed paper and a typewriter and hopefully a functional stenomask or whatever. These are operational things that need to be worked out, but that's not a problem this committee needs to address but it's a problem every service needs to address and if they're not doing it then they're derelict.

Col. MITCHELL. What about the notion that's been proposed by two commanders, and both rather forcefully. If we're going to protect a judge with tenure, that they have got to have some lawful way of communicating their dissatisfaction with the performance of a given judge to a superior authority so as to cause knowledge basically of a basis for removal. There's some question in the law whether that can be done nowadays.

Brig. Gen. MOORE. I think there are two aspects of that. First of all, my experience has been, at least in the Marine Corps, any knowledgeable Staff Judge Advocate does that. He ensures that he knows exactly what all the commanders are thinking and he also ensures that those commanders are not in any way influencing any of the judges as a result of that and I think that's an educational process that's in place now and it works. But I don't think that ever we should, if we have a system of tenure we should permit removal of a judge simply because you've got an upset Squadron or Batallion or Regimental or even a Wing Commander with a particular result of a trial. That's not what I consider to be misconduct.

Col. MITCHELL. But it might disclose a given case, incompetence which if not reported is never known.

Brig. Gen. MOORE. Absolutely. I think there has to be a system whereby let's say the impact of what a judge does is ultimately fed back into a decisional authority, but if you're talking about the fact that in an individual case a commander is unhappy with the result and that equates either to misconduct or that equates to a basis for removal of a judge, I would say no. I don't think you could permit that. I don't think you ever should permit that. And I would hope that a decisional authority is aware if the decisional authority is the Judge Advocate General or a Circuit Judge, because I would put it at the Circuit Judge level quite frankly, I would hope that a Circuit Judge is aware of what's going on with regard to let's say the special court-martial judges or other GCM judges working for the circuit judge, and I would think it doesn't take an unhappy commander to come to that circuit judge if the circuit judge is really doing what he or she should, a circuit judge knows this. But I think also there has to be a means by which there is some consideration, some fear and full consideration of the impact of what a judge does. The impact of that on a command. So that the system can assimilate that information and use it. But by no means would I ever in my opinion, in my wildest stretch, think that an unhappy commander no matter how legitimately unhappy he is could or should trigger the removal of a judge because of unhappiness.

If a judge, if let's say this scenario, if a commander is unhappy because a judge did something injudicious, something incredible, and no one else knew it but that commander and I can't see that happening, and the commander brings it to the attention of the Judge Advocate General of the Navy, such as a judge presided in a courtroom at the time the judge was completely intoxicated and nobody knew it but this commander who brings it to the attention of the system, yeah, that would be certainly grounds for saying that there's been misconduct on the part of this military judge.

I just can't see a system in which unhappiness of a commander is the only way by which incompetency of a judge is ever going to get to be known. But yes, you've got to have a vent for dissatisfaction in a command with the judicial system, not just an individual military judge but the whole impact of the judicial system and that's a matter of setting up a means of understanding. That's what a good Staff Judge Advocate does.

Col. MITCHELL. Do you believe that basically the prevention is the best solution is really going to ultimately eliminate most of the problems in this area?

Brig. Gen. MOORE. I think it's clearly the best solution. I don't think it's the only solution. Obviously if you say, well if we have nothing else but a good selection process we don't need anything else, but you do. You've got to have a means of ensuring that if command influence happens it's dealt with. I would hope that there would always be a means of dealing with command influence. Proper command influence. Obviously there is proper command influence and improper. We're talking about terminating improper command influence immediately and ensuring that it doesn't happen again. I think the present system at least as far as the Marine Corps is concerned, which is really all I can speak from, does not permit that to happen and is able to deal with it when it does.

Col. MITCHELL. One of the other witnesses also proposed that perhaps it might not be a bad idea to authorize a military judge to recommend that a sentence be suspended and that the convening authority be free to not follow that recommendation but if he does not follow that recommendation then he would have to set forth his reasons in his action and that that decision of his would then be reviewable for—What is your reaction to that idea?

Brig. Gen. MOORE. I don't have any problem with that. I don't think that's the best solution, but if you choose not to give a sitting trial judge the authority to suspend sentences that is a viable alternative, certainly, but that's not the alternative that I would choose.

Col. HEMINGWAY. Thank you for your time and patience.

(Whereupon, the hearing was adjourned.)

Col. HEMINGWAY. Gentleman, if we could come to order, our first witness this morning is Colonel William Crouch, Regimental Commander from Germany. Welcome.

TESTIMONY OF COLONEL WILLIAM CROUCH

Given to the Military Justice Act of 1983 Advisory Commission on 20 July 1984 at Washington, D.C.

Col. CROUCH. Thank you. Having given it a little bit of thought to what I might do, I thought I would tell you a little bit about myself for a second, what my job is so that you have some kind of an internal reference as far as my experience. As I understand it, I think I am the only special court convening authority that you may deal with, and so that may be unique in itself and my perspective may be slightly different than some of the general court authorities. I tried, by the way, not to couch my opinions strictly as a special court-martial authority, but I am sure it probably does color my thinking.

I have been in the Army 21 years. Most of my service is as an Armor officer, and I have served as a platoon leader; commanded four company-size units. I have been an executive officer for the same kinds of units; been operation officer and executive officer of squadrons and regiments, and I have commanded an armored cavalry squadron which is about a thousand man unit, and I am now in command of the 2d Cavalry Regiment, which I will tell you a bit more about in just a second.

My education is civil education. I am a graduate of Claremont Men's College from Southern California. I bet you won't get anybody else from California outside of the Navy in here.

I have a degree in Government. I have a Master's Degree from Texas Christian University in Diplomatic History. I'm a graduate with Al Raby in the Class of '81 from the Army War College, and the rest of the Army's MOS producing, armor producing schools. My job now is to command.

As I am sure you know, U.S. Army Europe is divided basically its combat elements into two corps, and both of those corps have a portion or confront a portion of the international boundary between East Germany and/or Czechoslovakia. To man that border, or provide surveillance along that strip of the border, there are two armored cav regiments, one in V Corps and one in VII Corps. Mine is the VII Corps regiment, and of course has the greater portion of the border. I deal with 650 kilometers of East German and Czech border with a unit of about 4,000 people. My headquarters is in Nuerenberg which is located in Bavaria, north of Munich, about a two hour drive. My squadrons, of which there are five, three are located in such a way that they're spread out so I can deal with the surveillance along the border. For instance, one is in Bamberg, another in Bayreuth if you're familiar with the geography. And then forward deployed from those locations are 200 man armored cavalry troops which perform that surveillance and provide early warning along a strip of let's say about 40 kilometers of that border.

So those 200 people living in what we call a border camp, normally out in the middle of the trees, although a permanent installation, on their own, are responsible for 24 hours a day, seven days a week, on Christmas Day, for surveillance of either the East German or Czechoslavakian border. They're looking across the fence at a Czech or East German border guard who is looking right back at them and they are attempting to provide all of the information that the corps commander charges me to provide him in a very professional and effective way. The regiment, besides having people in the mission also has combat equipment. I have about 1,000 combat vehicles, 170-some tanks for instance, 18 howitzers and so on, 65 helicopters. So my regiment is forward deployed. We face a potential enemy. We are an early warning unit. We are deployed in increments, really with troops that rotate along this border.

For instance, an armored cav troop will not stay there longer than about 45 days in a period of time without families and will return to the main installation, the squadron location, after a 30 to 45 day tour.

One final thought. In addition to our border surveillance mission or duties, we also are required to, if war should occur, we'll be the first ones involved and therefore we have to be able to do all those things, without getting into any more details, to confront him at the point he steps across the border and provide the early warning and other functions that I have to provide immediately if he would attack. So we have to be a well trained unit at the same time.

If that's enough background, obviously I'm very proud of my unit. I'll tell you this, I've spent five years in it and I'm a repeat. I didn't learn it well enough the first time so they brought me back, which was a dream.

As I understand it Sir, there are four things that I may be competent, at least may have an opinion on, that you'd like for me to comment on. I'll take them very briefly and then respond to whatever questions you all may have.

First of all, there is a proposal or question as to the guaranteed term of office for military judges. In my opinion, the Army trial judiciary right now has been very effective in ensuring that a judge is in a very protected position which is where I see this question leading and I'd like to get to the heart of it if I could, rather than talk around the edge.

It is well nigh impossible for most any commander to try to deal out of whim or desire to put some form of pressure or influence upon the judge. We don't deal with his efficiency reports, assignments, as far as the mechanizations of the system are concerned. And secondly, it is enough of an ethical issue and we have made it that way for, I want to say 15 years, but I'm not sure that it's quite that long, but for a commander to even contemplate that kind of an approach I think would, it's in my view not realistic.

In the Army, if I understand it correctly, an officer detailed as a military judge is assigned for instance to Europe. In my community he's assigned for a three year tour, accompanied with his family, and he proceeds overseas. And when I view him, when I see him, he's there for a military judge for a three year tour. That's what he's there to do. He exists in a separate system and that's the long and short of it.

A guaranteed term, a commander is assigned for a certain period, a normal tour. If somebody is going to shorten my tour, hopefully I'm going to have to commit some act or series of acts that a lot of people aren't going to be happy with for that tour to be changed, tour length to be changed.

The same token with the military judge item. I think in those terms as far as he's concerned, he's there for that same normal assignment. My concern about imposing upon him or upon that assignment system another system which is guaranteed terms or a guaranteed tour length is that all of a sudden we are taking a further step in something that I think is working rather well. We're providing another, I guess safeguard or piece of protection or something that I'm just really not convinced is required. I think the military judge has adequate protection for his judgment and that a capricious whim by a commander is really not a circumstance that occurs.

The other concern that I have, if I read the questionnaire correctly, is that there is risk should there be some kind of a longer tour or extended tour guaranteed tour of a judge, of really removing him from some of the experiences I'd really like for him to have as he serves. By the same token, I would like to have those people that serve as my principle legal advisor to have some of that experience, having faced the dilemma that a man must as he sits upon the bench, and I would like for him to be able to bring that kind of judgment and experience into the mainstream of the JAG corps.

My concern I guess, the word that keeps travelling through my mind is the term cloister, and I want separation, I want a certain amount of aloofness, but I don't want a cloistered and removed judge who is not privy to maybe sense of community, if that's a reasonable term.

I want to deal with one question if I may in the questionnaire directly. And the question was guaranteed promotion. That really bothers me. From the standpoint of the judge, I feel if something like this was created and it was attended by some system of guaranteed performance, guaranteed form of promotion regardless of promotion, that the credibility of the judge would be significantly undermined.

This is a man whose judgment is keen and if he is looked upon in gross terms as an individual who has been able to simply travel the rope without having to climb, then his judgment I think and his credibility could be seriously suspect.

Now Sir, I'll deal with questions on this or I can go to the other—

Col. HEMINGWAY. Why don't you go ahead and address all of them.

Col. CROUCH. Sentence by military judge, or military judge only, I'm sorry. Very briefly, I hope I articulate this correctly. When an accused in my view does not elect trial by judge alone and a panel therefore sits, I feel and I want that panel to have the full burden of determining whether an accused is guilty. And at the same time that they are making that determination I want the full weight of responsibility of having to eventually deal with the sentence resting on their shoulders. I do not, in my opinion, we should not create for a court martial panel, a set of circumstances that is less serious than the burden it now carries where a simple determination of guilt or innocence is then transferred to a military judge who has to put a determination of guilt into actual fact by the imposition of sentence. Those officers that sit as part of that panel need to carry that total weight with them as they deliberate both the guilt and should he be guilty, guilt or innocence, and should he be guilty then the sentence.

One additional comment is that the panel also when it sits is deprived, to a great deal, of information, as far as a community, a unit is concerned. And I think that—in the sentencing procedure is this experience, is something that should not be overlooked, and therefore I think that form of sentence imposition should be retained.

Suspension power for military judges. A commander is charged with the total responsibility. He is responsible for everything he does or fails to do in all aspects. And I'm never absolved of that, nor is any commander, and I know I'm preaching to the choir when I say that, but I wanted to couch my remarks that way before this. But when we deal with suspension the man that really has to make that call in my view is the commander because not only is he charged with the welfare of each individual within a unit, he's charged with the unit and its welfare and its mission. He has to weigh in his own mind all of the facts and circumstances that have occurred, that have led to the sentence with which he's presented. And then what is the total effect of suspension of a portion of that sentence upon the unit, particularly should the service member then come directly back to the same unit?

If you talk to me in terms of doing that at some point when I'm thinking about a thing that always pops up in my mind is a place called Camp Gates which sits right next to the tri-zonal point which is where—expression, it means the junction of the Federal Republic, Czechoslovakia, and East Germany, and I have a captain that's in command of those 200 soldiers there and his Lieutenant

Colonel is 60 kilometers away, I think in those terms, that's going to weigh heavily on me as far as a final determination of what was the precise nature of that which occurred and what can best be served within the unit which is the real responsibility. And I'm not sure that a military judge having to deal with a vast spectrum of units is in the best position to try and make those kinds of judgments.

It also seems to me, and one of your questions really keyed this, that we're not very structured in the Army to deal with suspension or conditional suspension. If we suspend and say the service member therefore has to do certain things, how do you monitor that? I'm not sure we have a structure, or it's going to cost us some more resources to be able to do that and I don't think we have the structure to do it. And certainly you never give an order that you can't carry out. So if a judge gives an order we have to have some way of monitoring it so we would have to, I think we'd probably have to create something.

The vacation authority bothers me a bit because I can easily conceive where if we were not very careful in this we could make a commander a supplicant to a court in dealing with vacation and I don't think that's a thing that we want to put a judge nor a commander in that kind of a position particularly as time may have passed.

The final issue, Sir, is one in which really I'm not ambivalent, but I really see more sides to this one as far as the extension of the special court-martial confinement period to one year from six months than might really be on the surface. From the special court convening authority, could that be an asset to me? My initial reaction when I saw it was yeah. That gives me a little bit more authority, a little greater power or ability rather than power, to deal with a certain set of cases. But then at the same time I don't have a great deal of difficulty at this point from my own perspective in separating those things that are referred to special court or referred to a general court. Rarely am I caught on the horns of a dilemma in that kind of a decision, mainly because those things are normally much more serious in their context. And at that point I want an Article 32.

The 32 investigation as far as I'm concerned is a very valuable tool and I generally, and you could probably get some, line up five colonels that are SPCAs and they'll all give you different opinions I'm sure. But the Article 32 is a resource consuming event. I have to detail sharp captains and majors to do those 32 investigations that I don't have to squander because of our mission. However, what they do for me is they make sure that I haven't gone off the deep end and they make sure that we know all of the facts and that we put the charges and all of the things that surround it, I think, in the right perspective before taking the next step. But it costs me to do that.

My opinion is probably that the six months sentencing authority counterbalanced by the requirement for the Article 32 beyond that with a general court is probably just about right. Would I like to have an additional sentencing authority of an additional six months? It could be of assistance to me but I don't want it if then somehow we'll transfer the 32 into lesser cases. We can't afford that, very frankly, in terms of what it costs my unit to deal with it.

So I haven't given you a very good answer there.

Capt. BYRNE. Yes you did.

Col. CROUCH. So that's it.

Col. HEMINGWAY. Colonel Mitchell?

Col. MITCHELL. If the balloon goes up where you are, in terms of forces that we have over there, that's not a very deep position is it? I mean you don't have much depth behind you.

Col. CROUCH. Not initially.

Col. MITCHELL. So you're looking at probably operating in some kind of a mobile circumstance if the balloon goes up?

Col. CROUCH. We're highly mobile.

Col. MITCHELL. When we start talking about trials by military judge and sentencing by military judge, both have been talked about before the commission so far. Do you think that in those kinds of circumstances, and I realize at some points in the battle you just can't take the time to try courts, other things have to come first, killing people and breaking things, but when things do slow down enough, is the fact that you're still in a highly mobile situation, is that going to interfere with your ability to move military judges in and out of the area and move witnesses around and gather witnesses at a single place for trial and so forth and so on?

Col. CROUCH. I will not give you a "it depends on the circumstances." I would say it probably has an affect on it. Could I do it? Military justice system during time of war as far as I'm concerned, as morality and ethics decay, as soon as the shooting starts, that's one of the few things that remains constant. That there is a system of morality and that is buttressed by a constant system of impartial justice that I think particularly in the kind of combat that unfortunately I can envision, if I ever needed it, I'll need it then.

Col. MITCHELL. Is your mobile environment going to cause you difficulty in getting the support if you have to rely on military judges to handle the process?

Col. CROUCH. Solely to handle the process? Yes Sir, absolutely.

Col. MITCHELL. Again as sort of a general question, various writers, I'm sure you're familiar with them, have sort of laid out what they call the differences between

military and civil law in terms of them both having objectives to protect the nation but they do it in different ways. In the civilian law of course, working on the civilian and military upon those in the military.

They say that in the civilian world the elements of that objective are in order, the protection of the people as a whole and the protection of individuals and individual rights, and then for the protection, administration of property and resources. They say that in the military society, that the priority is changed, and that while the first priority remains the defense of the people, of the population, that resource management elevates to second place and the protection of individual rights moves down to third.

Now in discussions I've had in the past with people about matters of military justice, I find there are two essential ways to deal with changes of the code or the construction of a code, and it seems to me that one group will say we need to have a certain baseline which for lack of a better term of expression constitutes an absolute maximum of what has been termed military merit or military power including the sum of all things related to the making of war, whether tangible or intangible, and then deviating from that in terms of protecting individual rights. Only when you can clearly justify a reason for deviating from the most expeditious way of doing things, the other group of people say no, that's wrong and dangerous. That the way to look at this thing is that we should assimilate in the military society all of those things which pertain to the criminal law in civil life except those specific things that we cannot adopt because they simply don't fit in our society.

Now do you fall into any one of those groups, and if so, which one? Or have I caught you a little bit cold?

Col. CROUCH. No, I'm not sure I'm smart enough to answer the question. I'm not sure that I really read the authors that you quote and I'm struggling right now for a simple answer and I don't think there is one. I do not find myself in either one of the two groups.

If I had a little bit of time to think that part out I think I may be able to take it on, if that's acceptable. I'm not sure I'm prepared to talk of that.

Col. MITCHELL. That's fine.

Let me go to something more directly related to what you just testified to.

In civilian life the concept of the guaranteed term of office or tenure as it's called in certain respects is designed to do one thing and that's basically protect a judge or his livelihood, his salary and so forth, from the effects of adverse public and political opinion generated by his judicial decisions. In other words, if a judge is not free to decide a case on the basis of the merits of the thing as he sees it because of the potential for adverse public or political reaction causing him to lose his means of earning a living and he's hostage to that circumstance in connection with guaranteed term of office business, do you see any of these bases applying in the military society?

Col. CROUCH. No, as I think I said, I really think that we have, my opinion, that in the Army we have created a judiciary where the judges, a judge really has the protection from those kinds of pressures. He's assigned separately, he's evaluated separately, he's completely out of that kind of mainstream and it is my opinion that that kind of capricious command pressure is not his experience, and I have to come back and restate one thing that I said, Colonel Mitchell, a little bit earlier. Commanders in my opinion now, the furthest thing from my mind would be to try and create any sets of circumstances that could be even indirectly related to me in putting any kind of pressure whatsoever on a military judge in any form. We are conditioned at this point that that's just a thing you're flat not going to do. You have created a trial judiciary to make sure you're protected from it. We've got a certain tour length that we operate on, and it is unethical in my view to do that. And finally, we're told not to.

Now if you take all those things together and you obey orders, you just don't do it.

Col. MITCHELL. Do you have any mechanism, legal or otherwise through which you could effect a military judge's demotion in grade?

Col. CROUCH. No Sir.

Col. MITCHELL. Do you have any way, legal or otherwise, in which you could affect the salary that that judge earns?

Col. CROUCH. No Sir.

Col. MITCHELL. Is there any way that you know of, legal or otherwise, by which you could affect his promotion or his chances for promotion?

Col. CROUCH. No. The judge advocate system is completely out of the Army mainstream.

Col. RABY. I'd like to think we're in the mainstream, Bill.

Col. CROUCH. There's no flank shot there.

Col. MITCHELL. You said you wanted, in terms, in connection with your discussion of military judge only sentencing, that you'd like to have the members in the full gravity of the circumstances in which they sit when they're deciding the guilt or innocence, that they need the knowledge that they're going to have to sentence this guy once they determine that he's guilty. Do you think that generates better sentences? What is the specific value you see in that other than just existence of the pressure?

Col. CROUCH. It's the sense of responsibility that I want those members that are sitting as part of that panel

to have that total sense of responsibility for all of which they are deliberating.

Col. MITCHELL. Do you think that guarantees a better sentence on the merits?

Col. CROUCH. I won't go so far as to say, I would say it creates the circumstances for the most serious environment that can be created for that panel. Now does that guarantee a better sentence? I don't know.

Col. MITCHELL. You made one statement in connection with suspension power. In connection with your statement that a commander must consider not only the unit welfare but, not only the individual as well, but the unit welfare if he has to choose between the two, almost has to come first and I assume that's implicit in what you say.

Col CROUCH. Not necessarily. I don't want to interrupt you but I don't think that's implicit.

Col. MITCHELL. Then let me rephrase it. I don't want to trap you.

What you said, if I did write it correctly was that the commander has to consider both the individual's welfare and the unit's welfare in deciding whether or not a suspension should be given. It has been argued that the information that is necessary to that kind of a determination can be provided to a military judge who could then, possessed of the same information as the commander, make presumably the appropriate decision. My question to you is this, is that observation really true or are the things that you are talking about too intangible to be trotted into a courtroom and laid before the judge in the form of evidence or other information?

Col. CROUCH. A good deal of it, probably a portion of it can be provided I'm sure at some expenditure of resources to gain that information. The research has to be done and there has to be someone to do it.

On the same token, the judge, regardless of how experienced or astute in my opinion, cannot have the same sense that a commander for a unit, that a commander must gain simply because of the total responsibility that he has for the unit. He has to weigh both the effect on the unit and on the individual and in peacetime very easily they must weigh equally and then make his decision. All of those things that he must have. Really, all of them probably can't be provided to a military judge.

Col. MITCHELL. Do units have in your judgment, personalities that a commander must understand?

Col. CROUCH. Absolutely.

Col. MITCHELL. And individuals also have personalities do they not?

Col. CROUCH. Absolutely.

Col. MITCHELL. And a commander must also understand those. Have you ever had the experience of someone standing in front of your desk or out on the parade deck or wherever you happen to be considering the thing at the time and you have in your mind the idea of maybe I'm going to suspend the sentence in this case and intuitively feel that if you do this guy's not going to make it, that he's not really worth doing that and yet have no real solid evidence that that intuition is correct?

Col. CROUCH. Having dealt with that kind of thing for 20 years, absolutely. That's human judgment.

Col. MITCHELL. Have you ever acted on that intuition, either to suspend or not to suspend?

Col. CROUCH. Now what you've created for me is an absolute trap like have I stopped beating my wife.

Col. MITCHELL. I don't think it's necessarily bad to play the game the either way. I think it's part of the process.

Col. CROUCH. But taken out of context it could be.

I will tell you this. If the commander paid for those kinds of judgments, certainly there are times I've made a judgment like that when I've been bereft of other kinds of information or whatever. I try never to have to do that, but to sit here and tell you that I haven't made that kind of a determination would be wrong.

Col. MITCHELL. Do you think that military judges do the same thing in court?

Col. CROUCH. I don't know.

Col. MITCHELL. Do you think or do you have an opinion as to whether or not a commander is better situated to both have or is better situated to have an accurate intuition in respect to a member of his command?

Col. CROUCH. I think so, simply by length of association and experience and total experience in dealing with like units and people that he sees. Yes, and he's privy on a 24 hour basis to all of those different stimuli within the unit.

Col. MITCHELL. And lastly in respect to your views on the one year special court-martial, it has been suggested that if we recommend that such an action be taken that in fact the jurisdictional limit is increased, that the Article 32 procedures apply to those cases in which the confinement authorized would be in excess of six months, but that the procedures be streamlined so they're not as cumbersome as they are now. What's your reaction to that?

Col. CROUCH. Again, I'm not interested in an Article 32 or anything similar to it for its an administrative requirement being applied that way.

Col. MITCHELL. Is it your feeling that in terms of resource allocation that that's an administrative overkill, that six months is enough and you don't need 12 if you have to graft this other stuff on to it?

Col. CROUCH. I think I said that in essence. I think I said that before.

Col. MITCHELL. That's all.

Capt. STEINBACH. The same statement that you've made in your remarks, the issue of influence, you men-

tioned conditioning. It sounded like a fact of life. Is that a correct interpretation?

Col. CROUCH. What you're doing is you're stepping outside of the military justice system. The justice system is a tool that underpins the society's military and to step outside of that and try to circumvent it is wrong and the minute you start talking in terms of right or wrong then we move into that other area.

Capt. STEINBACH. Is there any sanction or retribution that you would have in mind for a breach of this ethic if you will?

Col. CROUCH. I would fully expect the relief would be some removal, but there are provisions for, as far as the Army is concerned, some pretty stringent action. I believe if I should be caught doing any—

Capt. STEINBACH. We had a witness the other day that was very candid with us and indicated he did have a channel to express displeasure which I don't necessarily condemn. After all, anyone in a command responsible position has a few emotions that have to be vented somewhere or discussion of displeasure or a glitch in the system if you will. Not amounting to get rid of that guy or make an issue—things like that. We do have a glitch, we do have a problem. Possibly we've got a drunk here, he shows up in court under the influence. Whatever. A severe act of misconduct or a perception if you had an opportunity to discuss it with the senior JAG officer it may be minimized. Do you have either of those channels available to you?

Col. CROUCH. I don't want to sound naive in this and I'm afraid my answer may really appear that way. The only channel that I know of, should I encounter those circumstances would be to turn to my own judge advocate and say I don't know what to do about this one. I do not know of any kind of a system within the military to deal with that. I've never confronted it or been confronted by it. But maybe a general court-martial convening authority would have a different perspective, but from my view, I'm really not sure how to deal with it.

Capt. STEINBACH. You described a camp at the junction of several borders, obviously a very critical area in your thinking, and for some unknown reason a judge does not award a serious punishment for what you feel is a serious offense, and an individual who in your mind should not go back there receives a sentence that would under normal circumstances would send him back there. Anyplace to discuss that issue besides your SJA or do you think a personnel option is open to you to take care of any action that may develop?

Col. CROUCH. I want to make sure that I have this correctly. You're speaking in terms now of, for instance, an acquittal by a court-martial judge only?

Capt. STEINBACH. Let's go one step further and say possibly a conviction, but an absolutely off the wall lenient sentence in your mind.

Col. CROUCH. My only, I would probably, if I knew his name, would assault his ancestor. I might go to my boss and say I've got this real problem, but in fact what you just presented me with is a fact of life. It does happen and I don't like it but in the main, and I suppose that this has come out I would hope at this time, we have in my view a system that works. You know, there are a number of judgments both by panels and judges alone that I'm not happy with but I know it's an objective system and I'm going to get some bad ones and I'm going to get some good ones.

Capt. STEINBACH. On the whole you say it works. Have you ever come to the conclusion it may be overly protective?

Col. CROUCH. When we initially going through the—decisions and all the protections that were—to that as we initially got into it, yes. I was really concerned that our total system was overly protective.

Capt. STEINBACH. Have you ever functioned as a trial defense counsel?

Col. CROUCH. Yes Sir.

Capt. STEINBACH. The questioning of sentencing by a military judge alone you articulated some very clear feelings concerning the members' sensitivities to the military community, to the command, to the unit. Would those factors go out the window during the conditions that you described of, when the shooting starts, morality decays. At that point, would those factors minimize or eliminate the balancing of members' should be sentencing rather than a military judge or the military judge possibly have the feeling for the situation more clearly for the correct community at that time?

Col. CROUCH. I think conversely that the officer at that point is the one particularly that I want with that verdict. He is the man in my view that is responsible for the ethical and moral fiber, the end environment that a unit must live under, and when confronted with a live enemy, I want that man capable of rendering those judgments that ensure that fabric of society which he is protecting, it remains as stable as it can in the most chaotic circumstances.

Capt. STEINBACH. Let's turn for a moment to suspension of sentences. The issue of suspension powers by a judge. Can you give us any indication of the frequency that you have received either requests from defense counsel to suspend or recommendations from the judge to suspend?

Col. CROUCH. You know I read that question in the questionnaire and I remember having received a couple from defense counsel with the request, and I can't remember whether it's one or two and I do remember one

or two recommendations for suspension but very very slight.

Now I'm a special court convening authority and probably way out in the field on that in relationship to the other people you've interviewed.

Capt. STEINBACH. Recognizing that there have been in your mind very few percentage wise, let's deal with recommendations by the judge. Were you able to follow those or do you recall?

Col. CROUCH. I've tried to recall because this is not the first time I've dealt with the question.

Capt. STEINBACH. When you got the recommendations from the judge do you feel the judge was telling you how to do your job or getting into your tree so to speak?

Col. CROUCH. No, he was privy to certain factors that came out in the conduct of the courts martial and certain things that were presented to him that he felt strongly enough that he wanted me to consider. He has every right to do that as far as I'm concerned and I should consider it, at the same time that I consider the act or acts, the welfare of the unit and the individual.

Capt. STEINBACH. Thank you very much.

Col. HEMINGWAY. Before we proceed I want to ask that you tighten up your questions. We're running short of time.

Mr. STERRITT. My name is Christopher Steritt, I'm from the Court of Military Appeals. Two questions, one general and one specific, and I think they're rather straight forward.

The first one is do you believe discipline can be maintained in your command of American soldiers without a criminal justice system that is perceived by your men as, or that it's perceived by your men as being unfair and unjust? In other words, if your men look at the justice system that Congress establishes and they don't perceive it as being fair and just would that help you in your task of disciplining the men?

Col. CROUCH. Absolutely not. Discipline is taking care of the welfare of the soldiers. The system needs to be a fair one.

Mr. STERRITT. You spoke earlier, and this is in regard to suspension power in the commanding officer. Are you concerned with suspension or the fact of the impact of his return to the unit? In other words if a sentence is suspended and he goes somewhere else for example, a transfer or something like that, would you be concerned about the military judge having suspension power?

Col. CROUCH. Absolutely, because that man at the same time will be going to another unit. Another unit with another commander that has the same kinds, maybe different, but the same kinds of duties and responsibilities and problems that I have. I'm the best one to make the judgment if the man is from my unit. It's one of the things that we never want to do, I believe, is make a problem go away. And that smacks of that and therefore I do not believe that that's—

Mr. RIPPLE. Thank you Colonel. My name is Professor Ken Ripple from the University of Notre Dame.

Most of my questions have been already asked by my colleague from the Coast Guard, but I've got two with respect to sentencing.

First of all, you mentioned you thought at least the option ought to be open to have sentencing by the court martial itself because you like to keep the burden on the officers throughout the trial to realize if they found the man guilty they in fact would have to sentence him. Can't that also lead to a brokered verdict? In other words where the court-martial may be somewhat divided on the issue of guilt or innocence and the court-martial decides well we'll find him guilty but we'll give him a light sentence. That's the compromise which is worked out. Don't we run that risk if we have that arrangement?

Col. CROUCH. If I remember my manual well enough, our procedures in the determination of guilt and in the determination of sentence are far enough separate and there are a number of safeguards and I'm looking at you—because I'm groping with this point but my—there's enough separation of procedures of those two events that that form of collusion I think is almost precluded in the instructions that are given for that that governs the panel's operation.

Mr. RIPPLE. I think that's clearly correct. We would have to posit a situation here where the court-martial would choose to ignore the instructions clearly.

Col. CROUCH. Yes Sir, and I do not believe that probably in some general terms as I've said earlier, that that is a normal set of circumstances.

Mr. RIPPLE. And the last question I have is, am I correct in assuming that you think a panel of officers sitting as a court-martial have at least the same amount of experience and training as a military judge with respect to sentencing? In other words, qualitatively—court-martial is at least the equivalent of a military judge's judgment on the appropriateness of sentence?

Col. CROUCH. Yes.

Mr. RIPPLE. Thank you.

Col. RABY. Bill, let's see, on tenure, I think you articulated very clearly your reasons for it. I have no questions on that.

On joint—sentencing, in addition to what you mentioned is there any training value of any significance or not when in leadership training, having your officers as members of the panel, even though they don't sit too often, you know officers—

Col. CROUCH. I would never want to use a courts-martial as a training tool for a junior officer, and I don't even like to think of it in those terms. However, simply

by being a member of the panel, an officer is confronted with some judgmental requirements, given some terms of reference, and is caused to look at certain facts of life that have to be broadening, that have to condition judgment and have to put him in confrontation occasionally with matters in the extreme over which he must draw in his own mind some clearer conclusions based upon fact and then has to make some right and wrong, some ethical and moral judgments about that. Is that good training? You're darn right. That's going to help prepare a guy for all kinds of leadership positions. So yes, I think it's of value.

Col. RABY. Bill, do you have any opinion as to whether, or would the fact that a commander suspends a soldier's sentence, give that act of suspension more credibility with subordinate commanders and NCO's than if a judge does it?

Col. CROUCH. Yes Sir. A judge is too far removed.

Col. RABY. On judges' suspension, you indicated no you did not favor them and stated your reasons, and you started to mention vacations. Who do you believe should vacate a suspended sentence?

Col. CROUCH. The commander, and I can just leave it at that. The commander who is the man that suspended it should be the man given the power to vacate.

Col. RABY. If a military judge who tries the case is ever given the suspension power, who should have the vacation authority then?

Col. CROUCH. The natural, the logical response to your question, in context of everything else we've said, is or that I've said, is the commander because he knows the welfare of the unit. However, should that provision be enacted, I don't believe you can do it without giving both at that point vacation authority. And in that I see some real problems as far as conflicts of interest between those two agencies and I see the Army putting the military judge and its system in possible conflict, or in risk of conflict with the commander and that's simply a set of circumstances that I really don't want us to develop. Would it be an everyday occurrence? Absolutely not. But the fact is that it would in my view, we would create that kind of a potentiality which I don't believe is something that we need.

Col. RABY. And you don't see that conflict as existing within the system now?

Col. CROUCH. Absolutely not. We have it focused in one area, that of the commander.

Col. RABY. In determining whether to suspend a soldier's sentence, would you consider personally any of the following important: Whether he had any previous arrest or apprehension records, civilian or military, whether he had any counselling statements from the subordinate NCO's or chain of command; whether he received oral or written reprimands; whether he received any extra training from the sergeants for various deficiencies; how responsive he's been to military orders and what his military bearing was during routine duties?

Col. CROUCH. You're mentioning the specifics that make up the character of his service in that unit and all of those things have to be considered as far as I'm concerned in trying to make some kind of a determination on suspension.

Col. RABY. Some people have testified before this commission that some court-martial members are selected who aren't the top quality officers of the command. When you're selecting court martial members, just how important do you consider that duty and what type of officers do you generally select? Are most of your officers inherently qualified under the law just by meeting qualifications of being officers?

Col. CROUCH. I'm going to take longer with this one than you want me to, but now that you brought it up. The natural response that should come from me is of course that's very important duty for a man to perform and I'm interested in maturity and judgment, length of service and character and so on when I select someone. As a matter of fact what I'm doing is I select someone whom, I have nothing to say about the assignment system but when I select someone to sit on a court I'm saying that I've selected this man and my judgment is on line for that and the way he performs this function as a member of the court-martial, his objectivity, his maturity, his ability to articulate a question, to consider all points of view and to render some kind of a decision is an extension of my judgment.

Now if I'm short sighted enough to be expedient in the selection of a court martial panel, then what I do is undermine in my view my own authority, so I shoot myself in the foot, particularly in the 2d Cavalry Regiment where I just had to go through this and appoint a panel that I could ill afford to put some of the people on there that I had to, however I wanted folks that were the most seasoned, experienced and mature officers that I could find in the Regiment to sit on that panel for the welfare of the Regiment, and that's as serious a duty and as serious a decision I believe as I have. I've told you a lot more than you wanted to hear, but I really feel that.

Col. RABY. My final question to you, Bill, is, across the board, how do you think the military justice system is working now? Is it supporting the commanders and do you have any areas you think should be looked at other than what we've discussed today?

Col. CROUCH. Hopefully I've been able to articulate a sense of satisfaction. The system works. It has a tremendous amount of, a tremendous number of protection devices in it I'm satisfied with it. Sure I'd like to fine tune probably some parts of it. Were I given the opportunity to try and sit down and figure out ways to do that, but

given the system that exists to support a military operation which is something that is designed to function in the extreme and then give it some kind of a legal authority, I think it's doing very well.

Col. HEMINGWAY. In view of the time I'm going to ask our next two commission members to pass.

Capt. BYRNE. I'll pass.

Mr. HONIGMAN. I'll pass.

Col. HEMINGWAY. Thank you very much for your views.

(Whereupon, a brief recess was taken.)

Col. HEMINGWAY. Our next witness is Lieutenant General Lindsay, the XVIII Airborne Corps Commander, Ft. Bragg.

TESTIMONY OF: LIEUTENANT GENERAL JAMES J. LINDSAY, COMMANDER, XVIII AIRBORNE CORPS, FT. BRAGG, BEFORE THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION AT WASHINGTON, D.C. ON JULY 20, 1984

Lt. Gen. LINDSAY. I understand Jack Galvin talked with you yesterday.

What I'd like to do, just so everybody knows where I'm coming from, I'll paraphrase the statement I put together here on these issues as I see them and if I don't see them correctly, enlighten me.

But thank you all first for the opportunity to come here before you today.

I'm going to limit my comments to those with which I have some familiarity, and let's talk first about the changes in the military judge's authority.

I do not believe it would be in the best interest of the Armed Forces to place all sentencing power or the power to suspend sentences in the hands of military judges. The Uniform Code is not really a system of criminal justice, it's a tool for discipline within the military. And I think right now the tool is finely balanced and I don't think we ought to change it just for the sake of appearances.

I believe the proposed changes, while they probably are good in a cosmetic sense will not aid significantly in improving the system and could or will on the other hand—As far as the maximum sentence from the special court-martial, I believe it ought to be extended from six months to one year. I think it would fill the current void between six months and one year. Moreover, I think the convening authorities would take greater advantage of this one year sentence because of the savings in time and assets which accrue to simplify the procedure such as no Article 32 investigation. A one year maximum sentence would give us greater flexibility.

As far as tenure for military judges is concerned, it appears to me this is another proposal aimed more at appearances than at curing any substantial ills or problems. I'm not aware of any specific problems in that regard. In fact I see the current Army system in the military judge assignment as a form of tenure anyway and I don't think, as you've probably heard from other people here, that we ought to fix up something that isn't broken.

The final point as I saw them is the retirement system. The retirement system for judges on the Court of Military Appeals is beyond my competency. Maybe there are some other things beyond my competency, but that's one I know is beyond my competency, so I'm not prepared to talk to it.

And those basically, that's where I come out on the issues as I saw them.

Mr. HONIGMAN. General, my name is Steven Honigman. I'm in a private practice of law and I was a former Navy judge advocate.

General, you've addressed the specific questions before the commission and let me start with a broader question. Are there any aspects of the military justice system that you believe merit revision or change, improvement?

Lt. Gen. LINDSAY. I'm sure if I give it some thought I might come down with some things but in the broad sense I'm very satisfied with this system as I see it now. I've been in the Army 32 years and I think right at this point in time we're probably in as good a shape as we've ever been.

Mr. HONIGMAN. Let me focus on one specific issue. Do you believe there should be any change or increase in the commander's authority under Article 15?

Lt. Gen. LINDSAY. I'm just reviewing in my mind what you do under Article 15.

(Pause)

Lt. Gen. LINDSAY. No, I'm reasonably happy with that. If I could philosophize for a minute, I don't think commanders at company, battalion levels, use Article 15 the way it was originally intended to be used, that is we have correctional custody and that sort of thing and I don't see that being used.

I see in the past, anyway, and I have to harken back to my experience more as brigade commander because at the general court-martial level, particularly at the corps level, I don't deal on a day-to-day basis with some of the things I did as a brigade commander. But looking back over the last ten years or so I felt that there has been a tendency sometimes on the part of young commanders especially to let things go too long and then certainly be a court-martial.

Mr. HONIGMAN. Let me turn to the Court of Military Appeals. From your perspective as a commander, do you believe that the Court of Military Appeals has been rendering fair and reasonable decisions with the proper sensitivity toward military conditions?

Lt. Gen. LINDSAY. First, I probably haven't read enough on their decisions to give you an accurate answer on that, but those with which I am familiar, what I have read, my primary source being the Army Times, I would have to say I have no—

Mr. HONIGMAN. One proposal we're considering that has been suggested to us a number of times would be to increase the number of judges on the Court of Military Appeals from three judges to five judges in the interest of promoting a greater stability of philosophy, a greater institutional respect for precedent. Do you from your perspective as a commander believe that is a change that has merit?

Lt. Gen. LINDSAY. From a spur of the moment answer, no I don't. I see no reason why three people can't do just as well as five.

Mr. HONIGMAN. Let me turn to the question of suspension power.

I believe in your statement you said that it would be a mistake to place all sentencing power and all suspension power in the military judge. Can you give us your view of the system in which the military judge and the commander would each have the power to suspend all or part of a sentence?

Lt. Gen. LINDSAY. I just in that regard think the commander is in a much better position to know what's going on in the unit. He has probably a better appreciation for that individual soldier in the background, and that combined with his knowledge of conditions in the unit, I think he's in a better position to make that call than a judge is.

Mr. HONIGMAN. Can you give us some idea of the number or the frequency with which military judges in units are conducting court-martials of individuals under your command recommend that all or part of a sentence be suspended?

Lt. Gen. LINDSAY. I've just been back in the corps now for about three months and in the three months I've been back I haven't seen any recommendations in that regard.

Mr. HONIGMAN. With respect to tenure for military judges, and we've been defining that as a guaranteed term of office of some indeterminate length. Your view as I understood it is that it would address the appearance but not the reality of the current situation. Do you think there's any harm in a cosmetic change that increases the appearance of a military judge's independence on not changing underlying reality one way or the other?

Lt. Gen. LINDSAY. There could be, I'm not saying there would be. When you say tenure then we get into how long are we talking about.

Mr. HONIGMAN. Let's assume that there's a term of office that's exactly the same as the current expected term of office that now applies, a three year tour as a military judge. Would there be any harm in adjusting the appearance to correspond to the reality?

Lt. Gen. LINDSAY. Superficially I'd have to say no, but you could in fact if you had an absolute iron-clad guarantee that the guy would stay there, develop a situation where you had a very capricious or arbitrary judge who would take advantage of that situation. Of course that could exist now.

Mr. HONIGMAN. Are you aware of any situation?

Lt. Gen. LINDSAY. No, that was one of the questions in the survey and I'd have to say I haven't agreed with every decision I've seen over the number of years, but nor have I disagreed with every decision I've seen by a board. No, I haven't personally seen any.

Mr. HONIGMAN. In terms of extending the power of a special court-martial from six months to a year, in your view, would there be a possibility of, I guess what I would call a sentence inflation in which an offense that now seems to be worthy of two-thirds of the maximum sentence and which now would receive a four month sentence, would instead become a greater sentence because of the one year maximum?

Lt. Gen. LINDSAY. I couldn't say flat out that danger would not exist, but I personally don't think that would happen.

Mr. HONIGMAN. Thank you.

Capt. BYRNE. General, my name is Captain Byrne. I really think I have two questions.

One is, when you stated that you thought selection of military judge only as the only option for sentencing would weaken the disciplinary role, now as I understand the situation now the accused and his counsel presently have an option to elect, they can either decide based on their analysis of quite frankly which is the best for the accused, the military judge or members to elect. And if I was representing an accused I would choose that election in such a way as to benefit the accused's interest.

Now sir, with that being the circumstances, if the accused did not have an election that would mean that the military judge would be the only sentencing authority. Now he would have an election as to findings yet. He could still elect members with a military judge, but in your view, can you elaborate then how that weakens the disciplinary role of the commander when the accused has taken the election?

Lt. Gen. LINDSAY. First of all, I feel that bringing members of the chain of command or members of the organization into the process, and I heard the Colonel that was here was more articulate that talked before me, I just think the unit is involved and I don't know what percentage of the cases come up before us wherein they request a judge only. But again, it's part of tradition, it's a whole lot of things, but I just feel that that option should be there and in my experience I believe and I

have my JAG sitting over here, what percentage of the time do we opt for judge only?

Col. DOWNES. Most of the special court-martials I ran back over a month period here just recently, most of the special court-martials requested judge alone. The GCMs we've had have not ever requested judge alone and we're not talking about that tremendous amount of cases, we're talking about probably five per month.

Lt. Gen. LINDSAY. And there again when you talk to a general court-martial, 100 percent want a jury if you will.

Capt. BYRNE. I have another question. It may not seem evident where I'm going from the question, but to me it is relevant.

I'm going to go into a little bit of perhaps a sensitive subject in the Army right now, urinalysis. Before the Court of Military Appeals reversed their prior decision and decided that urinalysis was proper, do you believe that urinalysis was necessary insofar as the military is concerned?

Lt. Gen. LINDSAY. Absolutely.

Capt. BYRNE. And it was therefore necessary before the court changed their mind?

Lt. Gen. LINDSAY. Correct.

Capt. BYRNE. Thank you Sir, that's all I have.

Col. RABY. Sir, when you're selecting court martial members, what type of mix do you use? Do you use staff officers, commanders, a mix?

Lt. Gen. LINDSAY. I try to get a cross-section. In fact you ask the question, I just finished doing that last weekend and as I recall I was looking for eight officers and I went two 06's, two 05's, two 04's and two Captains to try to get a vertical cross-section and then I spread it. I think it worked out about half and half, commanders and staff. I know different people take different approaches to that. In fact my predecessor tended to lean away from commanders and I think the reason for that was it is timely to be on the court but I feel that it's important to have again the whole spectrum of the command represented, so I try to get a balance. It's 60–40 one way or the other. Somewhere it's in between a 60–40 range one way or the other. And the same thing is true with the section of enlisted members. They range from Sergeant Major down to Platoon Sergeant. I get a cross-section.

Col. RABY. You say it's important to have a cross-section. Why is it important to you?

Lt. Gen. LINDSAY. Well because I think one, the more experience you have both ways on the board the better. Let me rephrase that. The Command Sergeant Major in the Army and the Commander, of course are on the—if you will. They—the organization and that's probably going to be foremost in their mind. I find in many cases the staff NCOs and staff officers on the other hand provide a little more balance in terms of, I'm trying to think of the right word to use here. I don't want to say are not as hard-nosed, that's not the word I'm looking for, but in other words when I say commanders and staff, I'm also trying, at this level, the level that I have right now, I don't know these individuals personally. As a special court-martial convening authority, I knew them personally and I could do an even better job. In this particular case I'm trying to get a balance of people who look at the individual and the nature of the unit if you will.

Col. RABY. In other words what you're seeking is a court that will give a balanced, fair result?

Lt. Gen. LINDSAY. Yes. There's no guarantee that that particular process that I use will, but I think it's the most representative I can come up with.

Col. RABY. Suppose we had, I'll give you this hypothetical. We have a soldier that commits, we'll say an act of disobedience, and he's tried, well let's say a BCD Special, and he gets a bad-conduct discharge and three months confinement adjudged by a court with panel members. And let's take the same scenario where you have the same soldier, same offense, he gets the same sentence, but by a military judge, and this sentence is announced in the command. The impact of the sentence, is it greater in terms of deterring other soldiers or does it catch other soldiers' attention more if it's announced by military judge or by members, or is it about the same?

Lt. Gen. LINDSAY. I'd have to say I think about the same.

Col. RABY. Under the present system the soldier can request trial by judge alone as you know, in which case the judge determines both the guilt and the innocence and adjudicates the sentence, or it can request members either all officer or enlisted personnel if he's enlisted in which case the members judge the guilt or innocence and the sentence. Do you have any perceptions concerning how soldiers in your command or your senior NCOs feel about this option and what their reaction would be if we changed it and made sentencing mandatory by judge alone? Would it have any impact at all?

Lt. Gen. LINDSAY. In terms of the perception of the soldiers of the system?

Col. RABY. Yes.

Lt. Gen. LINDSAY. I think that they would like to have that option. I think they would feel it's more beneficial for them, the individual soldier, to have the option of going the other way.

Col. RABY. Is the perception, and I ask this, well, is the perception of soldiers important concerning military justice system important in the overall morale?

Lt. Gen. LINDSAY. Absolutely.

Col. RABY. A final question. Some people have said that if judges do all the sentencing then there is no reason why the Army could not go to a system of

random selection of jurors. That is instead of a convening authority selecting the court membership, taking into account what officers are available, what their missions are, that we'd maybe go to some system by computer or something else where a certain number of names would be drawn out or some other system of random selection.

Do you have any views regarding random selection of jurors and how it would impact on your mission as a commander in peace or war, say especially 82d Airborne?

Lt. Gen. LINDSAY. I would think that would be a very fool way to go. I would suspect a good percentage of the time you'd probably come up with a jury that was fair and balanced and so forth, but I have a lot more confidence if I know the commanders are involved in picking a jury than a random system because there's always that time when you will come up with some group that is totally out of balance one way or the other, either in terms of substandard soldiers, if you will. I have not looked at this in any detail. Would this random selection be based on a certain percentage by rank and years experience in the service, or would it just be totally random?

Col. RABY. The people that have proposed the system haven't really said what they think it should be. It could be either.

Lt. Gen. LINDSAY. There again, I think the current system works pretty darn well. I don't see what you would gain by going to random selection. I think administratively it would pose some unique challenges for you.

Col. RABY. Your questionnaire did cause me to think of one more question I'd like to ask, and then there was one that I forgot.

Sir, you've been in the Army for over 30 years. Have you ever, well in recent years, say in the last 10 years, are you aware of any commander that has attempted to jury rig a jury, a court member panel to get a certain result?

Lt. Gen. LINDSAY. No.

Col. RABY. If one of your subordinate commanders did that and it was proven to you that he did it, what would your reaction be?

Lt. Gen. LINDSAY. I'd obviously have to take some form of disciplinary action. I'm not sure what that would be, but I'd have to do something.

Col. RABY. One other thing that I ask only because the question came up earlier about Article 15s, and this pertains to the Army's filing procedures, sometime ago when we changed the regulation, the Department of the Army, they put the determination as to whether Article 15s should be filed in efficiency portion or a restricted portion of the OMPF in the hands of the commander imposing the punishment to power down or whatever. What's your view as to how that works?

Lt. Gen. LINDSAY. That was a very good move and we made a serious mistake when we were mandatorily filing because I saw at least in my experience a reluctance on the part of the company commanders to give Article 15s for that reason, whereas some commanders who are a little more hard nosed just kept driving on and as a result I think we had a real imbalance in the military as far as some soldiers just, based on the circumstances of where they were, ended their career early, where others having equal ability tended to move on up because a commander took a different approach. So right now the option we have I think is a good one.

I personally think we ought to go back to where we were before, they ought to be filed.

Mr. RIPPLE. Good morning, my name is Kenneth Ripple. I'm a Professor of Law at Notre Dame. I just have a few questions.

You indicated you would be in favor of enlarging the jurisdictional limitations on a special court martial so it could impose a one year sentence. If the Congress were to make such a change, would you foresee the necessity for any changes in the qualifications of the special court-martial military judge? In other words, how comfortable would you be with having a senior 03 or 04 officer sitting alone as military judge impose a year's confinement on one of your soldiers?

Lt. Gen. LINDSAY. I have no problem with that. I think the difference between six months and a year in the particular context is not so great that it would require any experience.

Mr. RIPPLE. As a followup question to that, do you think a military judge at that level has more experience, qualitatively, do you think he gives a better sentence than a court-martial gives composed of officers of comparable rank?

Lt. Gen. LINDSAY. That's a hard question to answer. The boards have problem with reasonable doubt and they have problems with other things whereas when it comes to sentence, it all tends to work out in the end I guess is what I'm getting at. I don't see a hell of a lot of difference, quite frankly, but I know a board is one thing, a judge is another. When it comes to the findings and when it comes to the sentence, they both tend to work that out in the process.

Mr. RIPPLE. As a commander, do you think there ought to be a mechanism and if so what kind of mechanism, by which you could make your views known if you felt that a military judge's service in your command was simply off base with respect to either his findings or indeed his sentence determinations? In other words you felt he was grossly too lenient in his sentencing or you felt that many of his rulings were simply grossly erroneous.

Lt. Gen. LINDSAY. I haven't had to face that one but I think right now I have the option to write to TJAG or any other—I'd go to the Inspector General and complain about it, I guess. And what they do I'm not sure.

Mr. RIPPLE. You feel there should be some mechanism by which you can formally and above board do that?

Lt. Gen. LINDSAY. As I say, I'm not sure the mechanism isn't there now in the normal chain of command. I don't know. But again I haven't had to come to grips with that one yet. And I'm sure, were I to find myself in that situation yes, I'd like a means of coming up and saying this guy is off base.

Mr. RIPPLE. You have the same problem with the ambiguity of the situation that all of us have. It is an area of some ambiguity as far as how it ought to be handled. Would you feel any different about it, or would you feel a different mechanism ought to be used if we were talking not about the judge's judgment,—sitting as a judge, but a matter of physical or mental infirmity or a matter of his fitness in terms of a moral fitness to sit as a judge or something of that nature. Would you think we should have a different kind of a system for investigating those matters?

Lt. Gen. LINDSAY. I'm going to display my ignorance here. I would assume that someplace in the system right now if we had a situation like that we'd have some means of addressing it. So I gather by your question you're inferring we don't.

Mr. RIPPLE. It is a matter of some ambiguity as to how it is handled or at least ought to be handled and that of course does impact on the tenure question.

Col. RABY. If I may interrupt for a minute, the Army does have certain regulations regarding professional misconduct and I'll get a copy of those regulations and provide them to the commission.

Mr. RIPPLE. I think we should have those because they do impact on the question.

Capt. BYRNE. The Marine Corps may also have some.

Mr. RIPPLE. They all deal basically within the JAG framework. That's why I asked the question. Are you satisfied with the JAG handling those matters?

Lt. Gen. LINDSAY. Again, not having had to face one of these things in a real world situation, I haven't given it a lot of thought, but if the problem was of serious nature or an adverse effect on my command, I would definitely want to be personally involved.

Mr. RIPPLE. Thank you.

Mr. STERRITT. I'm Christopher Sterritt and I'm from the Court of Military Appeals. I have three questions to ask you. One is a general question.

With respect to Court of Military Appeals opinions, regardless of whether you agree or disagree with those opinions, do you believe that opinion should have any effect on the retirement provisions that Congress provides for those judges

Lt. Gen. LINDSAY. I'm not sure I understand what you're saying.

Mr. STERRITT. Let me bring it down. Do you believe that the retirement provisions which this commission is studying for the judges of the Court of Military Appeals, do you believe a decision with regard to what those provisions might be, in other words, more money or less years or something like that, should have anything to do with the nature of the opinions that this court issues?

Lt. Gen. LINDSAY. It's a totally separate and unrelated matter.

Mr. STERRITT. Now the two other questions are, I think related in calling your experience as a general court-martial authority.

What input does a subordinate commander under you who is the commander of the unit where the accused comes from, what input does he have with respect to your decision to suspend or not suspend accused's sentence?

Lt. Gen. LINDSAY. When I get the transcript back, the defense attorney has a clemency that will be on there and obviously he's going to pick up the phone and call me if he wants, but as far as a formal written document, I don't believe we have anything set up in the board headquarters right now where he formally comes in, I'm just trying to visualize in my mind what I get to as I go through that layer of paper. No, right now there is no formal means for him to do that, but if I have any questions after I read the matters in extenuation and mitigation and I want his opinion then I can obviously call him.

Mr. STERRITT. Have you had experiences in the past where people, local commanders or subordinate commanders, have complained to you about a decision on your part to suspend a sentence?

Lt. Gen. LINDSAY. Not as a general court-martial convening authority. I have a special court-martial convening authority in that I found a unique situation in the early '70s. You know the Army was in a rather, I don't want to use the term chaotic, but we were having our problems. We also had developed a generation of leaders at the company and battalion level. This experience was in a very turbulent time in the Army, in combat in Vietnam and coming in and out and so forth, and their inexperience caused them sometimes to do some things that I didn't think were all that wise. So I would find myself getting far more involved in judicial matters and getting involved, and I wouldn't suspend it on occasions when they just felt very strongly, but I would try to do the special court-martial convening authority was to get some balance across the command so you didn't have

one over here and one over there. But I did—at that point in time.

There's a general court-martial convening authority, as a division commander, it was rare that I had to get into that because we had a much more mature, more stable leadership. We extended command, tenure, to two and a half to three years and we also sent everyone to Charlottesville down here, a totally different environment in the early '80s as compared to the mid to late '70s.

Mr. STERRITT. Thank you, Sir.

Col. RABY. You mean The Judge Advocate General's School? The senior officer legal orientation?

Lt. Gen. LINDSAY. Yes. That in itself is probably one of the smartest things we've done.

Early, and I guess it was in '73, we started sending Colonels there and then we backed it off to Lieutenant Colonels and now everyone going into commands.

Capt. STEINBACH. General, you were discussing the mechanics of the court member selection process. As the general officer in command, you have the authority to delegate your article 15 authority to principle assistants I believe, unless the manual makes a distinction between—service of the Army. Have you delegated that or do you handle Article 15s yourself?

Lt. Gen. LINDSAY. In my particular situation I have three division commanders who are general court martial convening authorities and they take care of their respective divisions. I've only been a corps commander for three months and I'm trying to envision how that works. I think general—

Col. DOWNES. No Sir, you have it.

Lt. Gen. LINDSAY. It's not come up. I haven't had one in three months.

Capt. STEINBACH. Where I'm going is to ask you if you've delegated that. I'm thinking in those lines to ask you if that responsibility or the duty of court member selection is any more severe, arduous than the Article 15 authority exercise? Leading to this, if you could delegate your authority to select court members, would you do so?

Lt. Gen. LINDSAY. No.

Capt. STEINBACH. Then you view it as more than an administerial task?

Lt. Gen. LINDSAY. I guess all commanders take a slightly different approach to that but that's something that I've always done and I feel, as I say it's a little more difficult for me now as a corps commander than as a division commander. I had pretty good knowledge of the people I was selecting for special court-martial. I had a very good handle on the personalities involved. Now it's more remote. I look at the names and some of them I know, most of them I don't. And I have a judge provide me with their ORBs and I look through them and if I have a question about a particular individual, and I guess it doesn't take over three or four hours to go over this thing and make a selection.

Col. RABY. When you say ORBs, you mean Officer Records Briefs that have all the personnel data about the officer?

Lt. Gen. LINDSAY. Yes.

Capt. STEINBACH. Just as a sidelight issue here,—authorize the delegation to someone of the authority to excuse court members for certain reasons. Is that something that you consider as inhibiting or causing problems in the process of court member selection in your view? Do you want to delegate that or do you think it should be retained?

Lt. Gen. LINDSAY. I retain that. I had that as a division commander for two years and I didn't find that a burdensome thing.

Capt. STEINBACH. You mentioned in passing, someone brought up Article 15s and the distinction between filing in different places. You made a comment you felt we should go back to where they used to be.

Lt. Gen. LINDSAY. I don't even know if we should file Article 15s. That's just a personal opinion.

Capt. STEINBACH. Can you give me some background as to some reasoning?

Lt. Gen. LINDSAY. Of course now you have the option, but, and I was probably influenced in making that statement by what I perceived as a period of time where we just, things really got out of balance because we just weren't giving Article 15s. All of a sudden you find yourself before a court-martial because we were reluctant to forego the Article 15. I'm trying to figure out how to articulate my views here because I look at drunk driving as an example, a soldier coming out of Europe. Of course we fix this with everybody gets a DUI now, gets a letter in their file. At one time a letter, a soldier who got a DUI in Europe automatically got out which invariably would—A soldier in the United States, on the other hand, would pick up a private entity influence, go before magistrate and nothing ever ended up in his file. That's the sort of thing I'm talking about although I do think that particular problem has been sorted out, but I'm sure there are other analogous situations that would be the same and that's where I don't know, philosophically I'm not sure we need to put Article 15s in the record. I don't have any strong feeling. In fact I don't know the system we have right now has the option, may have solved the problem.

Capt. STEINBACH. You're talking about inconsistent treatment rather than excessively adverse consequences?

Lt. Gen. LINDSAY. Yes.

Col. MITCHELL. General, with respect to this question of tenure or guaranteed term of office for military judges, I'd simply like to ask you some basic questions.

First of all, is there any way that you as a corps commander can effect the salary that's paid to the military judge?

Lt. Gen. LINDSAY. No.

Col. MITCHELL. Is there any way that you as a corps commander can effect the grade of a military judge?

Lt. Gen. LINDSAY. No.

Col. MITCHELL. Is there any way as a corps commander can effect legitimately or otherwise the potential for a promotion of a military judge?

Lt. Gen. LINDSAY. No.

Col. MITCHELL. If the Congress provided a guaranteed term of office for whatever length it may be, do you feel that that would have any impact whatever on, well let me rephrase it and make it a little better.

If such a provision were enacted, would such a provision be any guarantee in your mind that command influence would be in any way curb—

Lt. Gen. LINDSAY. Again I have to go back, I don't think command influence is a problem right now so we're not curbing anything. As I indicated when I started out, I think it would be a cosmetic improvement because it would make our system look more like, you know, the federal—

Col. MITCHELL. Do you see any way, if you could just imagine there is some command influence around somewhere, can you see a provision which simply guarantees a judge whom you cannot effect by salary, promotion or grade, that the tenure provision itself is going to provide any protection against the command influence?

Lt. Gen. LINDSAY. It's not going to do anything that's not already there.

Col. MITCHELL. In respect to the questions raised by the Court of Military Appeals representative concerning Court of Military Appeals retirement, and you observed you didn't think there was any real connection between that and the opinions of the court, that they're separate matters. Let me explain something and ask you the same question again.

Lt. Gen. LINDSAY. You want me to change my mind?

Col. MITCHELL. No, I just want to get your opinion.

(Laughter)

Col. MITCHELL. I think off the top of your head you might not have been aware of the potential problems that may or may not exist. If the Court of Military Appeals for the judges up there at 15 years, and if you knew that to qualify for substantial retirement he has to serve 20 years, so if there had to be an intervening reappointment of the same judge in order to qualify for retirement, there is a potential in that system for a judge who is appointed to the Court of Military Appeals to feel while he may work on the court as a for lack of a better terminology, a screaming activist, he just wants to remold the whole Armed Forces law system into something totally different, but as he moves toward that point where he needs reappointment he suddenly says wait a minute, the political environment does not favor my thinking at this time. I'd better change, and then subsequently changes and then reverts after his reappointment. Do you think that kind of a retirement system then is a wise idea or should the retirement system simply preclude that sort of potential?

Lt. Gen. LINDSAY. You're saying the current situation, again the 15 years, the 5 years, the 20 years, you threw me in there. I realize, as he realizes he's got to get five more years—

Col. MITCHELL. He'd have to get five more years and the potential for that knowledge of a reappointment against the political realities—

Lt. Gen. LINDSAY. Would cause him to compromise his principles?

Col. MITCHELL. To cause him to compromise his principles And while it may be easy to say for folks in the military that somebody who is bent upon remolding our system to our dislike perhaps, we might say well that's a good idea. Postulate the circumstances where the judge is of the opposite persuasion. He wants to maintain or even regress and the political environment at the time is just the opposite. Should that retirement system be such that it could effect the quality and the independence of that man's judgment?

Lt. Gen. LINDSAY. As I indicated earlier, I think they're two separate unrelated matters because I think, I guess I could have more confidence in human beings. I don't think somebody is going to be that influenced by whether he's going to get five more years to gain retirement benefits, I don't think it's going to sway him or change his basic views on life. If he's an activist he's going to be an activist. I really don't see a problem.

Col. MITCHELL. You feel strength of character alone at that point is going to carry beyond that influence?

Lt. Gen. LINDSAY. Yeah I do. If it doesn't then there's something wrong with the basic selection process.

Col. MITCHELL. In commenting on your general satisfaction with the court-martial system, you didn't really get into much specific and I don't want to either, I'd like to ask you perhaps more as a division commander than a corps commander, whether you were satisfied with the speed of the review process in general?

Lt. Gen. LINDSAY. I'm just trying to think of some specific cases and I can't off the top of my head. I'm sure like everything else we do it's slow, but beyond that I couldn't comment.

Col. MITCHELL. If the addition of two more judges to the Court of Military Appeals could somehow speed up the review process would you see that as an advantage?

Lt. Gen. LINDSAY. You talked to that earlier. I'm not sure that the addition of two people would.

Col. MITCHELL. Assuming that it would, would you favor it then?

Lt. Gen. LINDSAY. Yes. I hadn't thought of that aspect of it, if it speeded up the process, but I'm not sure that adding two people would do that.

Col. MITCHELL. How important is speed of the review process to the military commander?

Lt. Gen. LINDSAY. It's a relative question. The sooner you get things wrapped up, tidied up, put aside, to drive on to something else the better off you are.

Again I'm trying to think of the time as the division commander if I had any problems with this, if it caused me any problems as a commander, and frankly I can't think of any.

Col. MITCHELL. When a commanding officer decides whether or not he wants to suspend a sentence or for that matter when court members deliberate on a case, are there intangibles which are inherent in the decisions of those people that—through the command and the unit of the accused, that you feel a military judge is simply not in communication with?

Lt. Gen. LINDSAY. Probably, and there is some good and bad about that. We were talking on the way up this morning about a case of a young soldier that just beat the devil out of a girl and attempted rape and it was tried by a board of enlisted personnel, and there was no doubt, all you had to do was look at the pictures of this girl, this guy beat the hell out of her, but the fact that she had been in a place where they had male dancers, male go-go dancers or whatever, caused the board to question you know, well what kind of person was she. I just think a military judge would have seen beyond that very quickly and got to the real issue at hand. So as a result the guy got a BCD and served no time. I think the judge would have given him some time. That's one side. On the other side, I think a panel, members of the unit, take into account the standards of the unit and a lot of other things like that, the overall effect on the unit, and that to me I think is very important.

Col. MITCHELL. Is that something which is in your judgment demonstrable of evidentiary proof in one form or another? In other words some people suggested that these intangibles may exist. It's not an argument against allowing the military—information can be brought in and considered by the military Lt. Gen. LINDSAY. No, that' not something to bring in and lay before somebody. You've got to be there and feel it.

Col. MITCHELL. Thank you.

Col. HEMINGWAY. General Lindsay, we've had some witnesses who have come before the commission and urged that the military justice system should be aligned very nearly as possible with the civilian judiciary system. Do you see any danger in doing that?

Lt. Gen. LINDSAY. I don't think, first of all, that we have to be that closely aligned with the civilian judicial system because first of all the military is different. As you and I were talking before we started, I was talking to someone recently about the drug problem in the military and they were saying well you know, the military as a reflection of society produced it. That's true, but the fact is that the taxpayer expects a hell of a lot more from military, from a military organization than they do of society as a whole and so we don't necessarily have to be a mirror image of the society from which we come. We should be an efficient and effective military organization which is what I think the national command authority and the public expect.

Col. HEMINGWAY. You as a commander indicated your general satisfaction with the judicial system. Do you perceive that the enlisted personnel in the Armed Forces are equally satisfied with the fairness of the system?

Lt. Gen. LINDSAY. Yes. I make it a habit once a day, as long as I'm within my weight limit, of getting down, getting into a mess hall and eating with the soldiers, and I'll pick a table at random and I always ask them, tell me the dumbest thing we've done at Ft. Bragg or in the 82nd or wherever in the last week or so, or the dumbest thing you can think of. And you know, I've been doing that for years, and I've never once had a soldier complain to me about the judicial system.

Mr. HONIGMAN. What do they complain about?

Lt. Gen. LINDSAY. They start off with the food and we go from there.

Col. HEMINGWAY. General Lindsay, thank you for your time and sharing your thoughts with us today.

(Whereupon, the hearing was adjourned.)

Col. HEMINGWAY. Gentlemen, our first witness this morning is Major General Oaks, the current Chief of the Personnel Plans Division at Headquarters, Air Force.

General Oaks, I understand you have a prepared statement.

Major Gen. OAKS. Yes I do.

I appreciate the opportunity to come and express opinions before this group, and I do have a prepared statement. I have a copy of it that I gave to the reporter.

(Statement of MG Oaks follows:)

TESTIMONY OF: MAJOR GENERAL ROBERT C. OAKS, CHIEF, PERSONNEL PLANS, USAF, BEFORE THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION AT WASHINGTON, D.C. ON 27 JULY 1984

Major Gen. OAKS. I am Major General Robert C. Oaks. I'm currently the Director of Personnel Plans for the Air Force on the Air Staff and I do appreciate the opportunity to appear before you today and discuss various proposed changes to the military justice system. I'll just briefly cover my background and military experience so you'll be able to evaluate better the inputs that I might have.

I have over 25 years of active service, including a combat tour in Vietnam. I am a Command Pilot with over 3000 hours of flying time, mostly in fighter aircraft. In addition to serving in various operational staff positions I've been a flight, squadron and wing commander. In my present position I am responsible for all aspects of personnel planning and policy and for assuring the Air Force has the quantity and quality of trained, motivated people necessary to meet its mission in either peace or war.

From my command experiences I know the key role the military justice system plays in enforcing the discipline and good order necessary to maintain mission effectiveness. From the perspective of my current duties, I know the value of the military justice system in maintaining a quality force of dedicated, disciplined airmen. Thus, I am vitally interested in any changes to our military justice system, a system that I believe has served us well. We must insure that any revision to the current system does not hinder the military commander in maintaining good order and standards of discipline within his or her command; nor can we permit any infringement upon the rights of an accused military member. And I want to emphasize that because I think often we overlook that aspect of military members, their long term good, and served by giving proper and careful attention to the rights of the accused. And sometimes we're perceived that way and sometimes we do tend to lock on the crime rather than the accused and the rights of the accused. So that has to be paramount to consideration in any proposed adjustments to the UCMJ.

With these views in mind, I will now address the specific issues under consideration by your commission.

Sentencing by military judges in all noncapital cases. I do not believe the proposal to have the military judge impose the sentence in all noncapital cases is appropriate. I would deny the accused an option available today, i.e., to select sentencing as well as trial by a court of officers, and when requested, enlisted members. I suspect the elimination of this option would be perceived as a degradation in the fairness of the military judicial system. I am also not convinced that more consistent and appropriate sentences would necessarily result from judge alone sentencing. Likely, there would still be sentencing disparities when cases presenting similar facts are tried by different judges. It could also be argued that court members, comprised of members from the accused's command, may be in a better position than a military judge to determine an "appropriate sentence." These members are more aware of local conditions, problems and attitudes and the effect of the accused's actions on the military community than the judge might. Since the appellate process provides an avenue to mitigate inappropriate sentences regardless of whether they were imposed by court members or military judges, there does not seem, to me, to be a compelling reason to adopt a judge alone sentencing provision.

I'll move on to the next item, sentence suspension by military judges. I do not concur in a change that would provide for suspension of sentence by military judges. Military judges are not in a position to assess the effect on discipline, morale and good order that retaining a convicted military member would have on the command. Only the commander can determine this. As opposed to civilian court jurisdictions, the military judge does not exercise supervisory control over the member serving a suspended sentence or over the person administering the convicted member's probation. This is the responsibility of the commander and, as such, only the commander should have the authority to suspend sentences. Specifically, in the civilian community as opposed to military, there is not a single person responsible for the overall conduct of life and good order and discipline such as the commander, and so the commander poses an option, an opportunity, that is not available in civilian jurisdiction.

The third issue, expansion of special court-martial jurisdiction to allow imposition of confinement sentences for up to one year. From my perspective as a commander, I am acutely interested in resolving criminal offenses perpetrated by members of my command in the most expeditious and least costly manner possible—while providing all due protections to the accused. With this in mind, I support expanding special court-martial sentencing authority to one year. Currently, the stringent limitations on special court-martial sentencing authority often forces an accused member into a trial by general court-martial and the vulnerability of a more severe punishment than may otherwise be warranted, including a dishonorable discharge and forfeiture of all pay and allowances. Today, if the offense warrants confinement between six months and a year, there is no choice but to pursue a general court-martial. The proposed change

would reduce the requirement for lengthy and expensive general courts-martial, but would not, in my opinion, compromise the protections and rights afforded the accused.

Tenure for military judges. I see no value or gain in changing the current policy for assigning military judges. Although the Judge Advocate Generals of the services are in the best positions to address the tenure issue, I believe the practice of rotating military judge duties with other judge advocate responsibilities has been effective. We have no evidence that indicates the current assignment policies for military judges affects their impartiality. On the other hand, a tenure provision may limit the perspective of our judges by separating them for too long a time from field experience. I also believe we would stymie the professional growth and development of our Judge Advocates if a lengthy tenure was imposed on military judges.

Retirement system for judges of U.S. Court of Military Appeals. I am keenly aware of the role a viable retirement system plays in attracting and retaining qualified personnel in any system. In the military services, the retirement system is the number one career motivator. Without it, we could not maintain a standing military force. I believe the security afforded through a retirement program to be a major consideration in an individual's decision to accept a position in one's chosen career. Although I cannot personally address the specific elements that would be necessary to establish a fair and equitable retirement system for judges of the court of military appeals, I believe such a system would help insure the court is filled by qualified and dedicated judges.

And a related issue, although not included in my formal statement regarding the proposal for Article III versus Article I status of the Court of Military Appeals, I believe that that would be an inappropriate change although this issue is better addressed by the Judge Advocate folks. I believe the current status of an Article I court is appropriate.

For example, giving life tenure and expanding the jurisdiction of the court would not enhance the military judicial system.

This concludes my formal statement on the specific issues being reviewed by your commission. I'll be happy to address any questions that you might have at this time.

Col. HEMINGWAY. Colonel Mitchell?

Col. MITCHELL. General Oaks, if I might ask you sort of a philosophical question just to see where you're coming from on the question of sentencing by a military judge. When civilian society punishes somebody for violating one of its criminal statutes, it's fundamentally punishing that person for some criminal misconduct. In the armed forces it can be argued that the only real purpose for us punishing somebody for violating the law is disciplinary, that is, members of the armed forces must follow orders, whether they are orders given by other personnel or whether they're standards such as "Thou shalt not kill", because in combat, folks that violate those rules become war criminals, even though the same misconduct may become a violation of civilian law.

If that's a fair statement, is the disciplinary aspect of this question the thing which leads you to conclude that court members are really more, a more appropriate body for imposing sentence on offenders?

Major Gen. OAKS. Well the preservation of discipline within the armed forces, of course, I would concede the prime goal, and I think that goal could be met either way, either by judge sentencing or by military member sentencing. The discipline aspect of it is a complicated thing to talk about and to look at, but I believe first, discipline is enhanced when the system imposing punishment is perceived as fair and I believe that the perception of fairness is enhanced by our current system of having the individual have the option of either judge sentencing or court member sentencing, and that perception that I can choose my lawyer, my counsel, is going to help me make that decision, but finally I'm going to make that decision that I can get a better shake one way or the other. And depending on a lot of things, and of course those things play in the advice to the individual, but finally the individual is going to say I have an option where I can get the most fair decision, and that discipline that you talked about I think is enhanced in every instance when the individual perceives that the system is going to be fair to him. And providing him options I think is a general principle of enhancing the credibility or the appearance or perception of fairness.

If I give you a choice, then you make the decision, I think you are more likely to decide it was fair.

Col. MITCHELL. So you don't think, in other words, it is a matter of which entity is going to impose the most appropriate sentence. It's a question in your mind of an accused already having this right and you simply don't want to take it away from him because of the perception that he is losing something and because it provides him a benefit.

Major Gen. OAKS. That's the primary concern, is that perception of fairness. Now you have to obviously address the quality of the sentence, that is who has the ability to impose the really most fair sentence versus the perceived most fair sentence and I think you can argue that both ways. If you couldn't, we wouldn't be addressing it today.

But I believe that there is a value to have a fresh look at every case and I also believe that that option in fact makes the judge's decision if he's going to render it, more fair, because he knows he's being played off. If I know that I'm always going to sentence, I think there is a possibility that I would be less attentive to my respon-

sibilities than if I know I have an option. It's competition if you would want to put it in a fairly mundane way. It may be a disparaging way, but I know that if I don't do it right or if my track records runs, at the next case there's going to be, I'm going to give it to somebody else, i.e., a court. I can't evaluate the power of that particular argument but I just know in a general sense it's good for people not to realize I have absolute power all the time.

Obviously there is always the review process. I'm not sure that's an overpowering argument, but I think it is a consideration.

But also the third item to consider is that there are instances where in an organization the people on the court, the court members have a better sensitivity to what is the right punishment for that particular total set of circumstances, i.e. the whole sociology of the military court of that particular military organization. The judge I think in general has a good sense of that but I think that there are cases where the military members can do it better and be more fair in fact than the judge. Just because of their daily living in that existence. And the judge doesn't—

Col. MITCHELL. In respect to the choice matter, do you think it's a good idea to have a situation exist where the accused is really put in a position of having to guess which is going to be his lightest as opposed to the most fair sentence?

Major Gen. OAKS. I think they're one and the same. To him the lightest is the fairest. Very seldom do you get an accused who is found guilty who says the court crucified me. I mean to him, he just doesn't feel that way, and he feels that oh, they don't understand or I'm guilty and he knows he's guilty but they don't understand what drove me to it and to that individual the lightest is the fairest. Talking about the perception. And then you have to talk about well, how about society or the military organizations, what's fairest to that group? And I think the members have appropriate sensitivity to what's fair to the organization or to the military system, judicial system. That that's adequately protected.

Col. MITCHELL. In connection with the issue of tenure, based on your experience, if you were dissatisfied with a decision of the military judge, do you think there is any way you could affect the salary of that military judge because of your disagreement with his ruling or a decision?

Major Gen. OAKS. No, there is no way. I have been dissatisfied and I never gave a moment to the thought of retribution.

First of all there is administrative and organizational insulation that makes it impossible, and second, it's absolutely inappropriate. You know, we're so aware, first what's right, and generally a military commander is driven by a desire of what's right. But second, and I mean right from a total judicial view, not right in a particular case. We can have differences and we have differences of opinion on a particular case, but second, we're so attuned even if we didn't have a sense of that we are so attuned to what is inappropriate and you know, the Jack Anderson syndrome of let this get into Jack Anderson's column, that that would be so inappropriate and so damaging to the whole military structure for us to in fact undermine the credibility of the military court system, military judicial system by unwarranted, inappropriate influence over a judge's objectivity by threatening his status as an individual because of some finding.

Col. MITCHELL. Is there any way though, that you know of where if you decided that you wanted to take some kind of action that you could affect his salary or his grade or status as an officer or retirement entitlement? Is there any way you can really get to him in those fashions?

Major Gen. OAKS. No, there isn't any way. You look at the whole system of ratings and promotion boards, well let's take that out because that's certainly an appropriate thing to expand on in some detail. Let's say that I decided, exercised bad judgment, decided I wanted to get to a judge who had made a bad finding, either in sentencing or in finding of guilty or not guilty, and how would I do it?

Well, I have no direct link to him. He works for, in fact I don't even know who rates him and I really shouldn't know who rates him, but I could find that out, who his rating official is. So let's assume as the Commander of 86th TAC Fighter, when the judge is rated by the major command JAG at Headquarters, so the best that I could be would be go talk to that rating official, that colonel, who is the major command Judge Advocate and Staff Judge Advocate, and so I go talk to him and it would be an informal conversation because certainly I would never write anything, and I talk to him at the bar, in some private situation. I say, "Judge so and so, Major so and so, found wrong and he conducted himself badly." And so now I have to go through the professionalism of that individual and I have to have some leverage over him and I don't have any direct leverage over him because he doesn't work for me, so I'd have to have some informal leverage that would cause him to abort his professionalism which is the bedrock of his duties. In this case, to protect the judicial system and have him say, all right, I'm going to give so and so a bad rating. And I convince him through blackmail or whatever. I can't imagine, other than something absolutely illegal, where I could convince him to do that.

So he gives the individual a bad rating. Now if he said, Judge so and so found badly in such and such a case and put that in the rating, therefore I'm giving him a lower rating, that would be the easiest thing for an individual to overturn. The worst thing would be for him to give him a subtle downgrading, something that didn't—through this case. The individual doesn't like this rating, he sees his rating. It's an open rating system and he doesn't like it and he says I don't like that rating, and he has then the option to take it through the whole appeal process like all the rest of us do, to have an OER thrown out. So even if I aborted all of those other protections, that's a very tenuous logic. I have never heard of anything like that happening.

Col. MITCHELL. Let me follow that up with a question of asking you to make an assumption that you have a situation where a military judge is tenured in his position for some period of time and you were still dissatisfied with a decision that he made and you still wanted to go to the lengths that you just described, unlawful or unwise as they may be. Could you not still do those things? Would tenure preclude you from doing what you just described?

Major Gen. OAKS. No. Tenure would not. I'm basically opposed to the notion of tenure. I don't like the protection that tenure gives. I think we should all be accountable for what we do, so whether we're talking about college professors or military members or court members, I don't like what tenure does. On campuses as I've seen it or anyplace. So you have to realize that bias on my part. I think it shields a lot more incompetence than it protects objectivity.

Col. MITCHELL. I have heard it stated in these hearings, at least by one witness, that the reason that tenure should be adopted is that it would make the military judge feel different, and I think the context of the remark was intended to indicate that the witness meant more important. Do you think that all things considered, that is a justifiable basis for imposing a tenure system for military judges?

Major Gen. OAKS. I think if the judge is not impressed by his importance just by the fact of where he sits and the influence that he has over the judicial system, the disciplinary system and the lives of individuals, then you don't want him as a judge anyway. If he needs some artificial support to make him feel important or make him realize the importance of that then I don't think he has sufficient depth to be there.

Col. MITCHELL. Thank you.

Col. HEMINGWAY. Captain Steinbach?

Capt. STEINBACH. What is the Air Force policy and procedure for selection and assignment of military judges?

Major Gen. OAKS. I don't specifically know. I could talk about the general assignment process and that is for all officers, but I can't talk to differences specifically for the court system.

Col. HEMINGWAY. The trial judges on the Court of Military Review are selected personally by The Judge Advocate General of the Air Force. He is the only person who makes that assignment. They don't go through our career management decision.

Major Gen. OAKS. Those career managers I suspect would present to The Judge Advocate General a list of candidates and their records and he would select them, but I have not been a part of that process.

Capt. STEINBACH. Does your office or does the assignment of other Air Force officers come under your cognizance generally?

Major Gen. OAKS. No. In a general sense policy, and we govern personnel policy, but the actual assignment of people on a daily basis and being aware of those things does not.

Capt. STEINBACH. Are you aware of any of the reasoning behind this assignment selection process that's done by The Judge Advocate General rather than through the normal assignment process?

Major Gen. OAKS. Yes, I can talk to that. The more important things are, the higher you raise the decisions, and so you've raised those decisions to the highest judicial authority in the Air Force, i.e., The Judge Advocate General, and because it is so important, and I think that's a recognition of how important it is, the fact that he does it personally.

The only other way to do it would be to have a board do it and then it would be approved by his office. And I suspect the folks have felt—some loss of objectivity or—on the part of The Judge Advocate General's decision then they would have gone to a board. But we haven't done that apparently. But the importance of it is why it's raised there. It's like assigning wing commanders. The system doesn't assign wing commanders. The major four star commander involved assigns wing commanders. I think that's a very good analogy. Just the importance of the assignment.

Capt. STEINBACH. Thank you very much.

Mr. STERRITT. My name is Chris Sterritt, I'm from the Court of Military Appeals. I have two very quick questions. One with respect to sentencing by judges.

You spoke in terms of perception of fairness by the one being sentenced and the community at large. How is that perception in your opinion changed by the fact that so few jurisdictions in America actually have sentencing by juries, a very small percentage have it by juries or groups.

Major Gen. OAKS. Attitude, I believe, my belief is that the court system, the judicial system, the legal system in

the military is considerably different in the impact that it plays in an individual's life and an individual in the military has much more direct contact, more frequent interface, with the judicial system in the military than he does in civilian life. The average individual in civilian life bumps up against traffic cops and that's the most common interface, with traffic violations and traffic threats, but in the military your job performance is interwoven with the judicial system which more often, a person has to be a real criminal in the courts in civilian life to bump into the court system and you have to be guilty of some pretty strong, stringent, you get fired in civilian life. You know if I take home $100 worth of stuff, you know, paper or office supplies, probably they'll fire me. They might not even fire me. It's very unusual they would take me to court. But if I do a similar offense like that in the military, I'm going to get an Article 15 at least and I'm into the court system. Not the court system, but the judicial system. And I think we could talk for a longer time and I think that's probably just a fact.

So your perceptions are different. The individual, if you went out and asked, hey you on the street, come here, if I take you to court for a felony type crime, whose going to sentence you, he's going to say well I think the jury is. I think the normal perception is that the jury would. So what we're talking about is perception versus fact and I think that fact that you mentioned about civilian courts is really lost on most people, military and judicial.

That's a long answer to your short question. I don't think it's relevant, civilian status versus the military. I don't think it's relevant to the argument.

Mr. STERRITT. My second question is with respect to suspension power. Are you concerned with the fact of suspension or the fact of the return of the suspended man to the community? In other words are there other ways for the commander to deal with the return of a person who has had a sentence suspended than by him having the suspension power? In other words transfer power, administrative?

Major Gen. OAKS. I have a hard time breaking out what is my major concern. My major concern is the total picture. The commander has a better total picture of that individual. The effect of his presence or absence on the community, the unit, than the judge does. The judge could give probably a more consistent, I'm going to treat you all the same view. But when you talk about suspension, that consistency is not as important. The commander knows the individual, his particular attitude, as demonstrated by his performance, much better than the judge does.

Now the judge could hear those arguments as presented by the commander, but I think that when you take that total impact on the community or the unit, the military unit, and the discipline of that unit, the commander is in a much better position to assess that and the appropriateness of it. So I don't worry so much that the judge is going to say all right, I suspend your sentence and I'm putting you back in the unit, and that will cause great disruption. That will do it on occasion, but that's not my primary concern. I think the commander is better qualified.

Mr. STERRITT. Would there be a mechanism for the commander to deal with that situation? For example if the—

Major Gen. OAKS. Yes, if it's really going to cause a problem he'll move him. I mean he'll go to personnel at some level and remove him out of the specific unit. You'll even move him off the base.

Capt. BYRNE. General, my name is Captain Byrne. I really have only one area and I think you've already covered it but I might like to ask you to expand on it a little bit.

On sentencing by military judge only, which is the proposal, what I think is fair is happening in some instances, is the military judge and the members actually you might say get into a form of competition as perceived by the military judge. He feels if he's going to be awarding sentences he's got to come in a little less than the members do, and I don't know that the members necessarily work the other way, I don't know how much they work that. But what happens is that the accused elects, now this election is not made on any concern for fairness on his accused part, he's making that election based on what sentence he can get is the least, and which is what I'm sure either you or I would do if we were representing an accused. We would recommend they go by members if we think that the bottom line is going to be that he's only going to get a minimum sentence, whereas if he goes the other alternative, the sentence is going to be somewhat harsher.

So how does this equate to fairness?

Major Gen. OAKS. That's almost a statistical analysis. I don't have the statistics. Do judges always give lighter sentences? I don't know.

Capt. BYRNE. I'm not suggesting they do, Sir. What I'm suggesting is this does happen sometimes.

Major Gen. OAKS. Well that's wrong. I would hope that the judge would say what's fair and appropriate in this case rather than be driven by that I want to come in a little bit lighter notion. I guess I'm really not sensitive enough to the issue to give you the testimony on it.

Talk about it again. Maybe I'm not understanding.

Col. MITCHELL. Ed, I think I know what you're getting at. Can I take a shot at it?

Capt. BYRNE. Yes Sir.

Col. MITCHELL. General, the scenario plays up like this, and it's not uncommon. Especially in the early days following '68 when we came up with this creature called a military judge and the accused had the option to choose sentencing by him or by members, he set up the situation in which the military judge can or at least thinks he can and in policy in fact it was so stated, that can have a more economical trial if the members are not involved. Consequently the perception by a lot of military judges was, well if that's true, then we take a look at here what members are generally doing in like cases, or have been doing in like cases, and they sentence the individual beneath what they perceived to be what he's going to get from members had the case gone to members. Now members aren't dumb. They come from the military community and they have a perception, after a time, as to what military judges are doing with like cases, and they tend to take their lead on appropriateness of sentence from what they understand. Again, it's a perception thing of what the military judges are doing. It's not kind of a physical standard that you have ahold of, and the military judge perceives the court member, as a matter of fact the statistics in the '82 hearings would reflect there's very little difference at least, I think it was in the Air Force, between members and judges, and the average sentence was down at the very bottom of the scale. I think it was by one or two months. I think that's the problem that Captain Byrnes is addressing. If that fairly explains what you're getting at I'll back off.

Major Gen. OAKS. I understand that dynamic and I guess we have to say what is our goal? Is our goal tougher sentences? Is our goal fair sentences? If we have enough real concern and our goal is fair sentences, our goal should not be, you know, are we getting sentences that are too light for the particular crimes? And if this dynamic or this mechanism has driven sentences down to where now the sentences are no longer appropriate for the crime, if it's been that consistent and that real, then we have another problem, I think and I don't think we should try and solve that problem by saying well there is competition there. We should establish a table, reevaluate our table of appropriate punishments for a particular crime, but to take away that option of the individual because the system can't face up to its responsibilities for fair and appropriate punishments, I'm not sure that's the way to get at the problem.

I really like giving the individual an option of whether you're going to be sentenced by your peers or by the court, by a judge. A sentence of members.

You know, we talk about discipline. I've said this before, people have to perceive it as a fair system and that judgment, you know traditionally, I mean history, military history of 2,000 years, military justice has not been highly held, highly regarded. And today we have come a long way to a system that is highly regarded. I don't think people complain generally about they get a railroad job in the military. I don't hear that in a military court system. So you have to say that is a very positive thing from a discipline point of view and not just from a human rights point of view. From a discipline point of view, and I really worry about any step that is going to undermine that perception.

So I'm less concerned about harsh punishments than I am about perceptions of fairness. And I guess if we have to make a choice then I would rather attack appropriate punishments from another way, reestablishing a table, relooking at it, where have we gone, etcetera.

I don't know if that's a lot of discussion about your question—

Capt. BYRNE. I'm not addressing harsh punishment one way or the other. I'm addressing appropriate and fair punishments.

Major Gen. OAKS. Harsh is the wrong word. More stringent I should say, more stringent punishments. Harsh punishment is not the right word. But I am not equipped or prepared or expert in how have we come in punishment trends and where are we, versus where we ought to be. I am not uncomfortable with the punishments that we're giving out but I've seen a very small window of those punishments.

Capt. BYRNE. Thank you.

Mr. SALTZBURG. I'm Steve Saltzburg. I'm one of those life tenure members on the Commission. We'll see whether or not it affects my performance.

Major Gen. OAKS. Just realize it always has the potential.

Mr. SALTZBURG. I only have three questions. They all relate to perceptions of fairness in this system. You may feel more comfortable or confident about your own knowledge of some than others, but let me try all three.

First would you agree with my own perception that the quality of the lawyering, and I include the judges in that, in the military, probably is better today than it's ever been, that the trial lawyers, trial counsel, defense counsel and the judges who sit on the bench have improved over the years and continue to improve?

Major Gen. OAKS. Yes, and I say that with confidence from having seen it over a period of 25 years and I would be perfectly willing to put my professional status in the hands of one of our young captains that is in the Area Defense Counsel business.

Mr. SALTZBURG. On the same lines, do you agree with the second observation that I believe which is one of the reasons that the performance is good is that the training is probably better? The various schools under the Judge Advocate General School of the Army in Charlottesville, the one I'm most familiar with, is probably as good

today as it's been. And that probably helps, that personnel helps to account for the training and performance.

Major Gen. OAKS. I'm confident that's true. That's certainly one of the factors. The in-house or in-military training, and I think we're more appealing to a civilian, young law graduate, quality individual. And so I think we're getting better people in the door, in the front door, and I'm confident we're training better.

Mr. SALTZBURG. The third question is the one I think you may feel least comfortable with, and it's the one that I feel least comfortable asking, but it does seem to me in light of the fact that you have testified about whether we ought to make a change in the Court of Military Appeals, either retirement, in which you might welcome a change if it were to attract better judges, or to a different status, Article III which is something that wouldn't be as appealing to you.

The question I have is, how do you think the Court of Military Appeals is perceived by the military these days? Is it perceived as being increasingly high quality, much like the lawyers we've talked about and the training? Is it perceived as uneven? Is it perceived as low quality? What do you hear about COMA when you hear it discussed in the military?

Major Gen. OAKS. First you have to realize that very few cases, from the view of a unit, from the view of a particular installation, very few cases go up to the Court of Military Appeals and come back to that installation. I don't ever remember being on a base where a case went up and had significant appeal, impact. You know people, so I am uneasy in answering the question on the specific basis of specific case knowledge. But I think the common perception in the military is that the appellate process is effective. People feel that their case is going to get reviewed no matter what the finding is at each level, that it's going to get reviewed by competent authority. I think that in fact is a holdover from our general court system in the country.

We do have an effective appellate process and I think that that people expect and I think they believe they get, they perceive that they get an equally quality appellate process in military judicial system as they would in a civilian judiciary system. So I don't think people sit around and ponder what is the quality of that appellate process. I don't think they question it. I think they hold it in high regard.

Mr. SALTZBURG. Thank you.

Col. RABY. I'm Colonel Raby from the Army Judge Advocate General's office. My Navy and Marine brothers posed a scenario to you and set up a dynmic involving the military judge sentencing vis a vis those of court members. And I have a question.

You indicated initially that you've served at at least three levels of Air Force command, wing commander, squadron commander and what was the other?

Major Gen. OAKS. I was a flight commander which really isn't a court level commander but it is a commander in terms of command responsibility, but it is not a convening or assigning level.

Col. RABY. You had Article 15 jurisdiction?

Major Gen. OAKS. Yes.

Well let me think about that. I don't think the flight commander has, it was a long time ago. The flight commander does not have Article 15, the squadron commander is the level of Article 15 jurisdiction. I think that's true in every case.

Col. RABY. Well you did have jurisdiction of the squadron commander or wing commander obviously.

Major Gen. OAKS. Yes Sir.

Col. RABY. Based on your years of experience in the military and serving as a commander, from your standpoint as a commander as you saw it since the last, well I guess it would be the last 16 years, have you perceived sentences emanating from military judges or from courts as being so low that they detract appreciably from your ability to maintain good order and discipline to places you've been? Have you formed any perception across the board?

Major Gen. OAKS. Not in a general sense. Obviously there are specific examples that I can think of. Specific examples where I found fault, I would have given more and wished that we had a couple of months more, thought the sentence was a little bit light. But you're talking about two or three. And I found some that I was surprised that they weren't quite that heavy. So that's normal. I did not walk in here for example with an understanding about the process that we just discussed that a judge might be driven to give a somewhat lighter sentence because of court efficiency or because of some other perception or some other motivation.

Col. RABY. So nothing happened in your past experience as a commander that caused you to formulate an opinion regarding this topic?

Major Gen. OAKS. That's correct. And if you came to me and I was sitting in a commander position and you as my Staff Judge Advocate walked in and said the guy, Sir, who you know is guilty and who you hate, who you feel so strongly about, has elected to be sentenced by one or the other, I wouldn't say oh darn, now he'll get off lighter.

Col. RABY. Did any of your subordinate commanders ever come to you except for individual cases perhaps, and complain that they believed the sentencing system was so ineffective that it was seriously impairing good order and discipline?

Major Gen. OAKS. I've never had anyone come to me as a wing commander other than the saying Sir, we let that guy off, but it was never related to how he was sen-

tenced, and it was in a particular case where people might feel differently. But I've never had anyone, and that doesn't happen very often, that people come up and complain.

Col. RABY. If you, heaven forbid, ever should have to face a court-martial, would you want the option of determining whether you would be sentenced by military judge alone or by members?

Major Gen. OAKS. Yes Sir, I would. And all of my conversation on this point, I think that's the prime driver. That's how we ought to put the test. You know, what would I want, and I would want choice.

Col. RABY. Sir, regarding suspension of sentences, you testified very clearly that you did not believe that that suspension authority should be invested in the hands of military judges. One of the factors underpanning your determination was the fact that you believed that military judges do not have the same amount of information or the background to do the balancing as effectively as commanders between the needs of the individual and the needs of the individual command regarding whether the individual offender should be returned to that command with a sentence suspension.

Would you feel the same about this if the law were changed so that the military judges could have access to the same basic information such as arrest records, counselling statements, other types of documentation concerning daily duty performance, other acts of misconduct?

Major Gen. OAKS. There's a basic difference in how we live as a judge and how we live as a commander. If I'm a judge, I'm showing up in the courtroom daily, that's my environment. And that's my sense of what's going on. I'm worried about all the things that you ought to be worried about.

If I'm the commander, I'm worried about the mission accomplishment and my continual flow of information on a daily basis is not focusing on that court, but it's a much broader thing. That commander is going to talk to me. I'm going to have, you know, it depends on the level, but if I'm the squadron commander I'm going to probably have a feel for what that individual's performance has been, you know, for on and on, and before he ever got in courtroom trouble, I knew that he was having domestic problems, he was having work problems, he was working hard to get out of it, he was having financial problems, so I have that whole sensitivity. And there's no way that I can come in and in 15 minutes or in 5 hours brief you on that guy's situation that gives you that same sense, that same sensitivity, that same understanding of what that guy's total problem has been as if I developed it over five or six months or a year in my involvement with him.

Now I'm obviously going to be more prejudiced as a commander. I'm going to have a bias. But bias is not the right word. I'm going to have the total perspective, so I'm going to call it bias. So I walk into that suspension with a broader knowledge about that guy or gal, and their impact on the organization, good or bad, and I've got a deeper commitment to the mission of the organization than the judge does. The judge is committed to appropriate courtroom procedures, appropriate equity, even handedness, and those are important things. But I think when you get to suspension my main concern is impact on the mission and on the individual, and the commander is better able to do it. If not we ought to take all of our judges and put them in charge of the military organization and let them run it.

Col. RABY. When you were wing commander and you had authority over cases at that level, did you ever have a military judge come to you and recommend suspension? Well not come to you personally, but recommend suspension of a sentence that you recall that he imposed?

Major Gen. OAKS. I can't recall. It's a little bit of a fog because I had so many defense counsels come in and recommend it, but I don't remember any one, I don't remember a judge ever coming and recommending.

Col. RABY. You let the defense counsels come to you personally?

Major Gen. OAKS. Yes I did. Generally. I don't remember ever telling them they couldn't. There might be a case where you wouldn't want to, but I always talked to them.

Col. RABY. From your prior statement regarding what commander type of knowledge, commanders have, and you mentioned the mission, but you also said a couple of things that caused me to sort of feel that perhaps deep down you tend to think that commanders have the information not only to be very aware of the needs of their organization, but that they're in a better position to know when compassion is deserved than a military judge. Is that true?

Major Gen. OAKS. I think so. If I had that guy's First Sergeant and the wife in and if told about the problems, there's a sensitivity there that isn't going to get into the courtroom in a general sense. You know, about really in depth things. I'd say it won't get in the courtroom. I think it's less likely to get in the courtroom.

Col. RABY. You get it in an informal give and take situation rather than in formal settings.

Major Gen. OAKS. That's right.

Col. RABY. Free communications.

Major Gen. OAKS. And you can say well, the First Sergeant can come in and brief the judge, but you start trying to put together a process and when you think of court you think of process to ensure that those things happen, so you're talking about briefings. You're talking

about some First Sergeant walks in and he's dressed up and he's got his tie on, he's got his blues on, and he's reporting in a military manner to testify for. I think you're less likely to get that total sense of what went on than if I have sat through a lot of meetings with that squadron commander and that First Sergeant. He talked about these things and he talked about this particular case woven in with all of the other fabric of his organization, and that's not a disparaging comment about a courtroom process, I think it's just reality. Would an investigative officer, does he like to get the facts in a courtroom situation or does he like to just sit down and let us chat about something?

Col. RABY. Sir, we've been primarily talking about the military judge—suspension powers. You didn't clearly differentiate but I assume you included the Court of Military Review in your remarks about recommending they not have suspension powers. And I had a question there. The Courts of Military Review basically see those cases on appeal in which the sentence includes punitive discharge or dismissal in officer cases and confinement of a year or more, or certain—cases that are certified to him by The Judge Advocate General. They normally see a type of case where the sentence is likely to have caused the offender to be put in the confinement facility or otherwise transferred from the unit by the time they see the case and they usually don't even get the case, we'll say 90 days at a minimum, and sometimes the decision comes out a year later.

Now right now they are legally obligated to affirm only an appropriate sentence, assuming they've confirmed the findings and they now have the authority set aside for example, punitive discharge of confinement or—but they cannot suspend.

Now this causes this situation to arise. Sometimes they will look and they may be compelled to set aside a punitive discharge because it is not appropriate, whereas if they had suspension powers they could suspend. Conversely they might have to bite the bullet and make a hard decision and affirm the punitive discharge or otherwise they would suspend. It could work either way.

With that scenario, I ask you do you believe that the Court of Military Review should have a suspension power in order to more appropriately effect an appropriate sentence on appellate review and if they did have, what impact if any would it really have on the command?

Major Gen. OAKS. You see the implication from that is a suspended sentence, is a mitigated sentence, or a softer sentence than the imposed sentence.

Col. RABY. It would be lesser than approving the sentence as it is but it would be harsher than—a suspended punitive discharge, I hate to use the term harsher, like you, but we'll use it for the sake of being more severe or higher up in the echelon of sentencing, than a set-aside. A suspended sentence of punitive discharge will be more imposing on the individual.

Major Gen. OAKS. I guess I would argue that in my view the suspension question should be made with a maximum amount of sensitivity to that individual's situation and the higher you get the less information and consequently sensitivity to that particular individual's situation is available.

So I would argue that no, I don't think, I guess I would want the judge at the lowest level to have suspension authority if they were going to have it, rather than higher up. So I would argue against suspension at all levels in the judiciary.

Col. RABY. Thank you very much.

Mr. HONIGMAN. General, let me start with a broad question. We as a commission are addressing certain proposed changes to the military justice system. Are there any other changes that we are not specifically addressing that you would recommend?

Major Gen. OAKS. No. I really can't think of any. I haven't spent a lot of time thinking of specific things, focused on the specific questions presented but I'll just tell you and I'm sure you've already got the general feeling, that I am very comfortable with our system of protecting the rights of individuals and with assuring that those rights are protected in a way so that people perceive that their rights are protected while still having sufficient power to enforce the rules of discipline that are necessary for good order in the military. So I'm really quite satisfied with the system that we have. Really from both sides of the question.

Mr. HONIGMAN. In response to one of the earlier questions I believe that you give your opinion that the appellate process including the Court of Military Appeals functions generally efficiently. Do you feel from your perspective as a commander that the Court of Military Appeals in the decisions that it has rendered in general has shown a sufficient sensitivity to on the one hand the rights of the individual accused and on the other hand the special military circumstances and the needs of the military service?

Major Gen. OAKS. Yes. I think of specific cases and I think there's been an appropriate and good sensitivity to both issues. I guess I'd say you think in our society today that there is at least an alleged relaxing of a lot of the standards that are necessary in my mind to military structure and discipline and I don't know if that's true or not but there is that perception that there is a relaxing, that standards change, and I don't think that's been reflected in the appellate system or in the judicial system. We expect a lot of our people in terms of obedience to rules and regulations and we get it. And I think we're supported in the appellate process.

Mr. HONIGMAN. You just mentioned obedience to rules and regulations and certainly the decisions of the Court of Military Appeals lay out rules and general application throughout the military justice system and the military system as well. Would you agree that it might be an additional protection for the system itself and those who have to administer the system and live within the system if the Court of Military Appeals were increased from three judges to five judges, thereby reducing the impact of a single change in personnel upon a philosophy or system of decisions emanating from the court?

Major Gen. OAKS. Again, I hadn't thought about that. Why do we have a Supreme Court of seven or nine?

Mr. HONIGMAN. Nine.

Major Gen. OAKS. Now there's a lot of reasons. One is just work load, I'm sure. Let me back up before I answer that question.

You talk about, I do have a concern in the judicial system and that's timeliness and we always have to, of course that's our main concern I think in our civilian system, so timeliness is important and we're not where we ought to be in timeliness, although we're not in terrible shape. That's not a major problem in the military, but it is always a problem. And if adding two court members would increase the timeliness or improve the timeliness, that is certainly worth a consideration and I think your basic logic of you decrease one person's impact, philosophical impact in a place where philosophy is important, the long term trends are driven by those people's personal philosophies. And I guess if you ask me to vote today I would vote for five. I have no reason not to and I can think of some reasons to support that.

Mr. HONIGMAN. Let me turn for a moment to the suspension power which I guess is something that we've all been focusing on. General, when you were a wing commander, how many individuals were under your command?

Major Gen. OAKS. It's a funny arrangement. As a community commander, we had a community of 78,000. But portions of those were Army and portions of those were civilians. About 12,000 military members.

Mr. HONIGMAN. And that was 12,000 for court-martial purposes?

Major Gen. OAKS. I think so. It was between 9,000 and 12,000.

Mr. HONIGMAN. You didn't know each one of those 9,000 or 12,000 people individually obviously.

Major Gen. OAKS. No.

Mr. HONIGMAN. As a wing commander, how many talks did you have with the First Sergeant and the wife and so on about people's personal problems?

Major Gen. OAKS. I would meet at least every month with all of the First Sergeants and we would talk about these things. And let me tell you, that conversation takes place primarily with the squadron commander. His level. Where that kind, but not entirely. So how many, you asked me a question, how many. I would say one a month and maybe more. It's probably right.

Mr. HONIGMAN. One a month with all the First Sergeants in the group or with one individual talking to another individual?

Major Gen. OAKS. One a month, individual First Sergeant talking about a particular case. Either the squadron commander or the First Sergeant. In fact I guess I'd jack it up to two a month.

Mr. HONIGMAN. I think the real point I was getting to is one you just made, and that is the kind of conversation you were describing earlier really would take place between a squadron commander or even a flight commander as opposed to the wing commander, yet it's the wing commander who exercises the suspension power after a court martial sentence as a judge. Given the kind of individual conversations and the feel that is developed for an individual really occurs at a lower level, is there that much of a difference between the wing commander's perception of the accused's personal problems and work development and so on on a personal level and a perception of a military judge on that person's work and family related problems and so on on a personal level?

Major Gen. OAKS. There's a different orientation. You know, what is your goal as a squadron commander? Or as a First Sergeant? Or as a wing commander? Because for example, in a general court martial authority is vested in the—Air Force commander, and so the suspension of a general court, I guess what I'm trying to clarify in my mind is—the difference between recommending and approving. You get in a large organization, and there's not much difference. Your commander, the individual with that approval authority, relies on your judgment. So if I was recommending to the—Air Force or to the—Air Force commander, the approval of a suspension or a suspension, he's going to go on my recommendation 99 percent of the time unless there's some overriding, where he feels that my objectivity is biased.

Now that's different from the judge. The judge would feel a need to act independently and should feel that need. It goes back to what we were saying. My influence as a commander, what should be my influence over that judge? It should be minimal. He should act on facts, not on my recommendation. So there's a different process that we're talking about there. A different relationship and I don't think you can argue, you can argue it, but I don't think it's valid to say—the squadron commander or the First Sergeant could recommend that to the judge because there's a different relationship be-

tween that judge, there's an independence in the judge's situation that is not there in the command situation and I think that independence does not serve the suspension decision process.

Mr. HONIGMAN. I think the point I was trying to focus on is this. I think when you've been talking about suspension you've really been talking about two separate issues. One is who on a personal level can develop and possess the most wide ranging and appropriate information on which to base the suspension decision? That's on the one hand. On the other hand, who on a personal basis, the judge or the commander, has the most appropriate perspective to bring to making a decision based on the information at hand? I think those are two different issues.

Major Gen. OAKS. That's right.

Mr. HONIGMAN. My first question was directed to, as a wing commander versus a judge, isn't it really the case that the information may be the same but the perception in your view may be different?

Major Gen. OAKS. No. I think the perception is different and the information is different because that individual that you're talking about, that individual that is in trouble, that has got himself into the courtroom, there's going to be somebody, one a month, we're probably talking about the courtroom person, so I developed that over a long period of time, even as a wing commander, developed it. We talked about, very likely we talked about that individual, how he's doing, what he's doing, what he got, we're going to have to take him to court. I can just think of innumerable cases. The court cases I knew about them before they went to court. When did the judge find out about it? His involvement was the paperwork laid before him. He reads it, and testimony. And so I have a wider perspective on that individual as the wing commander. Now certainly the squadron commander had a whole lot more and before I make that suspension I'm going to go talk to him about it in a different atmosphere. So my orientation is command mission. That's my orientational perspective.

The information available, I'm going to have more information available I think really. You say well can you come in and testify about it? I guess I'd ask if timeliness is a concern in my point of view, and I suspect everybody's, and I've got a court system that is wise and timely, the court system is a flow of information, decisions based on information. Now I want to make, why do I want to saddle the court system with an additional decision? That should be based on different information than is normally—out of a trial. The information there is what's the total atmosphere of that military organization? The judge doesn't have that perspective like the commander does. What would be the total impact on that organization of a suspension or a non-suspension? And the judge doesn't have it.

Now I wouldn't say the judge can't get it, but now I've got to—some more—to him to an already bogged down system.

Did I answer your question? Your question was perspective and information. And I think in both cases, the perspective and the information would argue let the commander make it.

Mr. HONIGMAN. What if there were a system where the judge could get the information, and let's assume it wouldn't take all that much more time. There's an extenuation and mitigation hearing on which the accused can introduce evidence bearing upon the sentence already. And what if the squadron commander were to come and say I think that a suspended sentence would be appropriate? What about a system where the judge could suspend a sentence that the commander, if he had information or reasons that he could put on the record could, I don't know what the proper word would be, countermand, deny, the suspension. Would that be an acceptable process to you?

Major Gen. OAKS. I think we could certainly conceive of a system that would have some checks and balances in it that would, you know, make it so that it would work. But when you do that you're casting another situation or creating another situation where the commander and the judge can be put at odds. Why do that? What is to be valued? And I think right now the system enjoys the respect of commanders, their relationship with judges. So what's to be gained by pitting them against each other in another decision where if you don't like it you can vote against it? I'm not sure that would be healthy. I'm not sure it would be a major problem.

Mr. HONIGMAN. In the present system if a military judge recommends a suspension and the commander doesn't follow the recommendation, they are also at odds, so I guess there's some potential for that.

Let me just ask one or two other brief questions about tenure for military judges.

You've said that one thing that's very important is that the system be perceived as a fair system. If it's the case that in reality military judges enjoy an independence from command influence, command meddling and judge's decisions and they can't be arbitrarily relieved of their duties, do you believe that adjusting the perception to fit the reality would be an important goal? In other words, if you're hanging a name onto a system that already exists and it will be perceived as more fair, is that a reason to do it?

Major Gen. OAKS. Sure it is.

Mr. HONIGMAN. Do you think that would be a compelling reason in this case to adopt some system of a

guaranteed term of office for military judges, if in fact its only conforming the appearance to the reality?

Major Gen. OAKS. I think now a judge, I guess I believe but I have no basis for this belief, that a judge's three year tenure, his assignment tenure, either three or four years, and so that exists. He has administrative tenure and would it be offensive to say now, to come out and say the judge has tenure for four years or three years, whichever it is?

Mr. HONIGMAN. Whichever it is.

Major Gen. OAKS. I wouldn't find that particularly offensive and I can see some virtue to that. When you say tenure, to me it generally implies that he's going to go longer than normal, eight years or something like that, and I think that's wrong.

Mr. HONIGMAN. I think what we've been talking about is simply a guaranteed term and nobody has come up with a judgment as to what it should be or if it should be different from the normal term now.

Major Gen. OAKS. I would see some virtue to that.

Mr. HONIGMAN. Thank you very much.

Col. HEMINGWAY. Thank you very much.

Col. MITCHELL. Tom, I'd like to clear up one thing if I can.

You stated to say something, General, and I think backed off and I want to be sure that I understand what you were driving at in connection with the suspension business.

It can be argued that there's a difference between appropriateness of a sentence and clemency action versus the sentence. The thought process one goes through in this business is to decide first of all whether the judge sentence is appropriate and then to decide whether or not clemency is warranted so that you might consider suspending that sentence or a portion of it. Is that a distinction with which you will agree, and if so, is that the underpinning for your comments vis a vis the suspension power at the CMR?

Major Gen. OAKS. Yes, I agree with that and in fact I started to say that. You obviously got that impression.

Col. MITCHELL. In respect to tenure, as long as a military judge wears a uniform, do you think you can ever really create an impression in the minds, an absolute impression in the minds of the accused that this individual is wholly independent of Air Force influence?

Major Gen. OAKS. It's certainly more difficult, but on the other hand, I'd say I don't think military members worry about the independence or the command influence on the judge. I've never heard it discussed. I think it's heard more by civilians, by Congress, by people outside of the system. And I just haven't heard people say that. But I don't think people worry about it inside.

Col. MITCHELL. Does the Air Force have to worry about—unaccompanied tours for military judges?

Maj. Gen. OAKS. Do we worry about it? I haven't been there in that position.

Col. MITCHELL. What I mean is in connection with tenure, we kick out the term three years and four years as if everybody in all the services serves a three year or four year tour as a military judge, when in reality, the real killing is the 12 month unaccompanied tours—

Maj. Gen. OAKS. I don't know who the judge in Korea is. I don't know. I don't know what that organization looks like.

Col. HEMINGWAY. They go in and out TDY.

Maj. Gen. OAKS. That would have been my guess. I think that's a good solution to the problem.

Col. HEMINGWAY. General Oaks, thank you so much for your time this morning. We really appreciate having your views.

Maj. Gen. OAKS. I appreciate the chance to come and comment.

I talk about credibility, and if nothing else I see the Commission serving the purpose of Congressional credibility and those folks worry about us and in a lot of ways, and I think it's important that we enjoy their confidence and they feel a very direct concern, appropriately so, for fairness and that the military member is fairly treated.

So I have nothing else and I'm sure there are other things that I think, in a way we give them a vote of confidence. You know, the system has put this prestigious group together to look at these very basic and important questions and no matter what you say, it's important for Congress to have the feel that yes, the military members' rights are being adequately and appropriately protected.

I appreciate the chance to come and chat with you.

Col. HEMINGWAY. Thank you very much.

(Whereupon, a recess was taken.)

Col. HEMINGWAY. Our next witness is Vice Admiral Dunn. Admiral Dunn, do you have a prepared statement?

Vice Adm. DUNN. Not a prepared statement. I can make a statement if I may.

Col. HEMINGWAY. The floor is yours.

TESTIMONY OF VICE ADMIRAL ROBERT DUNN, COMMANDER, NAVAL AF, US ATLANTIC FLEET, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 27 JULY 1984

Vice Adm. DUNN. A Navy Judge Advocate General picked my name for reasons known best to him, to come

and appear before you. We happen to be friends and know each other. We went through a short course at Harvard together. Maybe that's what started it. But at any rate, I hope I can contribute something.

You should know right at the outset that while I've had a lot of command experience and I've been responsible for administering a large amount of nun-judicial punishment, when it comes to courts-martial, my experience may not be quite as extensive as it would have been had you seen me a year from now. The reason is that I've been in my current job about six months, and in the current job I do have GCM convening authority and review authority, and we're just kind of getting started in that aspect of it. But let me review for you.

I commanded an aircraft squadron and a carrier air wing, two ships, the larger ship was an aircraft carrier, and it was in days when our personnel were not nearly as motivated as they are today, and pride and professionalism hadn't taken over in the Navy. So I was required to take a lot of time holding courts and NJP in that period. And I did have a count of how many cases I saw in my two years. Not a fact I'm proud of, but I tell you that so you get an idea.

After I was selected as a Flag Officer, I was commander of a safety center where we weren't involved in the legal thing at all as far as individual courts-martial or NJP was concerned. However, I did have an interesting excursion into the sanctity of aircraft mishap investigations vis-a-vis the courts.

Then as a carrier group commander, not too much. However, I was the commander of our Navy military personnel command at one time; and while I didn't get involved in the legal things, I was certainly affected by them in my day to day work in that area.

My most immediate preceding job was as Chief of Naval Reserve, and that has some interesting applications as far as NJP. The reservist is only eligible when he's on active duty. If he does something and he goes off active duty, what are you going to do about it? That's possibly another subject.

In my present job as Commander, Naval Air Force, U.S. Atlantic Fleet, I'm told there are about 55 to 70,000 people in my command, about 167 aircraft squadrons, and a large number of aircraft. We're responsible for the training, the personnel management, at that level, logistics, for nine aircraft carriers, all of the squadrons that go in them, twelve maritime patrol air squadrons and numerous helicopter squadrons that do various things in logistics.

I have helping me in that job a lot of people, but of principle interest to you I do have a Staff Judge Advocate, a commander in the Navy JAG Corps. He has four Navy JAG assistants to assist him, and then the appropriate legalmen and a civilian legal secretary. And I do convene courts-martial on recommendation of subordinate commanders and my Staff Judge Advocate. And I do review special courts and general courts as they come through.

I guess in the six months I've had the job, I must have already reviewed almost 300 courts of one kind or another, coming out of the group. So that's my background, for whatever that's worth.

I have reviewed the questionnaire that was distributed. I didn't fill out everything but I did take a look at what I believe are the principal issues, if I can recall them off the top of my head.

As far as tenure of military judges, I feel that we in the Navy, and I guess I can say Marine Corps, but we in the Navy are doing pretty well right now in that we have a career progression pattern for our Staff Judge Advocates. It alternates various kinds of duty and there are normal tours of assignment as judges. We feel this is important for the professional development of the individual and it also gives the Navy a certain amount of flexibility. That's for the individuals' good, and for the Navy's good, if we have to move somebody, we can move him. But he knows that he's not going to be a judge all the time, and he can look forward to something else.

Another important part is that we feel that judges do a better job if they have some experience in the fleet so they really know the environment, the milieu in which the court was convened in the first place, and what the sailor is expected to do, and what his leaders expect of him.

Mr. HONIGMAN. Sir, I think it may clarify the question if we point out that by tenure we don't mean tenure in any long term, but rather a guaranteed term of office for a military judge of a given period of years, which we haven't fixed in our own collective minds yet. So we're not talking about keeping a man as a judge forever, or for longer even I guess than his normal duty tour as a judge.

Vice Adm. DUNN. I guess if the term were mutually agreeable and if there were provisions for removing somebody if he wasn't performing, I suppose that would be all right. However, kind of on principle, I hate to see an outside agency interfere with the right or the duty of the CNO to assign his officers where he wants to assign them when he wants to assign them. I have no doubt that gentlemen with good mutual understanding could work that out. It may not always work that way.

Another issue I'm told, or another subject, is regarding the length of sentence permitted by a special court. I think increasing from six months to a year is probably a good idea. Special courts are, in a lot of ways, easier and more expeditious, at the same time protecting the rights of the individual. We might cut down on the administra-

tive burden in a general court, by increasing it by that amount.

Let's see, my memory is failing me. Oh, the suspending of sentences. I really feel that the existing system where the convening authority is allowed to suspend the sentence, where we reserve for him the right to suspend the sentence, is probably best; because he is the one that's on the scene. He knows what he has to deal with when this individual comes back with a suspended sentence. And he may know things that haven't been brought out in the court proceedings. This would be especially true if we establish a tenure for judges that doesn't lend itself to career rotation.

Can somebody refresh me?

Col. HEMINGWAY. There were several other issues. Whether or not the retirement system for the Court of Military Appeals should be changed, whether or not there should be an Article III court.

Vice Adm. DUNN. I don't care.

Col. HEMINGWAY. And also whether or not sentencing in all noncapital cases should be done by judge alone as opposed to the choice that exists now.

Vice Adm. DUNN. You know I'm not sure I understand, I mean I understand what you're saying, but I'm not sure I understand the importance of that issue, I guess that's to standardize punishments? Would that be one way?

Col. HEMINGWAY. That is one of the arguments that is advanced I believe by proponents of the proposal. Now bear in mind of course the commission hasn't taken a position on this.

Vice Adm. DUNN. I have to base it on my own personal experience. My own personal experience being with NJP as opposed to courts-martial. In an NJP I was the judge, and the jury, and the sentencer, and everything else. And I was criticized from time to time by people in my command because it appeared I was not consistent in the punishment for a given offense. But I was consistent in my own mind because I listened to what the individual's division leader or supervisor, his immediate supervisor, had to say about him. I knew where he worked. I knew what his background was. I was able to take into account all these things, and I could assess in my own mind based on my own experience what I thought his potential was. I'm not sure that a judge, and I don't mean to impune them, I'm not sure he has access to all this information.

Capt. BYRNE. On the issue of military judge alone, most civilian jurisdictions have gone to sentencing by judge alone. Right now the accused has an election by which he can elect to go military judge alone or members, insofar as sentencing is concerned. The one question I have is, if we decided, if Congress decided to take away the accused's selection and simply allow a military judge to sentence an accused in every case except capital cases, do you think that this would somehow focus adversely on the military judge and appropriate focusing and criticism of the military judge. That somehow they would be subject to pressures that they're not subject to now, if any? Do you think that would change the circumstances in relationship of the military judge that would be focused for criticism?

Vice Adm. DUNN. I guess there is certainly the potential for that. My own feeling is that that wouldn't be a problem.

Capt. BYRNE. You didn't address retirement or Article III. They weren't on the questionnaires that you received. If you had received a questionnaire that covered those two issues and gave you the pros and cons, would you feel more comfortable in addressing those two issues?

Vice Adm. DUNN. I might. I'm not sure how the retirement issue affects me or affects the judicial system and that's why I really can't comment on it.

Capt. BYRNE. But if the questionnaire had pointed out the issues both ways, and there were issues that would affect perhaps the relationship of the court with the military justice system, would you perhaps have felt more comfortable addressing—

Vice Adm. DUNN. Yes, I could have given you an opinion, but I'm not sure my opinion would be any better than anybody else's.

Capt. BYRNE. We would like to have heard it Sir.

Vice Adm. DUNN. Okay.

Capt. BYRNE. That's all I have.

Col. RABY. Sir, regarding judge alone sentencing, you're now aware under our military system, the accused, before a courts-martial, has a right to request trial by judge alone, which means the judge determines his guilt or innocence. If he finds him guilty, sentences him. Or he can not exercise his option which means he will receive a court composed of members from the slate at large. They will determine guilt or innocence, and if they find him guilty, adjudge sentence. And finally, if it's an enlisted person, he has the option of requesting a third of the court as enlisted personnel. Now on the question of judge alone sentencing, what the commission is studying is whether or not we should recommend to Congress a change in the law that would compel an accused any time he went before a court-martial to be sentenced only by a military judge, and that means the court members after they had determined guilt, assuming they did, would not get to participate in the sentencing portion directly.

Turning back the clock a little bit to make this hypothetical reasonable, or more reasonable. Suppose you remember the days when you were a young Ensign, and let's say that you had gotten involved in a fatal traffic

accident and found yourself unfortunately referred to trial by a courts-martial. What system would you personally prefer to have? One where you had to have the judge sentence you or one where you could exercise the options?

Vice Adm. DUNN. I'd like to exercise the option. I think in that hypothetical situation I would opt for the court with representative members. I think they would know the situation more. They would be more sympathetic to me.

Col. RABY. Sir, in your years in the Navy have you formed any opinion regarding, I mean overall not any one specific case because we have specific cases both good and bad, but have you formed an overall opinion regarding how military justice has been functioning? Has it been basically serving the needs of the Navy?

Vice Adm. DUNN. Yes it has. Let me comment on that just a little bit. The only time it hasn't been serving the needs of the Navy in my judgment has nothing to do with the law itself. It has to do with the way the Navy was able to staff up those who assist the commanders in administering the law. For example, about ten years ago the persuasion on the part of the commanding officers, and I include myself, was that except in the very grosses cases, we would administer NJP because it was just too hard to get the court-martial convened, particularly if you're overseas or aboard a ship somewhere. But there is no problem with the law. That was a problem because we didn't have enough JAGs in the Navy, we didn't have enough legal men and other support. And those we did have weren't organized to serve command as well as they are today. Now, today, we do have more JAG officers and more legalmen and we form trial teams and we send those trial teams from the United States out to—units. They'll convene courts-martial right aboard the ships and it's more confined. Justice is expeditious, it serves the needs of command. Now there's virtually no hesitance to assign a court to an individual if his alleged offense merits that.

Col. RABY. One final question. You're a general court-martial convening authority at this moment as I understand. Of course the law requires when you select members you do it by basis of age, experience, maturity and so forth. We've had some testimony before the commission that because of the telling requirements on our commanders in terms of other mission essential tasks, that when it comes to selecting court members invariably it's not always the commanders' brightest, his most responsible people that sit on the court. You always get those people who just happen to be convenient.

How important do you view your obligation in selecting court members, and basically how do you view that duty?

Vice Adm. DUNN. I have to confess that until I talked with my own JAG prior to coming up here I never really thought about that problem. He is new on the job by the way, and he pointed out that that is a problem. Our tendency is to assign as court members those who as you suggest really don't have much else to do anyhow, and they don't have much else to do because they don't have the competence to do their job well. I don't think that should be a subject for the commission. I think that's a subject for the leadership in the services to look at.

I know since it's been brought to my attention I will exercise the leadership necessary to ensure that we do in fact have a cross-section of performance on those courts.

Col. RABY. The only reason it was brought before the commission is some people had argued this was a reason why we should go to judge alone sentencing and take the line officer out of the sentencing function. That's how the question got raised.

Vice Adm. DUNN. I should—I'm more in favor of not legislating any more than we have to and leaving the discretion to the commanding officer or the line officer to do the right thing.

Col. RABY. You're satisfied with the system as it now is operating?

Vice Adm. DUNN. Yes I am. There are a couple of things I might like to see changed, but I wouldn't fall on my sword about it. Like the ability of an individual to appeal a summary court or the individual assured a right to demand a court martial. There's a large body of opinion against me and I'm not going to as I say, fall on my sword over that.

Col. RABY. Thank you very much.

Col. HEMINGWAY. Captain Steinbach?

Capt. STEINBACH. No questions.

Mr. HONIGMAN. Admiral, from your perspective as one who has exercised sea-going command, would you advocate any special rules under the UCMJ because there is a special need for modification to serve the needs of ships at sea?

Vice Adm. DUNN. The only thing that comes immediately to mind is as I just mentioned about the summary court, because it sometimes is difficult to get everybody and all the trappings necessary for a special court if you're in a remote location. But this hasn't really, I must say this hasn't really worked such a hardship that we can't live with the existing system, especially now that the Navy JAG has modified its procedures and expanded in order to support us in the other kinds of courts.

The short answer to your question is no. I'm happy with the way things are.

Mr. HONIGMAN. Would you recommend any changes in Article 15?

Vice Adm. DUNN. I wish I'd thought about that. No. Some of my contemporaries and some of my subordinates would like to see, I suppose would like to see expanded punishment authority. I was pretty much able to deal with what we had to work with.

Mr. HONIGMAN. Thank you Sir.

Col. HEMINGWAY. Admiral, if the special court-martial sentencing authority were expanded to one year, from the vantage point of where you are at the present time, do you think you might be inclined to send a few more of those cases back to your subordinate commanders to convene under special courts as opposed to sending them to general courts?

Vice Adm. DUNN. There would be some increase in that. It wouldn't be marked, but there would be some increase.

Col. HEMINGWAY. Do you find cases from time to time that are referred to general court only because of the six month difference between what a general court and what a special court could adjudge.

Vice Adm. DUNN. I suspect, but I don't have any hard evidence.

Mr. STERRITT. I only have two brief questions. My name is Chris Sterritt, I'm from the Court of Military Appeals.

Is it your experience, Admiral, that a Navy commander would normally be briefed about an opinion coming from the Court of Military Appeals or he would personally agree to evaluate them himself?

Vice Adm. DUNN. He would be briefed on it.

Mr. STERRITT. In essence he would be depending a great deal on the Staff Judge Advocate's view of that opinion?

Vice Adm. DUNN. Yes, he would read it if it were something very controversial. But generally it would just depend on a briefing.

Mr. STERRITT. I have no further questions.

Col. MITCHELL. Admiral, with respect to your views about tenure, I'd like to ask if you think that Naval personnel, enlisted and otherwise, you've been exposed to over the years, perceive the current system of military justice as fundamentally fair?

Vice Adm. DUNN. I have to give you a facetious answer. I think those that never participate in the system think it's fair and those that have been hammered think it's unfair.

Col. MITCHELL. Do you believe that tenure, to the extent that there is any perception in some circles that the system may not be fair, do you think that tenure would add anything to the appearance of fairness to the system?

Vice Adm. DUNN. I really don't think so. I say that based on my amateur experience in the civilian world where you read about certain judges who have tenure and they become very controversial characters after awhile and the local citizens lose confidence in them because of that.

Col. MITCHELL. You mentioned that in respect to suspension authority for the military judge that you felt the commander ought to retain that. That he really has the best information. And you talked about basically that his is a command interest. Whether the individual comes back to the command is of interest to him primarily.

I would like to expand on that a little bit. You as a commander, when you think about your decision to suspend or not suspend a sentence, do you consider command as being only that entity which you yourself command, or do you consider command in the broader context? Should the sailor be returned to command anywhere in the Navy?

Vice Adm. DUNN. The latter.

Col. MITCHELL. So as a commander you don't have strictly a parochial view of impact?

Vice Adm. DUNN. No, it's the commanding officer of a squadron or a ship or whatever unit might be.

Col MITCHELL. If Congress saw fit to grant a military judge authority to suspend sentences, do you see that as creating or setting the military judge and the commanding officer potentially at loggerheads over the decision?

Vice Adm. DUNN. Yes I do, for obvious reasons.

Col. MITCHELL. Do you think that's an advisable circumstance to create?

Vice Adm. DUNN. No I don't. You see right now, my impression is that commanders in the Navy have confidence in the military judges that are assigned. And since we've had military judges I have not personally heard of any problems, any controversy, no second guessing or sniping. I realize it's there, but I have not personally been involved.

Col. MITCHELL. In respect to judge only sentencing authority, taking away the option of the accused and saying all sentencing will be done by a military judge. You mentioned there again that the commanding officer, and there personnified by the court members, has a better feel for the unit at least in that aspect of the accused's life and so forth. (They (military judges) really have no information about the accused.) Is a lot of what the court members know intangible and not susceptible to being brought before a military judge in the event he was given sentencing authority in the form of evidence, or testimony, or something?

Vice Adm. DUNN. I think it's intangible, that is to say it's not capable of being brought forth. I guess it could. I'm not confident that it would, because it is the impressions of individuals regarding their environment, training, and experience.

Col. MITCHELL. Moving back to the suspension power again, should the commander have it or should the mili-

tary judge have it, does the commander bring into the decision to suspend intangible aspects about the accused in the unit and if so, can that information be adequately brought forth in the way of evidence to a military judge?

Vice Adm. DUNN. Yes and no. Yes, he does have intangible information and no, I don't think it can be brought forth. And this won't set up in a court of law, but it's been my experience that the best commanders often times have to make decisions on the basis of intuition and this is an intuition which has been developed over the years. They've been successful because their intuition has been correct. And I don't know how you bring intuition into a court of law. But the good commander will have an intuition about whether this individual will benefit from a suspended sentence or this individual is too far gone, he's not going to benefit from a suspended sentence. And I don't think the judge, because he doesn't have the opportunity to know the individual that well, has access to that. He has an intuition too, but he doesn't have all the information.

Col. MITCHELL. One of the realities of the current military justice system of course is it depends on lawyers for its course you went to military judge only sentencing, that would simply extend that situation on into the sentencing process. I realize in peacetime things are more easily supported than they are in war, so if I might ask you to shift gears for a second. Let's get into a firefight with somebody. Now what is your prediction about the ability of the Navy and the Navy legal community to provide timely support of this court-martial process to the fleet?

Vice Adm. DUNN. I think it would have to wait. I think there would be a delay. And if there had to be something, we would just have to rely more on NJP, except for the more serious things, when we would have to either temporarily restrict, incarcerate the individual or send him ashore at the first opportunity. It's that kind of thing.

Col. MITCHELL. In the interim at least, you're at risk as far as the loss of witnesses and evidence and so forth.

Vice Adm. DUNN. We have to take that risk because the mission then would outweigh the need to administer justice. We would still protect the rights of the individual, I don't want to mislead anybody, but maybe at the expense of the disciplinary system.

Col. MITCHELL. But you do see some difficulty in timely support?

Vice Adm. DUNN. I sure do, because if we have a ship out in the ocean somewhere and we have a choice of sending a trial team or more ammunition, you know, the choice is obvious.

Col. MITCHELL. That's all I have.

Col. HEMINGWAY. Mr. Saltzburg?

Mr. SALTZBURG. I have no questions.

Col. HEMINGWAY. Admiral Dunn, you had indicated you had about 300 cases in the time that you had the Atlantic Fleet that you had reviewed from a general court-martial convening authority point of view.

Vice Adm. DUNN. Not a general, a special.

Col. HEMINGWAY. In your convening authority capacity, have either your military judges or your defense counsel come to you and asked you to suspend sentence or recommend the suspension of a sentence?

Vice Adm. DUNN. In writing in the regular trial. The package I receive, and I might say, I was surprised when I began wading through these thick packages, how many of the judges recommend suspension of sentence. And I question that. In the first couple my inclination was to go along with the judge, but then I saw they were all recommending suspension. I said well this is a routine. I don't know what they're trying to do, be good guys or something, because the convening authority didn't support that and so I supported the convening authority. But they never really put their reasons with why they wanted to suspend.

Now as far as the defense counsel, that's pretty routine.

Col. HEMINGWAY. Do they ask for a personal appearance?

Vice Adm. DUNN. No, in the time I've been there I've had no one ask for a personal appearance.

Col. HEMINGWAY. That's all I have.

Mr. HONIGMAN. Of those what you've called routine recommendations for suspension, how many have you granted?

Vice Adm. DUNN. About two.

Mr. HONIGMAN. When the judge hasn't put his reasons on the record, have you made any effort to delve into what reasons might have existed, either through your Staff Judge Advocate or speaking with somebody else?

Vice Adm. DUNN. I did on several occasions from my Staff Judge Advocate, and the reasons just didn't hold up in my mind. Looking at the seriousness of the offense, the individual's past record, and the whole scheme of things.

Mr. HONIGMAN. I don't really know how to phrase this, but are you now of the view that a suspension recommendation is a fairly routine, low level, ordinary recommendation, it doesn't carry a great deal of weight?

Vice Adm. DUNN. I'm afraid I am. When it applies to defense counsel I see it as an almost routine thing. When I see it as a judge it's not a routine thing but it happens fairly often. I put a lot of weight on what the convening authority and what my Staff Judge Advocate would tell me.

Mr. HONIGMAN. Where a defense counsel makes a recommendation, does the convening authority often or always comment on the recommendation? In other words, you have the defense counsel saying do it, the convening authority in every case saying either I agree or I disagree and this is why?

Vice Adm. DUNN. He does the former. He says I agree or disagree, but very seldom does he comment as to why.

Mr. HONIGMAN. Thank you.

Col. HEMINGWAY. Admiral Dunn, thank you very much for generously giving us your time this morning. I appreciate the travel and the time you've given us.

Vice Adm. DUNN. Well you're all very easy.

Thank you.

(Whereupon, a luncheon recess was taken.)

Col. HEMINGWAY. The next witness is Captain Eoff from the Navy Marine Corps Court of Military Review, the Chief Judge. Judge, welcome to the commission. The floor is yours.

TESTIMONY OF CAPTAIN ALBERT W. EOFF, II, CHIEF JUDGE, NMC CMR, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 27 JULY 1984

Capt. EOFF. I have some notes here. I'm not going to read them, I'll try and paraphrase them. Right after lunch I'm afraid I'd put you to sleep.

For those of you who don't know me, and several of you I haven't met before today, I've been in the JAG Corps between 24 and 25 years. I've been a trial counsel, defense counsel, ship's legal officer, staff judge advocate, a military judge and director of a law center, CO of a NLSO, appellate defense counsel, and now I'm a chief judge of the Navy-Marine Corps Court of Military Review.

I looked at the various issues which the commission has under study. Of course I don't know what the driving force was behind some of the questions that were asked. The tenure for judges was an attempt, I guess, to give judges some assurance that they won't be arbitrarily dismissed and maybe give them some status. There are various possible reasons. But both as a military judge and an appellate judge and as a CO of a NLSO, I've never known a judge transferred or in any way hampered for a decision or opinion. Now some judges have been transferred and some judges have been, I guess cautioned about their conduct, not in the court room, but with their personal conduct, a judge who has three martinis at lunch in the presence of court members, who is going to instruct that afternoon, I think that's a very legitimate reason for saying that he's done something wrong. But I've never seen a judge under either of those circumstances transferred or in any way disciplined for any ruling or opinion that he made.

Our biggest problem in the JAG Corps, in the Navy JAG Corps, is I don't think we've ever had what I consider to be a pure military justice man make Flag Rank. I think that's indeed unfortunate because that's 80 percent of our business. If you haven't had what I call an E ring job, meaning SECNAV or CNO type area, regardless of your background, you don't make Flag, or nobody has made Flag in the Navy JAG Corps. I think that's indeed unfortunate. And now that the Marines have had the 02 position for the last five or six times, he can't even be 02. The highlight of his career could be to aspire to Ed Byrne's job or my job, but a Navy JAG military justice man cannot aspire to being flag and I think that's unfortunate. I don't know whether it means they should get a better shot at making flag rank or one should be created for them. But it's unfortunate that a military justice type can't aspire to anything other than an 06 in the Navy JAG Corps.

I don't quite understand the hesitancy of giving military judges the right to do the sentencing. Some people seem to be hesitant about that. But since 1969 we basically have taken the line officer out of the court-martial system, when we made military judges, and required defense counsel be lawyers. Except for those few cases in the Navy where members are line officers, they are basically not involved except in the administerial act of convening a court-martial or of course at the other end of the line, exercising clemency in those cases.

Most line officers have grown up in the Navy, since 1969, without even knowing what a court-martial is or what court-martials do. Many of them only know that one of their men may have gone to the brig as a result of a court-martial or they got kicked out, so to say that members have any sense of the community, or know what punishment should be, or what they should do in punishment and sentencing, I'd say we just lost it since '69.

You might say, you can go pro or con as to whether that was good or bad. But the decision was made in '69 to basically take the line officer out of the court-martial and that's the way it's been. There aren't enough members cases, many line officers go through an entire career without ever seeing a court-martial or being a member. They don't even have an idea what the punishments are, what effect the punishments would have. In some of the members cases, quite frankly, some of the commanding officers may complain about what the military judge's sentences are. I've heard them complain over the years about how light they are, but some of the line officer sentences are ludicrous. Some general court-martial sentences are very serious offenses, wherein a fellow would get a reduction in rate. A case at the Navy Yard just re-

cently, with officer members, a man was convicted of I think adultery, sodomy, and I'm not sure what the other offense was. He got a reduction in rate by members of a general court-martial. I think they've lost the bubble. They just don't know what punishment is good or appropriate for an accused these days.

While judges are still criticized I'm sure for some of their sentences by people who convene courts or see the results, I still think that military judge sentencing is the only way to go at this time. Unless we're going to reeducate officer members in the Navy, and we just aren't in the position to do so, they really can't sentence the way the judge can, at least with the knowledge of what the sentence might do to the accused or might do to the sense of the community.

Another problem we have in the Navy of course is we have a number, as I'm sure you know, a number of convening authorities, all the way from small little mine sweeps all the way up to carriers and on of course up to large shore stations. Many of those commands can't come up with members. A small fleet tug, for instance, everybody on the ship knows all about the case, so as a result they have to go off the ship or go to a shore station to get a member's case. And as a result, those members don't know anything about the community which the accused comes from and care less about what the sentence might do to the community from which he comes.

So if it's a sense of the community that the members are supposed to bring, in many of our cases they can't bring it because they wouldn't have any idea what the community that the accused comes from is, or how they would be affected by the sentence.

When I was a military judge and as an appellate defense counsel, I thought that military judges should have the power to suspend sentences. But I guess I've come full circle in the 20 years, and I don't think military judges at either level should have the authority to suspend sentences. We just really don't know enough about the accused. If some procedure could be set up, such as probation reports that civilian judges get so that you know something about the fellow, is he paying his bills, is he supporting his family, how does he live, does he abuse his children, things we don't know and couldn't possibly know from the information given to us in the court-martial. The civilian judge has a probation report from which he gets a lot of this information. We just don't get that information, and I'm not sure we could develop a system, without a great infrastructure, that could give us that information at the trial level or particularly at the appellate level where we are even more out of touch with what's going on with an accused. That may be a year down the line since he's been sentenced. And unless we get something new to update it, a lot of times if we were to suspend a sentence it might be a mockery because we have no idea what that accused's situation is right now and whether a suspended sentence is in any way appropriate for this particular accused. Plus the command, I'm not going to say that they in all cases know how to use their power, but they are in a better position to know whether the accused should have a suspended sentence. They know more about him, they have more information than the military judge has, and they know how a suspended sentence might fit in with the rest of the discipline that is going on in that command either militarily or the administrative discharges that were given to other people that did basically the same thing. So they have a lot more information about the community in which the suspended sentence would be served.

There is one other area which one of the other services may have tried that I don't know that we've ever tried in the Navy. What happens to these fellows after they get suspended sentences? As far as I know in the Navy they're just turned back to the community. If they mess up of course we try to vacate their sentence and so on. I don't know if there is ever any followup. Maybe the other services have tried this. If we had someone akin to a probation officer, so that if this guy gets tempted to get back into drugs, or gets tempted to do something, or go over the hill, he would have someone akin to a probation officer to go to that would allow this fellow some time and maybe help him with his bills or whatever it might be that's giving him problems, so that we don't have to waste time on vacation proceedings or maybe throw somebody out of the service with a bad discharge who we could have prevented, who was on a suspended sentence.

As I say, this may have been tried, I don't know.

Mr. HONIGMAN. Isn't that properly the job of the senior NCO?

Capt. EOFF. Yes, I would think it is, but I'm not sure that a fellow if he knows he's in trouble or about to get in trouble would want to go to somebody within the command. If you had somebody who was outside of the command such as a career counsellor or somebody like that whose job was to handle this sort of thing, he would be in a better position to give the accused advice than somebody who might feel more of a responsibility to the command.

I don't know what percentage of general court-martials are in the Navy right now but we have very few, in comparison to the Army particularly, and I'm not sure that raising the confinement that a judge or members could give at a special court-martial would be of any value in saving time and effort along general court-martial lines that is.

I notice that in most of the special courts we get now from the field, the judges or members very seldom approach the maximum sentence that can be given to the accused. Quite frankly, at many of our commands such as San Diego, Norfolk, and Charleston, the cases are being dealt out, even desertion cases, even UA cases. I don't know what the advantage to the command is to deal them out, but they do deal them out for sometimes 30 days, sometimes 45 days, sometimes 50 or 60 days. And of course the judges know this and give sentences that are many times a little above that, but sometimes right on the nose.

Col. HEMINGWAY. When you say deal out, you mean a negotiated plea?

Capt. EOFF. Negotiated plea. And this will be even though someone with six or seven UAs gets a special court martial to start with, rather than a general, and then they'll get a deal for 45 days confinement.

Raising the max up to a year in special court-martial, I'm not sure this is going to do a lot of good, at least in the Navy. I can't speak for the other services. Because most of the sentences aren't even approaching six months now. Unless the judges or the commands that make these pre-trial agreements are going to change their ways, I just don't see the advantage of making it go up to a year.

If it's an attempt to make us like civilian communities and make a difference between less than a year for a misdemeanor and a year for felony, we're different in so many ways now I can't understand why we can't keep that difference in the future.

One area which I really don't feel that confident talking about, but I will, is that I think we need good judges on COMA. I think we need judges who don't have to worry about whether they're going to get reappointed. I think we need judges who can make it a career and don't have to worry about what they're going to be doing; whether they're going to make enough money to retire on. I think in fairness to them the tax court retirement is not out of line for the COMA judges. And in passing, I'll say I don't understand, and I'm sure the COMA representative will have something to say about it, I don't understand why the need for a Title III court rather than a Title I court? We'd have to build a new court system. If some of the jurisdiction is taken away from either federal district courts or some of the other areas and given to COMA as a Title III Court, I'm not sure what we gain. We'd centralize some. Maybe rulings on admin discharges and some of the other powers could go to COMA as a Title III court. But you take it away from the district courts where the situations occur. You'd make the command, and you'd make the appellant come all the way to Washington for something that he could very possibly do in the town in which he lives, at the local district court. By coming to COMA you might get military lawyers involved on the government side, whereas now they're handled by U.S. attorneys in the field who many times don't have any idea what an admin discharge is. That could be one advantage. But I'm not sure the advantage, the few advantages would outweigh the disadvantages.

I'll answer any questions you have.

Capt. BYRNE. Captain Eoff, assuming that you had military judge only sentencing, do you think that there would be a kind of undesirable pressure on military judges because they were the only sentencing authority? That somehow this is going to mean that the military judge in the military community is going to be subjected to more severe, intense pressure that would be of the kind they couldn't deal with if they were the only sentencing authority for noncapital cases?

Capt. EOFF. I really don't see that, that much, because I would venture to say 85 percent of the cases are judge alone sentencing anyway. Maybe by taking the other 15 percent, maybe you're putting more pressure on him, but I can't believe the judges would feel that much more pressure.

Capt. BYRNE. Directing your thoughts back to your comments about commands having a lot of pre-trial agreements, do you think the reason why commands, or do you have any grounds to attribute the reason why commands, are making such sweetheart pre-trial agreements could be because they are concerned about the whipsaw effect of the accused having the option of electing judge alone sentencing or members? And what difficulty there is in assessing the results of the accused having this advantage?

Capt. EOFF. As I say, I can't speak for the commands, but even in those cases where there are no pre-trial agreements, a vast majority still opt for judge alone. I can't believe the consideration is if we don't deal with these good deals they are going to take members and mess up our docket or keep our docket so clogged we can't get the cases done. I think counsel and their accused still feel that with a military judge, they can anticipate what they're going to get from the military judge in sentencing because of his track record better than from three, four, five or six members who really don't know what kind of sentence to give.

Capt. BYRNE. Then you don't think there's a problem with the election process by which a military judge can be elected for sentencing or the members can be elected so far as sentencing is concerned?

Capt. EOFF. I don't understand what you mean, problem?

Capt. BYRNE. In other words, it's to the advantage of the accused and it doesn't hurt the system insofar as the

appropriateness of the sentence is concerned, by the accused having a selection.

Capt. EOFF. No, because as I say most of them don't have members anyway. Maybe I don't understand your question. The judges give lower sentences because they don't want to have to fool with members?

Capt. BYRNE. Yes, that's the thrust of my question.

Capt. EOFF. I think that varies from command to command; and from the counsel at the various legal service offices, and the judge for that matter, his reputation. But I'm sure that is a consideration.

Capt. BYRNE. In preparing your remarks did you have an opportunity to see our questionnaire on the other four issues?

Capt. EOFF. Yes I did.

Capt. BYRNE. If we had prepared a questionnaire on Article III and retirement, would it have helped you in preparing your answers to those questions?

Capt. EOFF. I think it would have, yes.

Col. HEMINGWAY. Colonel Mitchell?

Col. MITCHELL. Captain Eoff, in civilian life the concept of tenure is in order to insulate the judge from the adverse public and political reaction to a decision or series of decisions. They do that by insulating his salary, basically his livelihood from reach of that opinion. Do you know of any way, lawful or otherwise, assuming that you are dissatisfied with a decision of the military judge, that you could affect the salary that that judge draws?

Capt. EOFF. Myself right now?

Col. MITCHELL. Yes, if you were dissatisfied with a military judge, is there any way that you could cause him to receive less money simply because of a decision he made in court that you didn't like?

Capt. EOFF. I can think of one scenario. First of all, I could call Ed Byrne on the telephone and say, "Ed Byrne, your judge down at Charleston is an idiot. He writes dumb opinions and when you write his fitness report you'd better reflect that in there." Knowing Ed Byrne, he would probably say thanks for my comments and ignore me. Then of course you could affect his promotion, theoretically by this fitness report.

Col. MITCHELL. How about his existing salary? Can you affect that?

Capt. EOFF. I wouldn't know of any way.

Col. MITCHELL. Could you affect his pay grade?

Capt. EOFF. No.

Col. MITCHELL. Could you affect his status as an officer?

Capt. EOFF. Only the lowering of his fitness report, if Ed Byrne was so inclined to take my remarks to heart.

Col. MITCHELL. As far as his retirement entitlement would go—

Capt. EOFF. No.

Col. MITCHELL. Assuming that you wished to put pressure on a military judge and assuming that a tenure position existed which guaranteed that military judge a certain term in office, would the fact that he had that tenure deter you from taking any steps to hold him to criticism or to otherwise vent your frustrations with his decisions in some lawful or unlawful way if you wanted to get even with him? Would the fact of that term of tenure stop you from doing it?

Capt. EOFF. No.

Col. MITCHELL. Now you indicated in respect to the question on military judge sentencing that about 85 percent of the cases in the Navy, in your judgment, were handled by a military judge only.

Capt. EOFF. It may be higher. That may be low.

Col. MITCHELL. That's just a rough, off the top of your head figure?

Capt. EOFF. Yes.

Col. MITCHELL. And you said, I guess the import of that decision is they really have it already for all practical purposes.

What if the Navy had a selection rate that was more like 50–50, so about half the courts were military judge only and half the courts were members? Would that affect your opinion at all?

Capt. EOFF. It might, in that we would have a better track record as to how members, or whether the members really do have a sense of community; and whether they know what they're doing in sentencing. As I said, that would mean more people involved in the system and hopefully knowing more about the military justice system and what the sentences mean.

Col. MITCHELL. I gather you view it as a collapse of sentencing or just put it, as a group, in the leniency of sentencing over the years since '68. Do you attribute that to the isolation of the court members from trials in the Navy, or do you attribute that to the quality of personnel that are routinely selected for court-martial duty in the Navy?

Capt. EOFF. I think it's a combination of both. I know sitting as a trial judge, I knew many times who the members were from the various commands. I know we didn't get the best members. I know the members were people they could spare. They had jobs and they could be free. They weren't picked for their abilities. They were picked for whether they could be let go. And since they didn't basically have information to start with as to what the sentences would do. Because they didn't do enough of it: because of the calibre of the member; and because he knew he was there because he could be spared, a lot of times I don't think they did the job that well.

Col. MITCHELL. That's all the questions I have.

Mr. STERRITT. Good afternoon, Captain. My name is Chris Sterritt. I'm with the Court of Military Appeals. I have four questions.

The first one concerns Congress' inquiry concerning a fair and equitable retirement for the Court of Military Appeals judges. Do you believe the quality of the opinions issued by the court in the last 30 years, evaluated either in terms of comparative legal quality to federal civilian courts, or as reflecting either the policies of the defense department or the Pentagon on discipline as individuals may appreciate it, should have anything to do with what retirement they receive?

Capt. EOFF. No.

Mr. STERRITT. Second, what would you tell the American public, what justification or reasoning could we provide to them with respect to eliminating sentencing by members? How would you respond to a charge from the American public that you're eliminating an important right of the accused?

Capt. EOFF. I'd say we're doing basically what 45 other states do now. Maybe 46. I'm not sure what percentage it is, but almost all the states, except Texas and maybe the District of Columbia or whatever, have judge alone, and the others are going to judge alone sentencing.

Mr. STERRITT. Three, I don't know if you've come across this in your legal work or not, but a question just crossed my mind. Is suspension of a sentence, is that an act of sentencing proper or is it a clemency type action? I just wondered if you might have come across anything making a distinction in that area.

Capt. EOFF. I'm not sure that I've ever really heard it put that way, but I consider it probably a clemency action.

Mr. STERRITT. My final question. You've been around a long time as you indicated, for 24 years. What is your experience with the extent of knowledge of members prior to 1969? How good were the good old days?

Capt. EOFF. One thing about before '69, we had line officers who had been trial counsels, who had been defense counsels, who had been summary courts, and who had been members. We did not have judge alone, they did both. They were the fact finders, took guilty pleas, and everything else. So the members were much more knowledgeable about military justice because they'd sort of done the legwork. They'd done cases as trial and defense counsel, and those were the people you were getting back in the different courts as members. So you had a much more knowledgeable member. Some of them were jaded one way or the other. If they had been prosecutors most of the time, they were sometimes jaded toward prosecution. If they were defense, sometimes they were jaded toward defense. But they were much more knowledgeable members.

Mr. STERRITT. Did you see a pattern of consistency in those days that would be noticeable?

Capt. EOFF. I would say before '69 the old six, six, and a kick, was a much more prevalent penalty than you see now.

Mr. STERRITT. I have no further questions. Thank you.

Mr. SALTZBURG. Captain, I'm Steve Salzburg. It's nice to meet you. I'd like to put a few questions to you. I do this, in fact, just to clarify the record on a few issues.

I gather your responses have been thus far directed to particular questions and you haven't been asked to give your own general view as to the full scope of the issues. I want to give you a chance to fill out your testimony a bit.

Let me ask you this. In the time you've been in the Navy JAG, you've watched the Court of Military Appeals in operation, you've seen the change in personnel, you've seen a number of presidents make new appointments. Do you believe that from time to time judges on the Court of Military Appeals have had reason to be concerned about whether they would be reappointed and whether the composition of the court, for example the chief judge, might change as a result of a new appointment?

Capt. EOFF. I don't know that I've ever seen it, but I think it could have been a consideration.

Mr. SALTZBURG. As I look at the background, I don't know what goes into the appointments, but certainly it is true, is it not, that the way in which the President deals with and has dealt with the Court of Military Appeals is quite a bit different than how the President has dealt with any other court probably in the United States? Would you agree with that?

Capt. EOFF. I really don't know how he's dealt with some of the other courts, quite frankly, like tax court and some of the others. I just don't have the knowledge to answer that question.

Mr. SALTZBURG. I don't either. That's all speculation. But I take it if one were sitting on the Court of Military Appeals one wouldn't have any way of knowing whether or not the President in fact might be making a particular decision as to reappointment or who should be chief judge. Whether he's taking into account whether a decision of a court, written by that judge, might be the reason for the President's decision.

Capt. EOFF. I think he very well could.

Mr. SALTZBURG. If that is the case, it is possible that even though we may pick very good people, if they're concerned about their jobs as many people would be, of their image and their prestige and their reputations, they may have reason to be concerned, might they not, about the impact of their decisions on their future appointments?

Capt. EOFF. I think they could, yes.

Mr. SALTZBURG. Let me ask you about the courts of review, and I don't mean to say or suggest that the President ever has taken a decision into account. It's really a question of do we know, and I don't know.

Capt. EOFF. I think it depends a lot on the character of the judges. Some judges would lean more to pressure, or would care more what might happen to them.

Mr. SALTZBURG. Might it not depend in part on the frequency in which the President may change the composition of the court?

Capt. EOFF. Sure.

Mr. SALTZBURG. How about the court of review. They're handled differently. For all intents and purposes I guess, you serve the equivalent term of years, right?

Capt. EOFF. A tour of duty I guess would be a good way of saying it.

Mr. SALTZBURG. And I take it your testimony was you don't know of any case, certainly not in the Navy or Marine Corps, but maybe not in any case, anywhere where a Court of Review member has suffered in terms of promotion or whatever because of a decision or an opinion as you put it?

Capt. EOFF. Not that I know of.

Mr. SALTZBURG. Would I be correct in saying that maybe part of the reason for that are the stringent provisions we now have that prohibit command influence? Some of the rules that have been implemented that actually are designed to protect the judges from retaliation, from influence?

Capt. EOFF. I may be sounding like a company man, but the one thing that I have seen over the years in the various JAGS that I've worked for, the various Judge Advocate General's, rather than pass heat on to court members, be it at the trial level or at our level, take the heat themselves and do not pass it on to the court members. Even if they think the heat may be deserved, they have in many ways tried to be scrupulously handsoffish with both the trial bench and the Courts of Review. As I say, there may be a time when we have a Judge Advocate General who is not inclined to take the heat, but to pass it on, but not since I have been on active duty have I known any to do that.

Mr. SALTZBURG. On a different subject, perhaps one of the reasons you have more trials going to the judges is the quality of the judges is so good now that people brought before court-martials believe judges are as knowledgeable and sympathetic as the members are likely to be. Another reason you've given us is that maybe the quality of the members is not all that it should be.

My question is, if in fact the Navy decided to adopt a conscious policy of trying to get better people to serve as members, try and get, as you put it, the best members rather than people who are going to be available, do you think you'd get a higher percentage of people electing member sentencing?

Capt. EOFF. I think very possibly originally you would. I think it would go up. Of course I think it's a reflection of counsel's opinions because they advise their clients. The accused says, well what do you think I should do? Should I take judge alone or should I go with members? And until the counsel have had a chance to test whether this new group of members are more knowledgeable members, you probably would see a higher percentage. If they found that the sentence was going to be higher and they weren't getting the deals many of them have been getting, you might go back to the percentage we have now.

Mr. SALTZBURG. One more question, and I don't want to make you uncomfortable in answering it. You may have given us the best answer that you can given the position that you now hold, but it has to do with the status of being the judge on a Court of Review. You began by mentioning that no one in the military justice area of the JAG Corps is serving as a Flag Officer in the Navy. Let me read that as possibly saying two different things, and I wonder whether you're saying one or the other or both, or purposely not saying. One reading of what you said is that you're in a position about as high as you could go. In fact, you mentioned that you and Captain Byrne are probably at the top, unless there's a Flag position created or awarded. You can't go any higher. That would suggest to me that if everyone agreed on that, that people in the Navy JAG would probably view your job as being a wonderful job and the best people would take that job if it were offered because they couldn't do better.

Another reading of what you said is, my previous sentence is not necessarily true because you don't get anything from taking that job or any other, and in fact it's just a matter of luck. That going into your job doesn't lead to anything further; and therefore the best people don't feel perhaps there is much benefit from serving in that position. That what we really need to do is find a way to promote people to take your job. I wonder if you might just spell out in a little more detail whether the best people in the Navy JAG look forward to serving on your court and how they feel about when that service is done, what happens to them afterwards?

Capt. EOFF. Up until the last three years, at least to a great extent, being assigned to the Court of Review was dead end. Most of the people retired from there quite frankly. My predecessor of course had been there eight years, seven years, and retired from that job. Many of the judges, up until recently almost all, were 06s, and that was a retirement billet for most of those people. A

few went on to other jobs, like one went to CO, Justice School. In many cases that is a retirement post.

If you want my personal opinion as a Lieutenant Commander, Commander, so on, coming up, my ambition was not to be a CMR judge. That's maybe not an indication of how everybody feels. Because I knew once you became a CMR judge that probably that was the end of the line and you were going home. As I say, that's not necessarily true in all cases. So I don't think it's a job that people go out consciously looking for, to become a CMR judge.

As I say, there may be individuals who want that job very badly. But I would say as a whole, it's not the kind of job that people go clamoring to the detailers for, because they know it's a retirement type billet or it's not going to lead to "bigger and better things" in the JAG Corps.

Mr. SALTZBURG. One more question. It bothers me a little bit and I'm glad you're here, that's not what bothers me, it's the truth of what you say that bothers me.

As long as the Court of Military Appeals is a court of largely discretionary jurisdiction, it doesn't have to take all cases. I mean your Courts of Review are really the heart, like Federal Courts of Appeal, of appellate review in the military system. I guess given my druthers, I would love to see the best minds in the military JAGC lu the trial judges at one time and on the Courts of Review at another time. I mean not serving like federal judges do, but serving for a term of years there. It's discouraging to think that we may lose those people, and they may treat it as a dead end of sorts.

Are there things that we can recommend? Is there anything that we could do as a commission in terms of recommendations for change that might improve things?

Capt. EOFF. There's one area that I've always thought, but I'm not sure this commission is in a position where you can make a recommendation. I think one of the problems is that because we have to do all the cases so much of your time is spent needlessly. You could cut down on the number of judges you had by getting rid of the cases that don't really belong there. So many, maybe 80 percent of the cases that I see daily, are cases in which there is no issue, has never been an issue from day one, and will never be an issue. But I spend 80 percent of my time handling that case and so does counsel over in the two divisions. And the cases that have issues in them, that you want to spend more time on, you have to take time away from those cases to handle the routine daily cases. I'm not sure that that is an answer to your question, but the fact that so many of the cases really, when you read a 300 page record and there's no error in it, you could have been spending that time on a case that has a real issue. It seems like a waste to me.

We have no choice as to what we take or don't take. I don't know that the waiver of appeal under the new rules, under the new law that's coming into effect, is going to make a difference. I don't know, maybe some percentage of those cases will disappear, but I don't think a great number will disappear. Those people will still opt for appellate review. But I think you could cut down on the number of appellate judges considerably. The commissioners that we have could also be cut back. And then judges who are there would be free to do what I consider to be more productive work on real issues. On cases that are much more interesting to them and mean more to both the appellant and the system.

Mr. SALTZBURG. Thank you.

Mr. HONIGMAN. Judge, you've mentioned one change that you would suggest and I guess that would take care of what I used to know as straight legals. Are there any other changes that you would consider recommending if you could make any change in the UCMJ that you thought was warranted.

Capt. EOFF. As I say, this may sound sacrilegious to the civilian members and any line officer, but since we have taken the non-lawyer basically out of the court-martial system, I think we ought to do it all the way. I think if a commanding officer in the Navy decides that he can't handle a case at NJP or administratively, that he should transfer that guy to a district attorney, a prosecutor who is a JAG lawyer who looks at the case and says yeah, this is a good case. We handle it, we do it. He's transferred away from the command he was in. We don't go through this ridiculous mess of having convening authorities who are supposedly impartial, and who don't know what they're doing. Someone tells them to sign a piece of paper because that's the way you create a court. The prosecutor tries the case and then the member either is discharged or is reassigned if he doesn't get a bad conduct discharge. But the CO stays out of it the rest of the time, and if the prosecutor decides it's a case that shouldn't be prosecuted, the man gets reassigned too. He does not go back to the command.

Our system is so cumbersome that we have to look each time to make sure that they dotted the T on the convening order, and the members are there, and so on and so forth. We have non-lawyers trying to type charge sheets out on little ships and that sort of thing. If we could put it, as we say, I'm sure there are some line officers who would disagree wholeheartedly with me on that subject in saying that. But as far as a system that's workable, I think that's a workable system.

Mr. HONIGMAN. Would this non-commander person, prosecutor, justice coordinator or whatever, be the person who would select the members who would sit on the court?

Capt. EOFF. I think you'd have a pool. I think not unlike, and this is sacrilegious too, not unlike the Army system when they had the computer in Vietnam, as I remember, when everybody was put into a pool and spit out. I'm not sure I'm ready to go yet with the E-5s on the commanders courts-martial. But I think as long as you maintain the seniority system, which I think still makes some sense, I think you could do it on a pool system.

Mr. HONIGMAN. You mean person's names would go into a computer and they would come out at random?

Capt. EOFF. The clerk of court says we need members for Johnson's GCM.

Mr. HONIGMAN. And we need X number of commanders and X number of captains?

Capt. EOFF. And the computer would spit it out and that way, theoretically those papers, either everybody in the pool, theoretically you wouldn't put in the pool people who are under disciplinary action.

Mr. HONIGMAN. You'd have certain eligibility standards.

Capt. EOFF. Right.

Mr. HONIGMAN. Even leaving aside the suggestion that we have a separate administration or justice system as you've just described, that's the kind of a system of selection, of a pool, that would tend to eliminate the problems you've also described which is that the best and most suitable available officers may not now be assigned because they're too much in demand for other reasons, and you just don't have the high quality juries now.

Capt. EOFF. You sure could eliminate that to a large extent I would think.

Mr. HONIGMAN. Going back to the system of a separate administration, who would be the person responsible for suspending a sentence under that system?

Capt. EOFF. I hadn't thought that far, quite frankly. If you reassign the accused like I suggested, then I don't think it would be the old CO. One, he doesn't have any interest in the man any more, that he wanted to give clemency. If he decided he couldn't handle him and transferred him over there, I think you would have to assign someone, come up with some sort of a system and I'm not quite sure what that is.

Mr. HONIGMAN. Logically speaking though, if you're taking the line officers out of the system, I would assume that it would be a judge or some judicial officer after receiving testimony or evidence on the commander's preference and the extenuating or mitigating circumstances.

Capt. EOFF. It could be done that way.

Mr. HONIGMAN. In your experience as a defense counsel and an appellate defense counsel and as a member of the judiciary, can you give us your judgment as to the frequency with which recommendations for suspension of sentences are made by military judges?

Capt. EOFF. It seems to me that they're made less now than they used to be at one time. Before I got here, I didn't see as many cases in the field as a military judge, but there are not that many. The military judge I would say, out of every 20 cases I'd say there might be a recommendation for suspension in one or two. That might be high. And it varies from commander to commander also as to what they do with those recommendations.

Mr. HONIGMAN. That was my next question.

Capt. EOFF. In some commands if a judge recommends suspension the CO agrees with him, and in some commands they would completely ignore it. I don't know with what frequency that happens, but I know that the line officers who had that responsibility many times feel that if the judge recommends it they'll go along with the judge. But in others, they'll completely ignore it.

Mr. HONIGMAN. Do you see an argument that there should be some higher authority with the ability to deal with that sort of disparity where the same judge may make a similar recommendation but it goes to different commanders; in one sense it would be almost invariably approved, in another it would be more likely denied?

Capt. EOFF. At the present I think as long as you leave the line officer in the pipeline, I'm not sure what would be a fair and equitable way of doing that. Whose will to impose over the two, which one is right and which one is wrong. We have a situation in Norfolk for instance, if a man is fortunate enough to be in the transient barracks he will get a deal. If he is aboard a ship he will not get a deal. They will get different pre-trial agreements. If they're in a good boy barracks they'll get a 30 day deal; if they're in a bad boy barracks they'll get a 45 day deal; if he's aboard a ship so he can't get to the pier, he'll get no deal. I'm not sure how that's somewhat similar, and I'm not sure how, as long as you give the person the right to deal or not to deal or in the case to suspend or not suspend—the judge's recommendation, I'm not sure how you impose somebody else over that system.

Mr. HONIGMAN. Isn't that to some extent the role of the CMR? That if the CMR is aware that there are these disparties, isn't there some obligation to bring the highest down a little bit to meet where the lows are?

Capt. EOFF. To some extent you can. The problem is, in my own opinion as I say, sentences as a rule are very lenient now anyway, so many of these people who have no deals are getting very good deals anyway because the sentences are much lighter than you would think.

What happens is the judges know, they know in the back of their mind because they see it day in and day out, and of course they have to do it—they know who

has the deal and who doesn't. So that when the shipboard fellow comes in there without a deal, he invariably gets a sentence much like the other one is going to get from the judge. So the judge evens it out by sentencing.

Mr. HONIGMAN. So in other words the involvement of a line officer in the sentencing process, even if it's before the trial begins by virtue of making a deal, can act as sort of a check upon the sentence that the military judge might give for a similar offense?

Capt. EOFF. Sure. The judges know what those deals are for. They go through them every day.

Mr. HONIGMAN. Let me ask you another question about judge only sentencing. At this point I think you would agree that the accused can perceive the option, the availability of a choice as a right they can exercise, and to some extent they do exercise that right. And you've given us some arguments why that right should be eliminated. It would make for greater efficiency and perhaps less disparity in sentences. What harm would be suffered if that option were to be continued?

Capt. EOFF. I'm not sure that I could say harm, but I think the same disparaging sentences would continue and probably even get worse because as the time passes and we get these higher percentages of judge only trials, the frequency with which members go in, get even less and less. The number of times any one particular member has sat on a court-martial becomes closer to one or none. Then I think the disparity in sentences get worse. To say well, the supervisory authorities and so on can fix those disparities, but unfortunately many times the disparity is the other way. I'm not trying to sound like a government man, but I don't think under the present system the government gets a fair shake on sentencing before members. That's my personal opinion. I think that members, since they don't know what a "good sentence" is for an accused, they tend to go light. And I think the government in those cases really gets the short end.

Mr. HONIGMAN. Isn't that really a reflection on the ability of the prosecutor to, in his argument and through testimony, educate the members to what the government's position is about an appropriate sentence?

Capt. EOFF. I think the prosecutors could do a better job, I agree. And I think it should be weighted in favor of the accused in that he gets a better shake. But given the volume of what defense counsel can put in versus the type of evidence that a prosecutor can get in, I'm sure that by sheer volumes the numbers get impressively immense and as I say they should.

Mr. HONIGMAN. Let me ask a question on another issue. Going back to the Court of Military Appeals, we've heard some testimony from other witnesses that it would make sense to increase the number of judges on the court from three to five. Do you have any opinion as to whether that would be a change that would have merit?

Capt. EOFF. Would all five act on a case or would they have a panel type arrangement?

Mr. HONIGMAN. I believe it would be a panel type arrangement.

Capt. EOFF. As I say, I'm not sure what their backlog is in the Court of Military Appeals, but I know when I was an appellate defense counsel we used to chomp at the bit as to why we didn't get cases out of COMA much faster than they seemed to come out. If it would make for, I'd be in favor of increasing it if it would increase the efficiency of the court.

Mr. HONIGMAN. Do you think it would also have a positive impact upon the precedential value or the longevity of the precedents coming out of the court, eliminating shifts in the court's philosophy resulting from the replacement of a single member?

Capt. EOFF. I'm sure that would have some effect because you wouldn't be changing members. For instance now, since we're down to two now again with Judge Cook having retired, we're at a point now where I guess we will get no more opinions until the new judge is appointed, unless they happen to be both, or the remaining two judges agree which is very difficult to find. You get help with that in that regard.

Mr. HONIGMAN. Would you recommend any increases in Article 15 authority?

Capt. EOFF. Quite frankly since I've been away from SJA work and advising NJP—for so long, I really don't feel that I could answer that well.

Mr. HONIGMAN. I guess that's it. Thanks very much.

Col. RABY. First of all, I want to clarify that in your testimony today about the non-use of the court member option. You were limiting your testimony to your information regarding Navy practice.

Capt. EOFF. Yes Sir.

Col. RABY. And you did not have access to the Army stats or the Air Force stats in this regard?

Capt. EOFF. No, I'm strictly talking about the cases we see in the Navy.

Col. RABY. Which was roughly 15 percent or 15 out of 100 that sailors would opt for court members?

Capt. EOFF. I say that and I might be giving a few percent, it might be less, it might be closer to 90 percent versus 85. I don't have the statistics. I know the cases we see, the number of member cases is very small.

Col. RABY. For the record I want to point out the panel, the commission, does have Army and Air Force stats. We haven't received the Navy stats yet on this, nor have we received the Navy stats on frequency of suspensions in the last year.

Do you keep stats on those statistics?

Capt. EOFF. I'm sure Code 72 in JAG has statistics on suspended sentences.

Col. RABY. That makes it a little hard to evaluate testimony about that.

From your experience, Captain, is there a strategy used by counsel and the accused in choosing their forum right now, as to whether to request judge alone or trial by members? When they do request trial by members is that an informed decision based on some sort of trial strategy?

Capt. EOFF. I would say yes for two reasons. I think for one, the guilty plea cases, opting for trying to get the lighter sentences for the members; and two, relying upon their being able to convince the members, of course laymen being given some very difficult instructions to follow, trying to apply the law and managing to beat, or finding them not guilty on things like maybe self defense which is a pretty tough concept for even judges to understand.

Col. RABY. Tough factual situations that involve human affairs?

Capt. EOFF. Yes Sir.

Col. RABY. And maybe cases with—litigation?

Capt. EOFF. Yes Sir.

This isn't in answer to your question but it made me think of a question which Mr. Honigman asked. The pool of members, though as I say it takes it out of command, many times depending upon the type of command an accused comes from, he will opt for members or not depending upon the type of command. Medical commands for instance give notoriously light sentences. If you're a corpsman, and you're going before doctors and nurses, you invariably will take members for sentencing because they are notoriously light sentences. There is a strategy. The pool of members might eliminate that aspect of it.

Col. RABY. Regarding your recommendation for removing the commanders from the system and going to your system of jury selection, have you really sat down and studied this as to how this would operate under various types of war conditions and how responsive that would be not only in the fleet environment but on land environment?

Capt. EOFF. I think it would be much more responsive than our present system because then you would take the commander out of it who has had a water fight.

Col. RABY. But if you went to random jury selection out of the computer, would you not take him out of determining where and when he needed these officers in a combat environment?

Capt. EOFF. You take the accused to a rear area and court-martial him.

Col. RABY. What is the rear area doctrine, do you know, for a European scenario against the Russians? Do you know how far that penetration can penetrate? I'm not trying to trap you but I know estimates run up to 500 miles, with the capability of a breakthrough to penetrate.

Capt. EOFF. I'm not sure that any of our systems would work under those conditions. Either the present or my proposed system for that matter.

Col. RABY. If we civilianized along the lines as you say, would there be any need for the Judge Advocate Corps then in the military justice arena?

Capt. EOFF. Sure, because I don't know anything about the Army or what your needs are. So if I sat as a military judge in an Army case I would feel as uninformed about sentencing I think as those members I talked about. And in the Air Force.

Col. RABY. Do you really think there is that much difference in a rape case?

Capt. EOFF. Now you give me individual cases, sure, now. Let's back off. You can't change the game on me in the middle of the game.

A murder is a murder, I agree.

Col. RABY. I'll withdraw that and substitute this question.

Doesn't the law allow now and don't we have cases where military judges from one service hear and try cases from another service?

Capt. EOFF. They have, but I think they're very infrequent.

Col. RABY. But they're not conceived as violating due process.

Capt. EOFF. Oh no.

Col. RABY. So there are differences. The differences are not great.

Capt. EOFF. I've been in seminars where we've given fact patterns to Army judges, Air Force judges, Coast Guard and Navy judges and Marine judges where the Navy would give them five years and a DD; the Army might give him six months and back to duty.

Col. RABY. Haven't you been in the same situation where Navy judges differ among themselves and Army judges differ among themselves?

Capt. EOFF. Sure. After the seminar is over then you talk about it, why did you do that? The Army judge did not perceive pumping black oil over the side purposely as being anything that bad in this particular scenario. So you get different points of view.

Col. RABY. How long would it take a judge to learn to be effective?

Capt. EOFF. We make them at least be a Lieutenant Commander before they can be a judge.

Col. RABY. Yes, but you've got an 06 Air Force officer. Just suppose if he was subject to arguments by counsel and evidence in aggravation. I'm not trying to trap you, I'm just trying to, and in fact I'm not advocat-

ing I might add, one service. I'm just trying to find out how far you feel the scope of your recommendations would go.

Capt. EOFF. I still think within each service, I don't think you can make it a purple suit type arrangement.

Col. RABY. I have no further questions.

Col. HEMINGWAY. It seems to me in the past decade or more from the late '60s through at least the late '70s and possibly even now a significant percentage of the cases that we've tried in the Department of Defense have been the result of drug abuse, mainly marijuana. Now when I first came on active duty if you possessed so much as one seed, you were probably going to be tried by court-martial. Over the period of time that's changed somewhat so it's taking an ever-increasing quantity of marijuana possession to trigger sending a case to trial. Has that been your perception also?

Capt. EOFF. Depending upon whether it's an introduction sale type, the straight possessions I agree with you.

Col. HEMINGWAY. Do you think perhaps that has contributed somewhat to the decline that we see in sentencing, that people don't view the simple possession today like they did before? Marijuana, I'm not talking about narcotics.

Capt. EOFF. You mean sentencing generally or sentencing by the members?

Col. HEMINGWAY. Sentencing generally. Do you even think judges look at the possession of a joint of marijuana now as they did in the mid-60s?

Capt. EOFF. No, but like you say we very seldom ever see a case with that small amount at a court-martial unless he has priors and then of course that would skew the sentencing around anyway.

Col. HEMINGWAY. The Air Force has had pure military justice people promoted to Flag rank. We've had others who were pure military justice people who have moved on, not been promoted to general officer rank, but they've been reassigned positions where they were competitive for that. Now when you say you haven't had any pure military justice people promoted to Flag rank, have you had some who have been in positions that were competitive?

Capt. EOFF. Yes, because they simply got out of military justice, the pure military justice arena. I don't want to mean that once you are one you are one. They got out of the pure military justice track you might say and then became what I consider the admin type lawyers.

Col. HEMINGWAY. Is that something that you think requires correction by legislative action?

Capt. EOFF. I don't think so, as I say once again I'm talking of my own opinion, but in our situation, visibility, in the front office of the Judge Advocate General and Secretary of the Navy and CNO office, means success. True military justice people do not get that visibility. They never get there. So as a result when the time comes to pick a general or an admiral as the case may be, those are not the people who are looked at because there's no visibility for them. If that makes any sense.

Col. HEMINGWAY. I understand that. But is that a problem that needs to be corrected by Congress?

Capt. EOFF. I don't think we're going to change human nature. I think what the JAGs do and what the Secretary does in picking his successor JAGs makes sense. Those are the people who he's seen, who he's dealt with, he knows them, he knows their names, he knows their work, and he makes his money on that 20 percent of the JAG work that the military justice people don't do. He very seldom ever gets taken to task for military justice matters by anybody, but he does get taken to task for international decisions, world decisions that he makes. That sort of thing.

It would almost have to be a separate track in order to ensure that somebody in the military justice system is going to make it and you can't blame the people who have to pick them, the flag rank people. If I were the Secretary or possibly CNO, that's what I would do too. Because if I'm going to get in trouble, that's where I'd get in trouble.

Col. HEMINGWAY. In regard to the Court of Military Review and your comments there, I take it when you refer to the cases that eat up the time you're talking essentially about the merits cases that come to you without assignment of error by either trial defense counsel through an Article 38C brief or by appellate defense counsel, but because of your fact finding powers you nevertheless have to review them, is that correct?

Capt. EOFF. In waiver cases, I guess that's what we're talking about, the case which we call waiver cases, meaning no specific assignment. Anyway, the Air Force calls them merit cases submitted to the court on merit. Although there are no specific assignment of error.

Col. HEMINGWAY. Does that lead you to believe that there should be a modification in the Court of Military Reviews' fact finding powers? Would you rather dispense with that function or would you rather simply say if there are no specific assignments of error it doesn't go to the Court of Military Review.

Capt. EOFF. I think the latter. If the case is without a specific assignment of error by either the counsel in the field or the appellate counsel, that's the review. Now maybe that's being too harsh, because there are cases in which we find, that come in that way in which we find errors, so that would be unfair to some appellants. Counsel do a good job and if they don't find errors, they're usually not there. But occasionally we'll find a statute of limitations or something that counsel has missed. I'm not sure how you would handle it, but I'm not sure all those

cases should go through a judge panel, and get reproduced and all the rest.

I'm sorry, there must be some way of handling those cases without generating all the time and paperwork that it does. We have 12 judges now. I'm sure we could go down to six judges if we didn't have the volume.

Col. HEMINGWAY. Having served on a Court of Military Review, I'm intimately familiar with the problem we're discussing.

Any other questions?

Capt. BYRNE. Captain Eoff, directing your attention back to what you said was the biggest problem that you saw in that there is not a track for military justice individuals in the Navy, at least those who specialize in it. Now if you were in the civilian community and you had had service as say a trial lawyer, both defense and perhaps prosecution and you were then a trial judge at the lowest level and then you were at an appellate level as an intermediate court, would it be expected you could aspire to selection to the highest court in that system?

Capt. EOFF. It varies. Some states, some they're elected. I'm not quite sure.

Capt. BYRNE. Yes. Assuming that you got there by election or appointment or whatever.

Capt. EOFF. I would think being a civilian judge a fellow might think that he could aspire to the highest level in the state if he has been a good judge.

Capt. BYRNE. Can you think of any reason other than the legislative prohibition we now have, can you think of any reason why an individual in the military justice track should not be able to aspire to appointment to our highest court, the Court of Military Appeals?

Capt. EOFF. I'm being sacrilegious to my fellow officers for saying this, but quite frankly, I'd just as soon see it stay civilian.

Capt. BYRNE. Why is that?

Capt. EOFF. The perception with the stars and the responsibility, there's an awful lot of—I think one of the reasons it was created was to give people a sense of, I guess, security in that three civilians are going to oversee this so the military can't push it under the rug. The system can't be oppressed by the military system. Three civilians will look at it. So as I say I don't see the paranoia some people have in that regard. Maybe I've never been oppressed by the system. But I think the perception is still there from a lot of people who were in World War II and so on, and I think the civilians, having the three civilians there means a lot to some people.

Capt. BYRNE. How do you think though it may affect the military justice system in how it supports the military?

Capt. EOFF. I think that goes back to what I said originally about selecting people for the Court of Military Appeals. When you go into court with the Deputy U.S. Attorney and it's a case of a conscientious objector or a homosexual and he doesn't know what a barracks is because he's never been in the military, you get rather upset and you have to spend most of your time educating your fellow counsel about the case that he's trying. We might not have lost O'Callahan had the court really understood about the military system. But that's beside the point. I think you can get experience in the civilian judges without going to military judges.

Capt. BYRNE. But then it would be training them when they're already at that appointed level.

Capt. EOFF. Well Steve Honigman's been a JAG, at least he knows how the military works.

Mr. HONIGMAN. I thank you for your endorsement.

Capt. EOFF. Maybe it's been 15 years down the line or 20, but as I say, I think there are ways other than that. I'd like to be up on the Court of Military Appeals with the salary and retirement and so on. I'm not sure that we can't do it with civilian judges.

Col. RABY. You testified earlier and I just want to get clarification regarding CMR judges. At one time you noted NMCMR was sort of a retirement court and I think from time to time also—people—Just for purposes in clearing up the record, it seems to me there are two types of people. You talk about the retired statement, there are some in stock arms who don't do any work and there are some that are very good. I've known some officers who are in their final tour have many years of experience to draw upon, they're very intelligent and work hard.

I wanted to clarify further your remarks, have you ever known anybody sitting on the Court of Military Review that was just incompetent and in apt to remain on that court?

Capt. EOFF. I don't know of any. I know there were some that didn't carry their fair share of the cases, but I don't know that it was through incompetency as much as it was just sort of lumbering procedures. I don't know of any judge who over the years I could look at and say that man's an idiot, he shouldn't be on the court including when we had civilians on the Navy court. That was up until about eight years ago or so, I guess our last civilian left. Whether they were civilian or military I don't know that we had any judges who I would say fit in that category.

Col. RABY. My perception of the highest courts of states, is often those individuals selected for the position are lawyers or judges who have had many years of experience and they're elevated after many years. Some of them are of an age in which we would be mandatorily retired, because lawyers frequently gain in knowledge as they get older, and that's why I just wanted to see if you were equating age with inability per se, and I see you're not.

Capt. EOFF. No, I think it became a perception though among some younger officers over the years that that was a place to stay away from because it was the end of the line. You went over there to sort of get ready to retire. That was sort of the reputation. I don't think it's that way now. I hope it's not that way now.

Col. RABY. Streaks of gray in my hair make me a little concerned about the age.

Capt. EOFF. We have many officers on the court now who will not retire from there who will go on to other jobs in the JAG Corps.

Col. MITCHELL. Captain Eoff, if my memory serves me right, whatever may have been the Navy experience with promotions off the CMR, the Marine Corps has had three or four general officers including the current Director of the Judge Advocate Division who have served on the court. My question to you would be if the Navy Judge Advocate General blocks out a billet for a Marine at the top of the military justice pile in his office, would the perception that you noted be markedly changed, if instead of doing that, the Marine Corps was given its own JAG Corps to report to SECNAV on Marine matters and hence breaking the billet loose for assignment to a Navy military justice type?

Capt. EOFF. I don't know if we need the Corps particularly. As I said, I don't know whether the Marines, I don't think have ever desired a Corps, but I've always thought because of the fact we had military justice people, both sides, both Marine and Navy, that the fair way to handle the job was to alternate it every other time, to have a Marine one time and a Navy the next in that 02 slot. And that both sides had a shot at that.

Col. MITCHELL. You view that basically as an internal Judge Advocate General problem and not needing a legislative fix?

Capt. EOFF. I don't think so.

Col. HEMINGWAY. Thank you very much Captain Eoff.

(Whereupon, a recess was taken.)

Col. HEMINGWAY. The next witness is Lieutenant General Walter Ulmer, the Commander of the III Corps, United States Army.

Welcome General Ulmer, We appreciate your coming up today. If you could, give us a little background of your experience in the Army, and after you make any comments you desire to on the issues we're facing we'll open it up for questions.

TESTIMONY OF: LIEUTENANT GENERAL WALTER F. ULMER, JR., COMMANDER, III CORPS, U.S. ARMY, BEFORE THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION OF 1983 AT WASHINGTON, D.C. ON 27 JULY 1984

Lt. Gen. ULMER. I'm beginning my 33rd year of service. I've commanded the III Corps on Ft. Hood, which is in the middle of Texas, for about two and a half years. The III Corps is the only post where we have two divisions. And I also have responsibility for training and readiness of three other divisions in the regimen of active forces in the United States.

Prior to that time I was in Germany where I commanded the 3rd Armored Division for two and a half years. My general court-martial jurisdiction in that area included about 38,000 soldiers. About 40,000 soldiers are at Ft. Hood, but because I have two divisions, two Major Generals who are division commanders down there, I have the non-divisional soldiers directly under my court-martial jurisdiction and that's about 15,000 folks. I've spent most of my time in armored mechanized units, although I've served over three years in the 82nd Airborne Division at Ft. Bragg.

My experience has been primarily in the field and it's been delightful.

Since you've already heard from General Lindsay and General Galvin and a host of other distinguished observors of military law, I doubt that there's much that I can really add to your deliberations but I'd be pleased to give you the benefit of whatever I can.

I don't have any prepared statement. I'll make two or three remarks.

Having watched it closely over the last 20 years and almost continuously in a command position for all but one year of the last 11, or a deputy command position, from my perspective the Army's military justice system is probably in the healthiest state that I can recall it. I think it's perceived by most of the commanders, junior and senior, as being supportive of the command and as being reasonable, although not certainly insignificant in terms of an administrative load. The members of the Judge Advocate General's Corps are, I think, respected highly all in all in today's Army and I'm generally satisfied. I feel that as a commander I have the appropriate tools to do what we are supposed to do.

Like most commanders, I see the primary mission of the military justice system as with all other logistics and supporting systems as having the sole purpose of contributing to combat readiness of the organization and it does that by giving the commander the power to discipline and do various things and at the same time creates the opportunity for developing a sense of trust and fairness in the perception of subordinates. I have a couple of general areas of concern. The first is that there has been,

I think, some intrusion of what I would call administrative due process in the various administrative systems within the service where in fact there may be no requirement for specific legal advice and review at any particular point in the process, and secondly I would like to see greater latitude on the part of subordinate commanders and their use of Article 15. I would specifically like to see a bit more reduction in paperwork, perhaps fewer records being kept, even though as a result the Article 15 record might be inadmissible in certain types of trials. And I would like to see the junior commander being able to impose Article 15 sentences which would include withholding of pay or forfeiture of pay. Those are the only comments that I have at this time and I'll be glad to attempt to answer any of your questions.

Col. RABY. Sir, about five areas that the commission is studying today and I'd like to ask your opinion on these areas, then you can go back to Article 15 in a little more depth.

First of all as you know under our current system, since 1968 when we went to the military judge system, an accused before a court-martial has the option of requesting trial by military judge alone in which case the judge finds him guilty or acquits him and if he finds him guilty the judge sentences. And if you accept trial with members, you are sentenced by the court members. There's been a proposal as to whether or not we should recommend a change in the law so that only the military judges would do the sentencing. Do you have any views regarding that?

Lt. Gen. ULMER. Yes, I think that's not a good idea. I think it's appropriate to keep the participation by the members of the court in the sentencing process when in fact there is a trial by court members. I think it's appropriate that officers and soldiers consider themselves as being part of the entire judicial process. I think that in many cases the folks on the court know at least as much as the judge might in terms of what seems to be appropriate within the environment, the command environment, and in the local organization and I think there is some connotation of distrust in the judgment and responsibility and fairness of military court members if you were to exclude them from the sentencing process in all cases.

Col RABY. General, if you had a soldier who was tried for a certain offense and we'll say given a sentence to a BCD, by military judge, hypothetically you could try the soldier again by court members and he were to get the same sentence, which of those sentences would have the most impact on general deterrence in your command? The sentence adjudged by the judge or the sentence adjudged by officer members in command or would there be much difference?

Lt. Gen. ULMER. I'm not sure that there would be much difference. And you know most of the soldiers in the command where they wouldn't know, most soldiers are more unaware of the nuances of what's going on in military law and whether the trial was by judge or by jury than I think most of us might suspect. The individual who is the accused and his circle of friends certainly know the gory details, but this is not a hot item for discussion among either officer or enlisted ranks.

Once in awhile there's a case where a judge or jury gives what seems to be either very lenient or very harsh sentence that causes some discussion among commanders and so forth, and I guess my answer would be first I'm not sure that there would be much of a distinction and secondly, it might more depend upon the personalities, if there were particular personalities involved on the post, than it would be on the process of judge or jury alone.

Col. RABY. So your reason for keeping the members in the sentencing procedure is primarily one of having the military officers continue, excuse me, having the military officer involved in the judicial process as part of his responsibility of rank and position?

Lt. Gen. ULMER. That's correct, and everything else being equal, I might trust their judgment in terms of the appropriateness of the sentence a bit more than I would a judge alone, although there is obvious argument on both sides of that case. Consistency of course goes to the judge.

Col. RABY. Having served in the military as long as you have, I'm sure you've had many many fine NCOs work for you and you've known many enlisted personnel who have done their job well. Unfortunately most of those people don't get involved with court-martial, being court-martialled. However once in a while one does. But do you feel that the enlisted man has much of a perception about his rights in a court-martial and much concern about them, or do you think it's something that they don't think about much?

Lt. Gen. ULMER. Those who never get into trouble don't think about it very much. Those who are either in trouble or think they might be or have friends who are, think about it a great deal. So the majority of the enlisted force today I don't think spends much time worrying about these particular matters. They are much more concerned about whether the company commander is a fair human being and other things going on to affect their lives.

Col. RABY. If we recommended to change the system, for example, so that they didn't have the option for selecting who would sentence them and have to go judge alone, they probably would not react to that negatively on any massive scale.

Lt. Gen. ULMER. I think that would be true. Most of them as you know, the majority pick judge alone. I

think most people who are picked to sit on the court consider it a reasonable duty, but if it were taken away I don't think that there would be the massive uprising.

Col. RABY. Speaking of sitting on courts, we've had some witnesses come before the commission and suggest when court members are selected by and large it's not the most responsible officers in the command that are selected, it's those who are most conveniently available. You've had many years as a commander exercising general court-martial jurisdiction and have selected many courts. How important do you consider that duty and what type of people do you select for membership on your courts?

Lt. Gen. ULMER. It's an extraordinarily important duty. Of course it gives credibility to the judicial part of the system. I can't imagine someone saying that court members are picked because of who's available, but I assume that somebody has. I spend a great deal of time looking for balance, maturity, and a variety of other things. I try to get a reasonable mix of other factors, experience and so forth, on the courts that were put together.

Col. RABY. One or two witnesses have suggested to the commission that the time is right to remove commanders from the judicial system entirely and if a case goes to trial we should just turn it over to the lawyers to determine who would be prosecuted, at what level and so forth. I'm sure you have a view as to whether this should be done.

Lt. Gen. ULMER. It's an argument that has some reason behind it. It's not a ludicrous argument and the farther away you are from the necessities of the military in the field, the more reasonable it becomes. I don't think it's appropriate to do that. I think it's part of a commander's responsibility and I think the authority for maintaining discipline and esprit and so forth within the command, uniquely is his or hers and I don't think that we can remove commanders from the process.

Col. RABY. Is this responsibility so important that you would voluntarily take it with you into wartime conditions rather than delegate it to some judge advocate in the rear area?

Lt. Gen. ULMER. The answer is yes.

Col. RABY. Sir, what do you think about giving military judges at the trial level or at the Court of Military Review the authority to suspend sentences?

Lt. Gen. ULMER. I think it's not a good idea. I think the convening authority is appropriate judge of whether or not a sentence should be suspended. He knows more about the climate of the particular command for sure and I again see that as part of a commander's responsibility.

Col. RABY. In your general court martial convening authority at division and corps level, have there been very many cases when military judges, as opposed to counsel, have recommended suspension of sentence that they've imposed?

Lt. Gen. ULMER. There have been a few. I would say in two and a half years in Germany there might have been eight or ten, perhaps a dozen, of several hundred.

Col. RABY. Out of several hundred?

Lt. Gen. ULMER. Oh yes.

Col. RABY. When you get these recommendations by a judge, do you tend to follow them or not follow them?

Lt. Gen. ULMER. My feeling is I take very seriously their recommendations because they don't make them very often and they are usually based on what the judge considers to be a good reason or he wouldn't make them. So in those cases I look particularly hard at the evidence, and particularly his rationale for it and then I make a decision for or against.

Col. RABY. One of the things the commission is supposed to study is increasing the power of special court-martials to impose sentences up to one year. In your view would this materially aid you in the maintenance of discipline to have this authority?

Lt. Gen. ULMER. I think it would cut down slightly on the number of general court-martial cases and that probably is for the good. I think we can do that without diminishing the rights of the accused in any substantial way so I'm for that change.

Col. RABY. If we did that do you have any concern that your division commanders might start referring cases to the special court that really should be tried by general court? In other words referring cases for administrative convenience.

Lt. Gen. ULMER. I suppose there's the theoretical possibility. I'm not sure, I'm just not sure that would happen. As I'm sure you know and have been told before and have observed, division commanders take that rather seriously, and they and their JAGs look closely at the level of referral. I'm sure we all make mistakes, but that possibility doesn't frighten me any.

Col. RABY. Another area we're supposed to look at is so-called tenure for military judges. The commission has described that as nothing more than a guaranteed term of office which could be the equivalent of a normal duty tour. We haven't decided what period it should be if it should be at all. Do you have any views regarding whether military judges should be given a guaranteed term of office, whether it would enhance their independence and judicial capability?

Lt. Gen. ULMER. I would think that would be the only argument for it. And I can't imagine how that would significantly improve the sense of independent action that those folks already have. I would think that the current system would be sufficient and that the concept of tenure would be an administrative burden on

folks that are trying to spread the wealth in wartime or peacetime. And I can see no convincing argument from our point of view.

Col. RABY. Do you feel right now, what is your view of the reputation of military judges since the system started in '68? Have you seen any changes in the quality of judges or do you have any observation about their performance?

Lt. Gen. ULMER. Their environment has changed dramatically since 1968 but putting all that aside, today I think that the judges have a great deal of credibility with both the members of the JAG Corps, the commanders, any individuals who are being court-martialed or who are otherwise participating in the process.

A few judges have reputations of being more or less lenient, but all in all it seems to be a pretty balanced affair.

Col. RABY. Have you ever had an occasion to run up against a judge that you felt was incompetent?

Lt. Gen. ULMER. I really haven't. We had one in Europe who sat there for awhile, who seemed a bit uncomfortable with the whole process including his position, but he was not there long and I'm not sure of the reason why. Problems of incompetent judges are minimal in my personal experience.

Col. RABY. If you ran into such a case, do you have any avenue of relief which you could seek or is there any way which you could act that you know of, to change the situation?

Lt. Gen. ULMER. You always have avenues and you would go up to the senior Judge Advocate General in the command and see what he might do, to whoever is in charge at that point of the military justice system. I have no direct control, obviously, or influence over the military judge. But I'm sure there are folks up the line who would listen to my suggestions or comments on the matter.

Col. RABY. Do you believe that you need any type of further control or power over the judge in order to maintain discipline in the command?

Lt. Gen. ULMER. I don't think so. I don't see the judges as lining them up and undermining my authority. Like all people who have authority that's a possibility among corps commanders and staff judge advocates and judges and so forth, but I don't see that as a particular threat at the present time.

Col. RABY. If I may go back to your remarks about Article 15. You indicated that you would like to see fewer records being kept and you mentioned the junior commanders having the authority to impose forfeitures with these fewer records. I assume here that you're making reference to the Army summarized Article 15; you would like to see with that lesser paperwork the power to impose forfeitures given to commanders under summarized Article 15?

Lt. Gen. ULMER. I am exactly. I know that part of these are Army procedures and therefore may not be germane to the commission as a whole and I don't want to waste any of your time in discussing the issue if it really doesn't fit in to your responsibility, but yes that is what I'm talking about.

Col. RABY. How important is Article 15, the power of Article 15 to the overall maintenance of discipline in relationship say to the court-martial process, or administrative—or administrative separation powers?

Lt. Gen. ULMER. I think it's very important. I think it's a very key ingredient to the overall structure. It should be available to the commander for just what it's described as, a non-judicial punishment, to take disciplinary action very promptly after the offense, to do it in a way that can be constructive as opposed to forever debilitating to an individual's career. In these days it probably means at the company level you have the power to levy fines and forfeitures and so forth.

Col. RABY. I think this is an important area, so if the other commissioners will bear with me a moment. You of course are very aware as I am, that now in the Army, Article 15 records are used for such things as to determine whether an individual may be eligible for—reenlistment, a variety of personnel actions. If we go to fewer records that means that those Article 15's will not be documented for those purposes.

Lt. Gen. ULMER. It certainly depends on what you mean by documentation. You can make as we used to in the old days some kind of a company punishment book that may or may not be admissible. What you say may be true. There may be other ways of course of documenting Article 15s. You could put it in some kind of a performance record or testimony by the commander or whatever. If the question is whether or not reduced documentation would be warranted in light of the fact that we may not have as many admissible pieces of paper for certain procedures, I'd say it might still be. In other words I would still vote I think for administrative strength in order to give the commander more flexibility, more speed and more promptness.

Col. RABY. A couple of years ago we changed the Article 15 filing system to power down to command option on filing. Are you comfortable with that decision as far as it went? Was that an improvement or was that not?

Lt. Gen. ULMER. It was an improvement. I believe also that there is a position for filing for a specific period of time.

Col RABY. The personal files used to be—

Lt. Gen. ULMER. I think there is, perhaps I'm getting it confused.

Col. RABY. Certain documents stay in the field 201 file for a certain period of time.

Lt. Gen. ULMER. It's not field 201. You can put certain letters of reprimand or certain—into an individual's military file for some designated period.

Col. RABY. That's not Article 15.

Lt. Gen. ULMER. It would be appropriate I think if you could do that for sure—Article 15 where you might want the promotion board to consider for the next two or three years that this individual received a minor punishment but at the end of that time it would be appropriate to clear it from his record. So I think that was a move in the right direction. I think there can be still more flexibility.

Col. RABY. You want to give them a wider range of options as to how long a document should be filed?

Lt. Gen. ULMER. Yes I do.

Col. RABY. Are you comfortable with the fact that if we powered that down to the commander on post the punishment, recognizing at times because of their less experience, they may make a human error?

Lt. Gen. ULMER. I am.

Col. RABY. One final question, Sir. In Article 15s, do you feel that the commanders need more authority, either at time of war or otherwise in the area of Article 15? More increased punishment authority, or do you feel that there's basically enough?

Lt. Gen. ULMER. Senior commanders should be able to reduce senior non-commissioned officers under an Article 15.

Col. RABY. Thank you Sir. I have no further questions.

Col. HEMINGWAY. Mr. Saltzburg?

Mr. SALTZBURG. I pass.

Col. HEMINGWAY. Mr. Sterritt?

Mr. STERRITT. My name is Christopher Sterritt and I'm from the Court of Military Appeals. I was struck by your comment with respect to the members continuing in a sentencing role and you emphasized the importance of them remaining as part of the judicial process. I think I've paraphrased it correctly.

I'm interested in focusing in on what you mean by part of the judicial process and what benefits that brings to the command from their participation in sentencing. Are you speaking, I've broken it down into three areas and you can work from that if you would. One, as a training tool or device for officers in making decisions. Two, in a sense of establishing a unit cohesiveness. For example, the other members of the command not involved in the court-martial itself draw something from the fact that they see the members, officer members or whatever part of enlisted members are on the court, doing the actual sentencing. And the third aspect is the accused, in the sense of him feeling that he might get a lenient sentence from members who are more close to the scene of the crime or the circumstances of it.

Which aspect of that or is it all three that you were speaking of with respect to keeping members as part of the judicial process?

Lt. Gen. ULMER. It's really not the first because I don't think we should be practicing decision making at court-martials. It's currently the third, in that I think it's appropriate for soldiers to have the option of being tried by members of their organization if they so choose. Feeling that if there is some peculiar thing about someone—peers more than the judge then they should have that option.

But basically I think there is in large sense participation in responsibility when a member of a military court knows that he or she may have to participate in the sentencing as well as in the simple finding of guilty or not guilty.

Mr. STERRITT. Is that sense of participation or obligation, does that add to the feeling of the unity of the command as a whole?

Lt. Gen. ULMER. I would think it would.

Mr. STERRITT. Does it contribute to the point in the sense that the members of the command are the ones doing the actual sentencing?

Lt. Gen. ULMER. I would think so, yes.

Mr. STERRITT. That's all.

Col. HEMINGWAY. Colonel Mitchell?

Col. MITCHELL. General, there's been a description of sort of a thought process or an inter-relation between court members and military judges at their own sentencing has been mentioned from time to time during the hearing. I'd like to describe that to you for a minute and get your reaction to it.

The military judge and the court members basically competing with one another in a way which tends to rachet down the sentence that is actually given out by whoever makes the final decision. It works something like this if I understand it, that the accused looks at the choice of judge only or jury based on his perception of who's going to give them the best shake which doesn't mean appropriate, it means lightest. Who's going to be the easiest.

The military judge sits in there with the notion that if he sentences, in order to keep the system from being inundated with members only trials which require instructions even on the sentencing and so forth, that he has to adjudge the sentence which is at least perceived by an accused, or most of them, to be more favorable than the sentence of the court members. The court members, on the other hand, being aware generally of what goes on even though that may be a rather indirect feel, nevertheless have a feeling for what the military judges are doing, at least in the courts-martial within the command

that they are a part of. So that they may use the knowledge as sort of a rough standard by which to go by in similar cases. Then when the court members strike a level which approximates that at which the judge is making sentences, the judge ratchets down a little bit more in order to stay inside of the court members sentences, thereby encouraging selection of judge only trials and keeping the process more expeditious.

Have you run into that in your experience, and if so, what is your reaction to it?

Lt. Gen. ULMER. Of course the people are keeping tabs of the sentences given by the judge are not the accused, they are the defense lawyers.

Col. MITCHELL. That'a right.

Lt. Gen. ULMER. I understand what you have explained and I've thought about it before to some extent. If in fact there is such manipulation, consciously or subconsciously, I don't think it dramatically effects the judicial process nor the typical outcome very much. Or putting it another way, I would say that that still might be a reasonable price for the flexibility that the system now has with either judge alone or jury trial. If that gets to your question.

Col. MITCHELL. Is it important in your mind for an accused to have the perception that the unit is punishing him as opposed to a military judge, or for that matter even a commander?

Lt. Gen. ULMER. I think it depends on the type of offense. If it's purely a military offense which are the type of things that junior commanders are concerned with, insubordination, AWOL and whatever, I think it's appropriate that he think that his commander is a key player in the process, that he knows he is to Article 15, and prefers a judge or whatever. If it's one of the more serious offenses, talking about manslaughter or murder or something, I don't think that that scene is something that the company commander or battalion commander is basically concerned with and who represents the federal authority then, whether it be the judge or whatever, I don't think is really germane.

Col. MITCHELL. In connection with the issue of tenure, although I listened to you describe how if you became dissatisfied with a decision of a military judge you could call somebody and that somebody would at least listen to your complaint on the subject. I'd like to know if you feel that you have any realistic way in which to affect the salary of the military judge with whom you disagree, his status as an officer, his grade, or for that matter his retirement entitlement.

Lt. Gen. ULMER. I might have, I suppose, some small impact on his status as an officer if for what seems to be good and sufficient reason I am continuously concerned about his administration of military justice. But my presumption about judges is the same as my presumption about commanders and that is we are all fundamentally worthy of trust, that we're trying to do the same thing and that, when we have folks that aren't, that's an aberration in the system to be treated by something other than a normal process of things.

Col. MITCHELL. Tenure is basically a civilian concept. It's not military. And the reason why the civilians have—judges or this thing called tenure is to protect those very specific things that I mentioned to you, to protect the judge's livelihood from the political or public pressure that might be brought to bear because of an unpopular decision. As a military officer and a military judge, you're really in the same position as an individual in civilian life.

Lt. Gen. ULMER. The military judge is almost totally immune from miscellaneous incursions, through its promises and whatever. The military judge is in my experience left alone unless there are very extraordinary circumstances that are normally seen first not by the commander in any case but by the lawyers who are involved in the process.

I don't think tenure has anything to do with protecting his fair mindedness, even-handedness or his immunity from—

Col. MITCHELL. Even if you became distraught over a decision of a military judge and you wanted to go after him and tear his head off, you would not be slowed down by the knowledge that he had tenure in his position.

Lt. Gen. ULMER. That would make no difference.

Col. MITCHELL. It's been suggested by a witness before the commission that if Congress provided tenure to military judges that that would elevate the stature of the military judge and make him feel more important in the system. In your mind as a commander, is that an important consideration?

Lt. Gen. ULMER. It may do just the opposite. It may make him such an abnormal professional within the service that his credibility would be somewhat diminished for a variety of reasons. I don't think that would be looked upon favorably by most of the constituencies that we're talking about.

Col. MITCHELL. Thank you.

Col. HEMINGWAY. Captain Byrne?

Capt. BYRNE. Perhaps I'm wrong, but has anyone asked the general about special courts-martial yet?

Lt. Gen. ULMER. I said I'm for a year.

Capt. BYRNE. Would you favor a year if you also along with that, say if you were going to send it to a special court-martial that could award a year, you also had Article 32 requirements?

Lt. Gen. ULMER. Probably not. I think Article 32 should go along with the general court-martial.

Capt. BYRNE. That's all I have Sir.

Col. HEMINGWAY. Mr. Honigman?

Mr. HONIGMAN. Good afternoon, General, I'm Steven Honigman.

You mentioned earlier that you believed the UCMJ provides you with the appropriate tools that you need to administer justice. Are there any changes apart from the Article 15 changes you've described that you would recommend for the military justice system?

Lt. Gen. ULMER. I really don't think so. I'm quite comfortable in some recent modifications, and whether those are Army modifications or whether they're code modifications or what, I'm not sure, but in any case those seem to make sense in providing my staff judge advocate with the authority to make some decisions and do certain things that I was exclusively doing prior to that time. So I'm not uncomfortable with what we have to deal with.

Mr. HONIGMAN. Are there any changes that you would like to see made to help you to function in a wartime as opposed to a peacetime situation?

Lt. Gen. ULMER. If we would modify the Article 15 as I had recommended, that would take care of some of the small stuff and would eliminate considerable amounts of paperwork. I think that going to the year sentence for the special court would be an assist also. I'm not sure that other than a more liberal approach to pre-trial confinement that there are any other things that I would think were essential.

Mr. HONIGMAN. General, I assume to some extent you have followed the decisions rendered by the Court of Military Appeals and from your perspective as a commander you are familiar with their impact upon the administration of the justice system. Is it your view that the court, generally speaking, has handed down decisions that take into account the rights of the individual accused and also show a sensitivity to the military's needs and considerations?

Lt. Gen. ULMER. I'm not sure that I'm competent to answer that question. I really don't feel comfortable making a generalization.

Mr. HONIGMAN. Given the impact of decisions of the Court of Military Appeals upon the methods of administering the justice system, would you believe that it would be a meritorious change to increase the number of judges on the court from three members to five members?

Lt. Gen. ULMER. I suppose it would be, to give a little more stability to the court. That presupposes that you would have a higher probability of stability with five than three and there are some arithmetic pluses and minuses to that. But in short I would think that would be reasonable.

Mr. HONIGMAN. You've talked briefly before about the assignment of officers to sit as members of courts-martial and we've heard testimony and it's been eluded to before that in some cases or many cases or often or sometimes officers who aren't the best and most capable, proficient candidates to sit as members are nevertheless assigned because they are available. And conversely, the type of officer who might be an appropriate member, and fighter pilots has been one example, are not assigned to sit as court members because the view is that their duties make it unreasonable to spare them. And I think you've testified that in your view it's important to have a proper mix and that you seek the professional, the highest professional calibre. Assuming there are commanders who don't necessarily share that view, is there any system that you would recommend be adopted to ensure that the most capable members are selected? In other words is there an institutional fix that would be possible?

Lt. Gen. ULMER. The solution is to pick commanders who are sensitive to the requirements of military justice and its administration and I think that's the ultimate solution to the problem. There has been talk about going to the lottery system or random pick or computer selection or whatever. That doesn't appeal to me for a variety of reasons. That's another indication of mistrust in the commander, and the better solution is to get a commander that you trust.

I don't think I have a quick fix that would provide a guarantee that a commander is going to select those folks who should be selected. Since all of us have people who we're working for and that this is a rather sensitive area and it's a pretty highly visible area, I would think that the chain of command needs to counsel, approach or advise folks of how this needs to be done, and in a pre-command process of refresher training or whatever that this is a subject that should be brought up, and in the Army today it is for brigade and division commanders.

Mr. HONIGMAN. You mentioned earlier in your testimony that one argument in favor of retaining the option of having members sentence is that it tends to instill a greater sense of responsibility on the part of the members who are determining guilt or innocence, is that correct?

Lt. Gen. ULMER. Yes Sir.

Mr. HONIGMAN. Can you expand upon your view of what positive effects result from that greater sense of responsibility?

Lt. Gen. ULMER. I think that any process or policy that makes an officer or non-commissioned officer feel more a part of the totality of everything that is going on within the organization, whether it be supply economy or equal opportunity or tank gunnery or military justice, I think there is a greater feeling that he or she is part of the team. This is a concerted effort, quite different from

the civilian environment where you are in and out of the organization or where you're working eight hours or twelve or whatever. But when you have the full time responsibility for everything that goes on or doesn't go on, I think that's a part of it.

Mr. HONIGMAN. Do you think the knowledge that a member will be responsible for a sentence may have an impact on the degree of responsibility with which they approach the question of guilt or innocence?

Lt. Gen. ULMER. I do. Whether it should or not is another matter, but I really do think that if you know you're going to have to sit through the entire process and that you might very well be part of determining the sentence, I think you're going to be a bit more attentive and a bit more thoughtful about the whole operation.

Mr. HONIGMAN. Do you think that the same principle might also apply to a military judge adjudging a sentence if he would know he would be responsible for the suspension of a sentence?Lt. Gen. ULMER. Probably not, or at least to a lesser degree. He's doing something there which is at the heart of his profession, which he's an expert in the field as opposed to the individual who is coming in and out of the process. So if it would impact on the military judge, my suspicion is it would be of much smaller magnitude.

Mr. HONIGMAN. Thank you very much.

Col. HEMINGWAY. General, when you started you said that you didn't think that whether or not an individual being sentenced by members or by the judge alone was a hot issue of discussion among enlisted people today. Is there anything about the system itself that has in the fairly recent past, been what you would consider to be a problem of concern to the Armed Forces?

Lt. Gen. ULMER. Down at the bottom level where I think I work, the business of Article 15 filing or not filing, and the business of the paperwork associated with an Article 15 and whether or not you had to get legal advice regarding the Article 15, whether or not you can reject an Article 15, these are things that the small unit leader and the NCOs and the soldiers talk about. Lawyers talk about other kinds of things. They are of course much more concerned with the nuances of the systems and the various ramifications of judge and jury and whatever. We have the most motivated and dedicated and trainable junior enlisted force today in the Army that we've had in the time that I've been in the service. But I just bet that a significant number would have to go through a period of review to describe which court has which sentencing authority and so forth. When they start to get involved personally in this, they are of course brought up to speed. But in general, it's not something that people sit around having a beer over and arguing.

Col. HEMINGWAY. From your comments then, commanders and the troops are satisfied with the system and it would seem therefore that the only time people get upset is when they perceive that individuals as opposed to the system are abusing their rights.

Lt. Gen. ULMER. I think that's a fair statement if you take into consideration my comments regarding non-judicial punishment and the administrative burden associated therewith.

Col. HEMINGWAY. Do you think that we in the military are more subject to these abuses than are civilians?

Lt. Gen. ULMER. I'm not sure I understand the question.

Col. HEMINGWAY. Is the individual subject, simply because he's in uniform, to the overzealous commander any more than a civilian would be to an overzealous judge?

Lt. Gen. ULMER. He's more carefully and totally scrutinized of course. He can generally get away with less. The organizational expectations are higher towards certain kinds of conformity with regulation and other norms. Since you asked the question, the quality of justice that he gets is probably higher than that of his civilian counterpart by a significant order of magnitude.

Col. HEMINGWAY. That's all I have.

Col. MITCHELL. General, you mentioned one of the things that distressed you was the amount of administration which attends non-judicial punishment in the character of some, what is your feeling about the administrative aspect of the court-martial business? I don't mean to pin you down to specifics because you're a general officer and that you're SJA, but in a general sense, what is your feeling about the administration which attends a court-martial? Too much, too little, about right?

Lt. Gen. ULMER. It's too much if you're talking in terms of a perfect world. It's probably about right given the state of the world and what we need to do legitimately to attend the rights of the accused and all the parties; records of trial, verbatim records of trial are verbatim records of trial and they serve a useful purpose in the appellate process and I understand that and I have no great quarrels with that. The Article 32 process is sometimes lengthy and that's a very reasonable process. There is good reason for it.

There is just not a lot at that subject level that I can quarrel with. I find of doubtful value where I indicate what judge or whatever is going to happen, but most of those small things are being ironed out.

Col. MITCHELL. When you as a commander are considering whether or not to suspend the sentence of an accused, do you bring to bear on that decision a lot of intangible things which relate both to your command and to the accused and to your own experience as an officer?

Lt. Gen. ULMER. I suppose I do but I very carefully go over the specifics of the case, the circumstances, the commander's recommendations, what the SJA has to say, what the defense counsel or the judge has to say, all of those kinds of things.

Col. MITCHELL. But these intangible qualities also get plugged into the act? Your intuitive sense.

Lt. Gen. ULMER. I've been watching these soldiers for a long time. Of course.

Col. MITCHELL. Do you think that the military judge sits in the same position that you do with respect to that question?

Lt. Gen. ULMER. He does not usually have as much experience as I do and he is not in this particular assignment quite as close to some of the environment of the command as I am. In some cases, however, having listened in detail to a lot of things going on in the command he's more informed about certain things than many of the commanders are.

Col. MITCHELL. Do you think the intangible aspect of that decision to suspend is a significant reason why that decision needs to remain with the commander?

Lt. Gen. ULMER. It's a significant argument but it's not the most powerful one. The most powerful one simply is the authority of the commander should be supported by his having the particular decision.

Mr. SALTZBURG. I'm Steve Saltzburg. One, I just want to clarify something. Colonel Raby asked you a question that I think was later asked in a slightly different way and the terminology may be very important when someone reads this. The question he asked was whether you had known an incompetent judge, an incapable judge doing the job, and you said the only example you raised may not have even been incompetent. It was one judge for a short time in Germany, and the question was put, well could you have in some way, if you found an incompetent judge, could you have done something about it and you talked about going up the ladder to the Chief Judge Advocate.

Later on the question that Colonel Mitchell posed was slightly different. He asked you about a judge whose decision you didn't like, you could go up the ladder.

Now I did not hear you, if I was listening, I heard you talking about the incompetent judge, I take it there hasn't ever been a case where in response to a decision you've ever thought about going up the ladder to complain about a specific judge's decision, is that right?

Lt. Gen. ULMER. No, that's wrong. There have been a couple of decisions where the sentence seemed to be so dramatically different from what was the norm, what was expected—that I asked my SJA if we could get some clarification as to what was the rationale, and I think there was an explanation offered through some channels in one case and I can't really remember the outcome of the other. But I want to be clear in terms of what I said regarding the influence or lack of influence of the commander in relation to the current military judge system.

In terms of my influencing his decision on a future case I think I have no influence and I don't think I should have any. I think I should have a general influence in terms of the military profession on military officers, doctors, judges, lawyers, as a whole in the collective sense, understanding what we're trying to do in military preparedness, fairness and all those other kinds of things.

If, however, there were a judge whose performance was—strange, nonsupportive, that he was creating a spectacle within my command, I think that I could now make that known through judicial and command channels and that someone would at least listen to it. That's quite apart from my having the tendency to or having tried to influence any judge's decision in a particular case.

Mr. SALTZBURG. I'm glad you clarified. That's what I thought you were saying.

Another question about the Court of Military Appeals, I sometimes think that we lawyers knitpick about judicial decisions that are so narrow in many senses in their overall implications for the future, the way you do your job in relation to their job that it must be almost amusing to hear lawyers talking about it. And when you care about the decision—and I gather you get advice about that from the staff judge advocate.

The question I have is over the years, especially the last few years, have you found that the advice you've been getting about what your responsibilities are to enforce the law as a result of Court of Military Appeals decisions, have those decisions tied your hands? Do you feel uncomfortable with them?

Lt. Gen. ULMER. Like many Americans, I have been somewhat uncomfortable with some decisions that seemed to overly protect the accused in certain cases regarding the collection of evidence for example. And it seems, third or fourth hand, by the time it gets to me in a practical sense, I'm not uncomfortable with what I think are recent court decisions. I have always been uncomfortable with District Court and Supreme Court decisions that have related to the power of the military to do those things that they are specifically chartered to do. I think the federal court system in general has been very supportive, but I don't spend much time to tell you the truth, reading or arguing the nuances of the Court of Military Appeals decisions. But those decisions are promptly brought to me by the SJA when he thinks they have something that is germane to what we are doing.

Mr. SALTZBURG. It occurred to me that a lot of the decisions now in the Court of Military Appeals are very much affected by the adoption by the President of rules of evidence which cover extensively criminal procedure. He has promulgated them and the court has essentially gone by them unless it's prepared to make a constitutional decision that overrides those rules. Am I right in assuming that you—have at least one out unless they're dealing with a constitutional decision and that is trying to change some of the rules in the manual, trying to change the code if necessary, to provide some better balance. Am I correct on that?

Lt. Gen. ULMER. Whether or not the services have an influence and an out in changing the code?

Mr. SALTZBURG. Maybe it's one way of sometimes dealing with a decision that may turn out to be unfortunate or have some implication the court might not have considered.

Lt. Gen. ULMER. I don't know. Those things are really handled at the Washington level and I really can't comment very much about how that all goes on because my ignorance—I'm sure it must be handled probably well.

Col. RABY. Basically regarding the Court of Military Appeals decisions, I don't want to drag this forever, but other than the area of search and seizure and Article 31 rights, does that court say very much that's brought to your attention that gives you any pause or concern? You talked about evidence collection. I assume you referred to what you could search for, whether you could use confessions.

Lt. Gen. ULMER. The useability of certain types of evidence seized as part of a search. And to the area of what must be the basis for a commander executing a certain kind of search.—just cause to proceed and that sort of thing.

The Court of Military Appeals does not regularly affect my operation that I know of. I'm sure that they do in the larger sense.

Col. RABY. You don't feel that you are being hindered in accomplishing your mission by anything the Court of Military Appeals has done in the last 30 years to your knowledge?

Lt. Gen. ULMER. I wouldn't go so far as to say that.

Capt. BYRNE. General, you read the questionnaire that came out.

Lt. Gen. ULMER. I did.

Capt. BYRNE. If in that questionnaire we had approached the question about Court of Military Appeals decisions from the point of view of the practical implications and related them to your experience over the last probably 35 years, would this have been a better way to have approached your questioning on this so you would have had time to think about it? For example, let's just give one example. Do you think the present urinalysis program has been a effective way to ensure that your soldier is able to perform his military duties?

Lt. Gen. ULMER. It has contributed to a more healthy force, yes.

Capt. BYRNE. Now if you will, go back say five to seven years when you were not able to use the urinalysis program. Was that a detriment to you?

Lt. Gen. ULMER. The current rules are more supportive of me than the prior restrictions when there were greater limitations on my use of that, yes.

Capt. BYRNE. And if we had presented you with questions that had addressed these things in this line that pointed out how decisions impact on the overall readiness, would you have been better able to answer questions on Court of Military Appeals decisions?

Lt. Gen. ULMER. I would think so.

Capt. BYRNE. Thank you very much.

Col. HEMINGWAY. General, it's been a long day and it's going to get longer before it's over. We appreciate the time that you've spent here today. It's been very helpful to the commission. I know it will be helpful to the Congress.

(Whereupon, at 3:50 p.m. the hearing was adjourned.)

Col. HEMINGWAY. Our witness this morning is General Sennewald, the Commander of the United States Army Forces Command.

Good morning and welcome, General Sennewald.

If you would for the Commission's benefit, we would appreciate it if you could give us some idea of the nature of your command and the experience that you've had.

TESTIMONY OF: GENERAL ROBERT W. SENNEWALD, COMMANDER, U.S. ARMY FORCES COMMAND (FORSCOM), BEFORE THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION AT WASHINGTON, D.C. ON 28 JULY 1984

Gen. SENNEWALD. I joined the service in '51, so I guess that's 33 years of experience. I commanded, I'm a combat arms officer, I'm a field artilleryman. I commanded five years as a lieutenant-captain, of a battery. I commanded a battalion for 13 months in combat. I served in Korean combat as well as in Vietnam. I commanded a division artillery as a Colonel for about 20 months. I commanded Ft. Dix training center for about almost two years. I commanded the United Nations Command, Eighth Army, the Combined Forces Command and United States Forces, Korea. That's four hats. It sounds very complicated but after four and a half

years of experience you can sort of sort out both command lines rather easily.

And now as of the 18th of June I'm commanding the Forces Command here in the United States. It's advertised as the largest Army major command that we have. I command all of the tactical/operational forces in the CONUS, in the 48, and Alaska and in Panama. And I say that with all of the humility that I can muster.

That's sort of a resume in terms of what my command experience has been.

Col. HEMINGWAY. I assume you're familiar with the issues that the commission is addressing. If you don't have any other prepared remarks you'd like to give, we'll open up to questions.

Gen. SENNEWALD. I would like to, as we talked this morning, and I didn't come with any prepared statement, but after that experience that I've had I feel very strongly that the military justice is an integral part of the commander's environment and how the commander uses his military justice system and how he involves himself is very important and very key, and I'm here to tell you that I would reject any effort to take the commander out of the military justice system any more than he has been removed thus far. I think the system that I've been involved with over the last 33 years has been a good one. I have never as a commander overly influenced. I think, well I have never been influenced by commanders as I went through the military justice procedures and techniques and I say that on or off the record.

I think in addition the term military justice is one and it's an appropriate one because I think the word military should not be forgotten, and it's in my way of thinking different than the court system we have in the civilian environment. I don't think we could argue in the terms of justice and where it's appropriate. I think we must meet those requirements—justice. I think there is some uniqueness in the terms of the military system that I hope all of us would recognize and I'm prepared to expand as you see fit.

Col. HEMINGWAY. Do you exercise convening authority now?

Gen. SENNEWALD. No I do not.

Col. HEMINGWAY. You're a subordinate commander?

Gen. SENNEWALD. That's right.

Col. RABY. Sir, one of the major areas that this commission has been tasked to study for Congress is the question of whether our sentencing procedures should be changed so that an accused, regardless of whether he elects to be tried by a military judge alone or by court members, or court members that include enlisted personnel, if he were found guilty and it got to the sentencing stage, the military judge would be the sole authority that would act on sentence.

In other words, take the court members out of the sentencing procedure in those cases where the accused requests trial by members. What is your view regarding this proposal?

Gen. SENNEWALD. Well I think it's my view, and I think I can speak unanimously for the 16 commanders that I've polled and this is Lieutenant Generals and Major Generals who are commanding, that we don't think collectively, and I personally don't think, that's a move we should make. I think again the military and the line officer must be involved in the justice system from the very beginning and I think must represent the military community across the board. And I think part of that is accomplished by being a participant in the sentencing procedures and determining the sentences. So I think unanimously we reject that particular idea.

Col. RABY. Those subordinate commanders are your major subordinate commanders in Forces command?

Gen. SENNEWALD. That's correct.

Col. RABY. Another proposal of the committee is that the military judge at the trial level and/or the Courts of Military Review at the review level, be given the authority to suspend sentences that are imposed. Do you have any views regarding that?

Gen. SENNEWALD. Again, I'm speaking for the commanders and I think again the commander should have and retain the full authority to suspend the sentences. Again, he is responsible, the commander is responsible for the disciplining of his organization and he's responsible for the well being and the conduct of the people, of what his installation or activity he is involved with, and I think he also understands the needs of the military community and I think he should retain sole authority in terms of that particular area.

Col. RABY. You do not believe that it would work to have a shared responsibility in this area, would work as well?

Gen. SENNEWALD. First of all I don't know what's broken. That's my first question. And number two is, I don't know how we would share it. I think the ground rules would be difficult to develop and again I come back to the fact the commander knows the requirements of his command in the military community and in the environment and I think he ought to retain the prerogative of suspending sentences.

Col. RABY. Another area of study by this commission is whether special court-martial jurisdiction should be increased to, the confinement portion of it should be increased to, one year from six months. Do you have a view regarding that?

Gen. SENNEWALD. I think probably not as strong as the last two views or comments, but if we could streamline, speed up, reduce the administration requirements. I think that fundamentally most of the commanders sup-

port going to one year and I think that essentially there appears to be some savings, administrative savings, permitting this to be accomplished, extending the sentencing to one year.

I guess the companion piece of that is would that increase the appellate and increase the requirements in that area, and I think marginally. So I guess on balance we would like to see the sentencing be extended to one year.

Col. RABY. What if instead of increasing on the back end of the system, that is the appellate system, where normally the accused is administratively transferred or fined or whatever, so it isn't quite the problem for the command that he was before the trial, what if they front loaded it and put an Article 32 requirement in for the increased jurisdiction. Would you then favor it? The Article 32 investigation?

Gen. SENNEWALD. I would be less enthusiastic personally.

Col. RABY. I take it then that the primary basis for you and your commanders' support of the increased jurisdiction is that it presents an opportunity to move a certain class of cases commensurate with the needs of justice faster through the system and thus gives you a quicker means of reaching a disciplinary result?

Gen. SENNEWALD. I think that's fundamental. Of course that gives us more flexibility in terms of sentencing. Six months up to a year. It doesn't have to be the six months or one year. I think it gives us the opportunity to tailor if you may, if that's the term, the punishment to the offense and all those things are factors in there, but I think fundamentally I would—military justice, streamline it, move it along more rapidly.

Col. RABY. Sir, another area that we've been asked to study is whether military judges at the trial and Court of Military Review level should be given tenure. For purposes of this study the commission has defined tenure as being nothing more than a guaranteed period of service as a judge, which we have not fixed a period in our minds. In fact we haven't concluded whether we should even have tenure. But if we did conclude it, we haven't fixed a period in our minds. It could be the normal duty tour, it could be a set period. Do you have any, and your commanders, have you formulated a view concerning the tenure question?

Gen. SENNEWALD. I think fundamentally, again I ask the question, what is the matter with the current system? If I can believe my JAG, and I believe everything my lawyers tell me, he says the average tour that the judge has now is essentially three years. Again, I don't understand what's broke. I think if we give tenure we're going to reduce some of the flexibility for the staff judge advocates in terms of assignments and utilization and so I think on balance I would oppose tenure. And I guess there would be another aspect to that, I'm sitting here thinking. The process then of removing inept, or judges who simply don't measure up, and I mean not from what the commander believes but in terms of administering justice within a system, and I think if we go through that tenure business we'll have another—in terms of how to gracefully remove those people who simply were selected, it was a poor selection to begin with and I think we need that flexibility in terms of what we have now to take those people out of the system and let them function somewhere else in the military justice program as opposed to being a judge.

Col. RABY. Considering military judges in general and their performance in duty since they received the title in the Military Justice Act of 1968 to become effective the following year, what is your current perception of how military judges are functioning within the system?

Gen. SENNEWALD. I think good. And I think quite frankly it was a good decision to develop and institute that program. I think it's put a man in the courtroom, the judge alone or with a panel, that has an opportunity to guide it, to ensure the rules of evidence, et cetera are met. So I think from every aspect it's been a plus. I've had many judges quite frankly who have delivered sentencing and sentences that I've not been too pleased with, but on balance I wouldn't change that. I think that's been a positive aspect and I think it's also an opportunity if we steer clear of the tenure aspect, I think it's also an opportunity to grow; people within the Staff Judge Advocate Corps of all the services to spend a tour in the position of being a judge. I think it grows them, I think it gives them insight and prepares them for more responsible positions. So from my standpoint I think it's a positive aspect of the system. I wouldn't change that.

Col. RABY. I know that most commanders I've spoken to do not like stovepipe commands. Just inherently, we don't particularly care for it. We do have in the military of course CID.

Gen. SENNEWALD. Some is a modest comment.

Col. RABY. It's proliferated over the years. I'm trying to be charitable.

What is your view of the trial defense service? Have you had an opportunity to really evaluate that since it's been in effect the last few years?

Gen. SENNEWALD. I was commanding Ft. Dix when we brought that into being. I would have to say that I don't object to that and I think that if this provides a perspective of fairness and reinforces that aspect of fairness, then I submit that I don't object to the stovepipe in the defense lawyer system.

Col. RABY. There's been a witness or two that has come before the commission and has testified—

Gen. SENNEWALD. Let me go back and say one other thing. I would also say that I don't think it's a necessity,

but I think that it's with us. I think that it's something I can live with without any problem.

Col. RABY. We've had some witnesses come before the commission who have testified in essence that the way military justice is developed they think the time is right to maybe set up a completely separate trial command and take the convening authority out of it, that there's no need to have him make the decision of what cases he'll refer to trial, that that can be done much like a district attorney in the civilian community, and this would release the commander of the administrative burden of making these type of decisions, especially in time of war.

What is your view regarding this proposal? I can sort of guess from your earlier remarks.

Gen. SENNEWALD. Well obviously I can't support that and I'm a victim of my experience. Again, I think the commander has the responsibility to be in the military justice system and that's a command of every level and I think starting at the captain or the lieutenant who is commanding and I think that the military justice system and how it's administered is part of the environment. And it's a tool the commander has along with many that instills the discipline that's necessary in the military organization. And I think the commander that wants to push that aside and wants to relegate that to some third party is missing the boat. That commander, when he indulges or works in military justice, he is exercising his command. He's exercising his authority. He's reinforcing the discipline or destroying the discipline, if he does it improperly or incorrectly. I just think that's so critical.

And the commander who says, so I can have more time to lead and command, really doesn't have a broad enough perspective because he is leading and he is commanding when he's administering military justice. And I've done that on Saturdays and Sundays with my lawyer, and I happen to have one of those personal control facilities there, PCFs there at Ft. Dix, and I went through four or five hours every Sunday afternoon of all of the Chapter 10s and I read every one of those, and I thought that came with the territory. And if a guy doesn't want to do that, or the woman, then they ought not to be a commander.

Col. RABY. The commanders time is very valuable. You apparently believe that this is so important that the time is worth, it's what is necessary to be devoted.

Gen. SENNEWALD. That's right. All I would be doing is saying my position in another way. I think it's fundamental.

Col. RABY. At time of war you still want your commanders making the decision of the type of cases to refer to trial and selecting the court members?

Gen. SENNEWALD. That's correct. I think we can do that. Again, I'm not so sure that the current system can work in time of war as it's envisioned in peace, but a fundamental aspect of the commander involvement I adhere to from the very beginning and even more so in wartime. I know that we have—done a great deal of study in terms of modifications that we would need in time of war. So that's kind of moving above our discussion here today.

But the fundamental concept is valid and should remain.

Col. RABY. Some witnesses have testified before the commission that when it comes to the selection of court members, that commanders on occasion, well I won't say occasionally, I'd say as a matter of practice, that they believe commanders tend to select the officers who are just most conveniently available without regard to selection of the best qualified officers, the brightest, the best, whatever in the command. How important did you consider court-martial duty when you were a junior officer and then when you were a special court-martial or general court-martial convening authority? How much consideration did you give to court-martial selection?

Gen. SENNEWALD. When I was a junior officer I thought it was an onerous task, but a lot of things I thought as a junior officer were really kind of something I ought not to have to do. But I would submit to you, and I grew up in a system where we did not have judges and we went through the battalion level court-martials and I think that junior officer must serve, all junior officers must serve on court-martial panels, and I think it begins to grow them in the system. And the best and the brightest I would question now of going to how you select and who you select, I would tell you that I tried to get a cross-section of the people represented on the post, and I wanted combat arms, combat service support, and I had people who were in the admin business and I never had a question of whether they were smart enough or whether their qualifications met, or the fact that they appeared as a member of a panel, so I think the system is good, the officers and the enlisted if selected should serve. When I selected them, we wanted to get a representation of the military community that was represented on that particular post. Whether they are the best and the brightest, that's kind of hard to tell.

Col. RABY. In order to be eligible for commission, an officer, male or female, must have a certain score on tests, isn't that correct? Or used to.

Gen. SENNEWALD. If you want me to tell you that by definition I think they should be qualified, I would say by definition they ought to be qualified to serve on a court-martial because they are commissioned officers.

Col. RABY. For the benefit of the rest of the commission here, what is the average education level of a major in the United States Army today roughly?

Gen. SENNEWALD. I don't know about the average, I'm going to shoot from the hip, but I think that 99 percent, and I think I'm right, 99 percent of the officers in the United States Army are college graduates. Those numbers are available. I can't speak for the rest of the services, but we're talking about a relatively well-educated officer corps. I would say 99 percent have a Bachelor's degree.

Col. RABY. The senior NCO corps in the last 10 years, has its educational level increased in your opinion?

Gen. SENNEWALD. Oh yes, and I think again I'm speaking for the Army, that as we get up to the 7's, 8's and 9's, we find almost every one, I think it's a requirement for 7, 8, and 9 to have a high school education, and to be competive most of those people have two years of college.

Col. RABY. One final question, Sir, if I may. If you had the power to change anything or to add anything to the current military justice system, is there any area that you feel very strongly about right now that you would like to have changed or amended or increased power—requirements?

Gen. SENNEWALD. No, I'm comfortable. My own concern is that I don't know how much work has been done, my only concern would be the application of the military justice system in wartime and I do know that the Marines and the Navy afloat have some problems in terms of available people as it's now prescribed in the system. But I think it's working and it's workable.

Col. RABY. I have no further questions.

Col. HEMINGWAY. Mr. Honigman?

Mr. HONIGMAN. General, let me pick up on the last point that you made which is that the Marines and the Navy may have some problems with the implication of the code in wartime. In your opinion, are there any problems peculiar to the Army that would be posed in wartime by operating the code as it now stands?

Gen. SENNEWALD. I guess, and I'm going to kind of shoot from the hip, I guess the areas that I would say would be in a bare base situation in the Middle East, on an island or whatever where you're going in with a force and not too large, and you needed to stay there and you're in combat, the question is do you bring the judges along or do you ship the man out? Is he evacuated and does he do the military justice someplace else in another location? Do we have the lawyers to provide him the proper defense and the prosecution? I guess it's the availability of people as we've now structured it and again of course that, plus the need to do the administrative aspects, coupled with the requirement to do a speedy trial.

Mr. HONIGMAN. Would I be correct in thinking those are more logistical problems than institutional problems?

Gen. SENNEWALD. That's right. But of course if you lay on the commander the need to do it in a certain period of time, then the question is what is most important, you know, where does he put his focus. I'm the first to understand that there's a need to put the enemy first and we'll take care of military justice second.

Mr. HONIGMAN. General, have you tried to keep abreast of the decisions issued by the Court of Military Appeals in the military justice area?

Gen. SENNEWALD. Not since I left Ft. Dix and been in general court-martial.

Mr. HONIGMAN. While you were at Dix, was it your view that the court was generally issuing decisions that on the one hand would take into account the rights of the accused under the system of justice and on the other hand showed a sensitivity, understanding, to the unique military needs and considerations under the system?

Gen. SENNEWALD. I would have to tell you that it would be my impression, as I follow these, the understanding of the court could have been improved, the understanding that the court had of the uniqueness of the military situation could have been improved.

Mr. HONIGMAN. Sir, can you tell us what years you were at Ft. Dix that formed the basis of that opinion?

Gen. SENNEWALD. '78 through '80. '78, '79, and beginning part of '80.

Mr. HONIGMAN. Would you agree that one function of the attorneys representing the government before the Court of Military Appeals would be to advise them in each particular case of the military considerations that they should take into account in deciding that case as part of their adjudicative responsibility?

Gen. SENNEWALD. I think without a doubt, but I think also I have only met, maybe because I've never been in a position to, but when Judge Fletcher came through Korea, it was the first time I ever met a member of that court in the field. And I would suggest to you there's a need for that so that that judge understands the environment in which the military justice is administered. And I'm not in a position to criticize the court and each has to do the things that they think are best under the circumstances and I accept that. But again, I go back to my original statement that says there is a uniqueness out there. The commander has the responsibilities and lives with those people day in and day out, 24 hours a day. And so I would submit to you if I was God, that the members of the court would take a sabbatical periodically through the system to visit the Navy and Air Force and the Marines and the Army, and I would submit to you that each system is a little different, and each system has a little different sense of needs based upon the environment in which they operate in, for whatever it's worth.

Mr. HONIGMAN. Given that the court's decisions do play a role in not only deciding particular cases but in deciding how the system of justice works and how the overall military system works in justice areas, would you agree that stability of precedent is an important objective on the part of the court? In other words the court would flip-flop from one philosophical approach to another quickly?

That's a leading question I can see.

Gen. SENNEWALD. I'll give you my philosophy that I did at Ft. Dix, or as a colonel or as a lieutenant colonel or as a captain, I did what I thought was right and I exercised the court-martial system with the advice of my JAG in the manner in which I felt was the best. What the court did and what the appellate system did with my court cases had very little impact on what I did.

Would you like to say that consistency is significant and important? And I'd say yes, that's probably true. But did it make a great impact on how I did my business as a major general, and I would say absolutely not. Because I felt that those three people had their own backgrounds, their own biases, and their own needs to fulfill in terms of their responsibility and they took care of theirs and I took care of mine.

Now that doesn't say that I was happy or unhappy. But I felt that everyone has to do what they think is right.

Mr. HONIGMAN. On the other hand of course, consistency of opinions would be important to your staff judge advocate in determining what advice he would give you when appropriate to the military police in determining what searches and seizures they indulge in.

Gen. SENNEWALD. Absolutely. Not getting into the techniques and the rules of evidence, obviously that's a given. But the question of what the court did, whether they upheld, rejected or whatever the case may be, if I felt the man or the woman needed to be court-martialed under the system then I court-martialed him or her, for whatever that's worth.

Mr. HONIGMAN. Would you support an increase from three members to five members in the personnel of the Court of Military Appeals and would you view that sort of an increase as tending to help achieve greater consistency in a way that would be meaningful to you and to your subordinates?

Gen. SENNEWALD. I don't know, that would probably even out, I suppose, to people on one side or the other. I think obviously you must—it would be the mavericks on either side if that's the term. I guess I'd have to think that through. I really don't know what that would do for me, for the system, and it would probably give, I guess it would have the tendency to even out.

Mr. HONIGMAN. It's also been suggested that it would reduce the impact of the shift when one person leaves and is replaced by another, and you can get two mavericks on one side instead of on the other.

Gen. SENNEWALD. I think that's probably right. Also there's an associated administrative load on that. When you have three to five, and I would also tell you you may extend the time necessary to review cases.

Mr. HONIGMAN. Do you believe that any changes would be appropriate in Article 15?

Gen. SENNEWALD. No, and I would have to say my administration of an Article 15, it's been some time since I've done that. And I normally would only be associated with the general officers, if I'm administering Article 15 to them. So when I say no I would speak from a very limited personal experience in administering Article 15.

If you want to talk about that you ought to get a LTC here. He could probably talk to that a little bit better than I because he's living with it on a daily basis.

Mr. HONIGMAN. General, going back to your time as a commander at Ft. Dix, can you give us some idea of how much time you personally devoted to military justice matters? What proportion of your week or day, or just some yardstick.

Gen. SENNEWALD. I would say over a weeks' time I would put five to ten hours in military justice. And I think that's about right. Probably more like ten as opposed to five.

Mr. HONIGMAN. Can you give us an idea—

Gen. SENNEWALD. Again I had a PCF associated with that and that required probably half of that time.

Mr. HONIGMAN. Can you give us some idea of the proportion of cases in which a military judge made a recommendation that a sentence be suspended completely or in part?

Gen. SENNEWALD. No I can't.

Mr. HONIGMAN. Would you say it was a great percentage, a small percentage?

Gen. SENNEWALD. My recollection I would say a few times as opposed to some or many I would say in a short time.

Col. RABY. Can I clarify something for the record?

Sir, on several occasions you've used the term "PCF". I assume you're referring to the personnel control facility which was the organization that's set up on certain installations or commands in the army where soldiers who have been AWOL are returned and they're pending administrative disposition, whatever that may be, in their cases.

Gen. SENNEWALD. That's absolutely right.

Col. RABY. Prior to sending them back to a normal troop.

Gen. SENNEWALD. That's absolutely right. And they would then as I recall, would be handled under Article 15, court-martial or Chapter 10 administratively in lieu

of court-martial. And again, this was the entire northeast United States, so the workload is very significant.

Mr. HONIGMAN. General, in those few cases that military judges did recommend a sentence suspension, what was your practice in reviewing that recommendation?

Gen. SENNEWALD. You mean how did I react to it?

Mr. HONIGMAN. Yes, did you view it for example, with the presumption that since the judge made the recommendation that the sentence should be suspended? Did you engage in any independent investigation of your own? Did you speak with the soldiers, senior NCO's, commanders and so on?

Gen. SENNEWALD. I think in those cases obviously I reviewed it. I think that probably I talked to the JAG as we went through the case, and I think generally I would have talked to the commander.

Mr. HONIGMAN. Can you give us an idea of the frequency with which you tended to suspend the sentence in accordance with the recommendations of the military judge?

Gen. SENNEWALD. Really I couldn't.

Mr. HONIGMAN. Did there ever occur instances in which you would suspend a sentence in the absence of a recommendation by the judge or by defense counsel?

Gen. SENNEWALD. Yes, I've done that.

Mr. HONIGMAN. General, in terms of exercising your authority to personally select court members, how did that process work? Did you select only officers that you knew personally? Did you select—

Gen. SENNEWALD. If I remember correctly, I would get a roster of all the officers on the post and I would get a cross-section in terms of rank, and I would get a cross-section in terms of combat arms, combat service support, so that I had the entire community represented, and I would appoint maybe one or two panels and we would do this on, I can't remember, a six month basis. I know we did this repetitively, but there was no recommendation given to me. I did no interviewing, except that we did it on a roster basis.

Mr. HONIGMAN. Did I understand you to say that you appointed panels to sit for six months?

Gen. SENNEWALD. I think if I remember correctly when they pick their turn in the barrel if I may and did this job, yes. I don't know whether it was six months, four months, one year, but the man was not a permanent member of the court-martial.

Mr. HONIGMAN. But on the other hand he would expect to serve for more than one court-martial?

Gen. SENNEWALD. Yes.

Mr. HONIGMAN. And it could be as many as a dozen or more?

Gen. SENNEWALD. It could be, but probably not.

Mr. HONIGMAN. General, if there were a way of ensuring that there would be this representative cut, both in terms of rank and in terms of the arm of the service represented and if there were a pool of officers or senior enlisted men who were eligible by virtue of their age and by virtue of absence of disciplinary problems, would you view it as a diminution of your authority if the actual individuals who fit those standards were selected at random or by lottery so long as the representation was there?

Gen. SENNEWALD. I don't think so. Again, I would ask you why? Is there a need? Is there a problem with the current mode of selection?

Mr. HONIGMAN. Let me suggest and ask your view, would you agree that the perception of the system as an impartial, fair system, is important to the maintaining of discipline among the persons who are subjected to the system of justice?

Gen. SENNEWALD. Not only that, I would come down on the side of trying to do what is right. I have to get on the side of the angels.

Mr. HONIGMAN. But to the extent that a change could be made that would increase perception of the system as impartial, in other words, that somebody isn't picking particular persons because of some predilection they may have towards acquittal or conviction, would that be a compelling reason to make a change so long as in actuality the system continues to function properly?

Gen. SENNEWALD. I would not object; again I think it's a little administratively tough. If he would give me a pool of commanders, staff, combat arms, and the other people in all grades, I don't have any problem.

I think also there is a challenge for cause as you well know, a peremptory challenge which is exercised on a continuing basis which also supports the perception of justice.

Mr. HONIGMAN. I have no further questions. Thank you very much.

Col. HEMINGWAY. Mr. Saltzburg?

Mr. SALTZBURG. I have none.

Col. HEMINGWAY. Mr. Sterritt?

Mr. STERRITT. My name is Christopher Sterritt, I'm with the Court of Military Appeals.

General, you spoke of, or gave your opinion concerning decisions from the Court of Military Appeals from '78 to '80 roughly when you were at Ft. Dix. I also noticed that you said you relied heavily on your SJA in legal matters. Just for my own clarification, would you read those decisions or would your staff judge advocate come and brief you on them?

Gen. SENNEWALD. Do you mean the decisions made by the court?

Mr. STERRITT. The Court of Military Appeals.

Gen. SENNEWALD. Those ones that my staff judge advocate felt were significant, those ones that were establishing a trend or he felt, as we mentioned here, the

rules of evidence, the importance of doing things correctly, I reviewed the standards of the Court of Military Appeals so that our cases were not dismissed on administrative grounds as opposed to the merits of the case, and so I think that's where we fundamentally focus in terms of discussion on the military justice. And did I take those briefs home and read them? No.

Mr. STERRITT. My only point in this regard is many times those decisions contain an appreciation of the uniqueness of the military when a balancing decision is made within, and I don't think that's the same as saying the decision ignored it. I may be making a technical difference here.

Gen. SENNEWALD. Let me tell you that I'm not here to debate the quality of decisions of the court. I would just submit to you that we looked at those carefully and especially those ones that affected us as we went through the day-to-day development of the military court and the military justice system.

Mr. STERRITT. My second question has to do with your answers with respect to retaining member sentencing and retention of command suspension power. Several witnesses as well as yourself have focused in on the identification of command with the military justice system, concept of participation I guess is how you put it. In terms of sentencing, as I understand your answers, the ideal would be that the members as members of the immediate environment in which the crime was committed and which would be affected by the punishment, would be best able to make a correct decision as, in terms of punishment. Is there anything else that you're speaking to here? I'm talking sort of in terms of what do we mean by participation of command with the military justice system for purposes of discipline primarily?

Gen. SENNEWALD. I guess it has to do with the soldier there, committing an act, found guilty, and be sentenced by people who he sees and works with and deals with, being sentenced by the chain, being sentenced by the institution as opposed to a judge alone who is out there, someone he can't identify with as well. I think this is fundamentally important. It's the relationship, essentially it's a senior group, well senior to him obviously, enlisted if he so desires, who are now being involved in controlling that man's fate or that person's fate as opposed again to the judge who's out here and does not have that same relationship.

Mr. STERRITT. Is it in the sense of an immediate reinforcement of command authority?

Gen. SENNEWALD. I think so, absolutely. And I think that's fundamental to the system.

Mr. STERRITT. Thank you.

Col. HEMINGWAY. Colonel Mitchell?

Col. MITCHELL. I'm a little bit nervous about asking the things that are crossing my mind right now, but maybe I'm being too—A lot of witnesses come in here and talk about the uniqueness of the military and the importance of the commander and the importance of the involvement of the chain of command and the disciplinary process. I look down the road a little further—I see other people becoming involved in the decision-making process in whatever emanates from this group. I wonder just how well they understand any longer what you're talking about? If I might, and if I don't catch you unaware, could you sort of discuss this uniqueness, put some flesh on it? What is unique about the military? What drive? What is the imperative behind this need for a different system than exists in civilian life? What is the importance of discipline? What makes the commander important in respect to that kind of an action? And just basically get into this kind of an area. I think maybe the meaning is going to be lost because a lot of people think they understand what you mean and they might not really understand what you mean.

Gen. SENNEWALD. I guess the commander in the system, be it the company commander or the battalion commander or the patrol leader, is responsible for everything that unit does or fails to do in a way that is far removed from the civilian environment. And that is, as a platoon leader, I have the authority and the responsibility to accomplish my mission, be it that people will be killed as I accomplish that mission, and I have to have under certain circumstances immediate responses, unquestioned following of orders. And this relationship between that platoon leader, that company commander, and the battalion commander is where we part in terms of the civilian as opposed to the military. And I think that the military justice and the involvement in the authorities provided the company commander, this system is just one element in the whole here where that company commander can impose his will and establish the discipline in his unit. And I think the soldier, especially in a line unit and a combat unit, must understand that that company commander has control over him, and when that soldier fails to do what he's supposed to do, that the company commander initiates the punishment, that the company commander has some authority to administer that punishment, and that is appropriate at each level.

But most importantly, where the rubber meets the road down at the company and the platoon and the battalion level. And I submit to you that every individual is not John Wayne and every individual out there as a lieutenant and captain meets those authorities, I would submit also over-exercising the military justice is an indication of a deficient commander. And it is not a subject for the fundamental—of leadership. And you can debate what leadership is for the rest of the morning I suppose.

I submit to you that company commander and that PFC must understand that relationship if we're going to get the job done in combat and in stressful situations.

Col. MITCHELL. The reinforcement of that mechanism has to bear in mind, I take it, the worst class of obedience, that is to say those people who, those people within the unit who are essentially unwilling without coersive action to do what they're told to do.

Gen. SENNEWALD. I think it does, not only for the bad guy but for the good guy, because when you single out, when the company commander singles out this individual who has not performed properly, who has committed offenses, he takes action, he, the company commander, initiates it. That reinforces the rest of the people who are doing well and who are obeying the rules.

A kid told me one time, it was interesting, when I was commanding Dix and would take the guy off the street in Philadelphia and in seven weeks try to make him into a soldier, I know of some very outstanding behavioral modification during that period of time. But one day I interviewed every outstanding soldier of the cycle so I asked this one soldier, he came from the ghetto in Philadelphia, who could see his friends peddling dope and working prostitution and making just a lot of money, he joined the army and now he was a soldier and I said, "When did you decide that you wanted to do well?" And he said, "When it paid off." When people recognized people who did well and—when you single out this bad individual and you take appropriate action, you're reinforcing the behavior to the people who are going to comply and be good soldiers.

So I don't want to tell you that the military justice is essentially for the bad people, it's also, it reinforces the compliance and the obedience of the good people.

Col. MITCHELL. What I was getting at was degree more than fact. The essentially good soldier who might foul up now and then, by the other people who aren't going to foul up, and simply need to be reminded that certain things aren't done. It might be sufficient for them to simply reinforce through the mechanism of the military judge sentence, that is that more in direct involvement in the chain of command adequate when you're dealing with those individuals who are much more incorrigible than what you say, the average or better than average soldier probably isn't going to get in trouble anyway.

Gen. SENNEWALD. If we're back to the sentencing question and whether the judge alone or people on the panel of a court-martial board does it, it seems to me again that this was the involvement as the whole military, and also the responsibility of the second lieutenant and the first lieutenant and the captain and the major, whoever sits on that board, has a responsibility in the discipline and the institution as a whole and that sentence that they prescribe is exercising that responsibility.

Now when I sat on the board as a lieutenant, I thought I did it with some reservation because it took time out of my other efforts, but I recognized the responsibility that I had and I did it to the best of my ability. And so I think from that standpoint, again the sentencing is one of the aspects of military justice and it lets everyone focus on his or her responsibilities sitting on that court-martial.

Col. MITCHELL. A couple more levels of this thing. What makes the soldier obey the order of a corporal, which is more or less his contemporary, at least within a couple of years or so?

Gen. SENNEWALD. I think that's the command environment that makes the corporal get response from the PFC's. And that command environment is first of all established by the company commander and by the battalion commander and how supportive the company commander is to his NCOs, how carefully selected his NCOs, so that he only has the best people in the system, the best people as officers. And there are so many other pieces that you fit together,—the military justice provides the underpinning to that command environment. I think it's the administrative procedures and tools to get rid of people who don't measure up and how those are applied. It's the IG system that the Inspectors General who continually sense the pulse of the command. It's the chaplain if you may, who supports from the moral standpoint the morality of the command. And all of this put together, but fundamentally the company commander, but all of this put together lets that corporal who is ten days older than the PFC, lets this corporal when he tells the PFC to do something, the guy responds. Some of that is the military justice system, and it's the fact that if he doesn't respond then he's going to have to stand up and explain why.

Col. MITCHELL. The accused in a court-martial fundamentally has a choice whether to be tried by members or be tried by military judge. Is this under involvement or involvement of the chain of command sufficiently important that that option ought to be scrubbed and we ought to go back to having members sit on these trials?

Gen. SENNEWALD. If I had my druthers I'd go back, especially for court-martials on the BCD, especially with the BCD's and Generals, I would not have judges only.

I'll tell you how it sorts out. If you have two judges and there's not a decision whether it's trial by judge alone or by panel until someone decides what judge will try that case, if the judge is noted for being a little tougher, Judge A and Judge B, and Judge A gets the court case, we'll have a panel. And the defense counsel will take his chance with a panel as opposed to the judge alone.

If Judge B is selected, and his experience is such that he judges on sentences less harshly, then they will take him and will do it with the judge alone. And I'm watching that operate for two years, I think those are the fundamental imperatives.

Now obviously these are in cases where the defense counsel understands that his opportunity of getting acquittal is pretty limited. This is the game plan, the game that's played. And I don't have any problem. If I was in the same situation I would do the same. It allows you to play games like that. And if I had my druthers again, I'd like to see the people sitting there on the court-martial and the judging of guilty or innocence by the panel and the sentencing by the panel.

Col. MITCHELL. Under combat circumstances, the old system we used to have when I was a little boy, where they had members conducting the trial and line officers as trial and defense counsel, is that more flexible than the current system?

Gen. SENNEWALD. I don't want to return to that. I think that causes more problems in the final analysis. I don't want to return to that.

As I told you, I was pleased with the judge in the courtroom. I just think we ought to not turn it back that far.

Col. MITCHELL. In respect to wartime you also indicated that considering the—of combat you probably had to have some more changes of some sort. What I'd like to ask you is some more general question related to that and that is do you think you could have a wartime legislation package sitting on the shelf that could be trotted out when the shooting started and them implemented at the last minute and be implemented effectively?

Gen. SENNEWALD. I knew I was going to get that question.

Col. MITCHELL. Or should those changes be made now?

Gen. SENNEWALD. My sense is that maybe there are some options available that you could write in that under certain circumstances in peacetime that you could employ so that we had some experience and we didn't just simply have it on the shelf and under the most stressful situation throw it out there for the system to absorb under practice to utilize. You know, the waivering of some of the timeliness in most criteria, some of the logistics and administrative things under certain circumstances that we could have some leeway with I think may be meaningful. I think that these are isolated places and there may be enough areas in the world where we could gain some experience from this and it would be something that's taught, available, and looked at on a continuing basis as we go through the various pre-command courses, as we teach military justice in those courses, etc. For whatever that's worth.

But I would submit to you that we would really get a—take that package off the shelf and put it out there, we would spend the rest of our years when we win the victory in adjudicating cases—

Col. MITCHELL. In respect to your selection of court-martials you mentioned that you were quite particular about getting representation from different communities within your command. I was sort of interested in whether that was driven by a feeling that you had that different communities within the Army bring different perspectives to bear on disciplinary problems or whether you're simply spinning around the obligations so that everybody has the opportunity to contribute.

Gen. SENNEWALD. I try to spread around the different backgrounds and concerns because I think those people who spend most of their time dealing with soldiers have a little different perspective in the terms of soldiers as opposed to those who are more administrative, that by the nature of their positions deal with civilians and are not involved on the military justice scene on a continuing basis. So I try to spread around the experience. And did I have commanders on there? Absolutely right. Did I have second lieutenant administrators? Yes.

Col. MITCHELL. Do you think if the law was changed and we had judge only sentencing that the military judge coming from a legal community might bring with him or her a unique perspective? And let me put some flesh on that before you answer because I want you to see exactly what I'm getting at.

Lawyers, I think it is fair to say, generally, there are many exceptions, view—

Gen. SENNEWALD. I can really hold you to that statement, right?

Col. MITCHELL. —views misconduct in terms of its being criminal. Most of the military commanders that I've talked to tend to look at the reasons for punishing offenders to be disciplinary. In other words, even though the crime of, or the act of thievery is a law, it's a violation of law in civilian life, it is punishable because it is a violation of law. In the military we punish the man because he is essentially undermining the discipline and the morale of the unit and subsequently it becomes a disciplinary imperative rather than a criminal imperative.

Gen. SENNEWALD. And would the judge bring a different perspective?

Col. MITCHELL. If he comes with that criminal attitude toward misconduct. Some offenses which the military might deem to be significant in their impact on discipline are not viewed by the judge as being significant because he's looking at it from the standpoint of it being a serious or not serious crime.

Gen. SENNEWALD. I think that's true, but I think also equally important is there's a certain responsibility that the commander has that the judge can never assume, and

again I think that responsibility is unique for the military. I think that's why the involvement must be there. And again, all these statements about commander involvement does not mean it should have any lack of justice. We should absolutely do that correctly and I'm not saying that because that's a given, but sometimes we associate commander involvement with injustice and I absolutely reject that.

Col. MITCHELL. I'd like to assume for the purposes of the next question that you're very angry with me as a military judge and I've now joined the Army and the rest of my relatives say there isn't any problem about going across service lines, and you become absolutely irate and you say I'm going to get that guy. I want to ask you then whether you have any practical way to affect my salary, my grade, my officer status, or my retirement entitlements because of your anger of a decision that I made?

Gen. SENNEWALD. I know of none. I'll tell you what, there's a number of things as a commissioned officer that you ought never to get involved in, and the smart ones never do that. One is losing money. The other is losing classified information. And the third is attempting to influence a court-martial. I would tell you again, I don't want to be like Snow White or Ivory soap, but I was extremely careful that no one could ever tell me or charge me with influencing court-martials or judges, and I think the commander who puts himself in that position is absolutely dumb, and the staff judge advocate that lets him do that is even dumber.

Col. MITCHELL. Now let's suppose—

Gen. SENNEWALD. I would like to get a new staff judge advocate and I would affect his career.

Col. MITCHELL. Now let's suppose that I'm given this tenure so that I'm now in my job for a fixed period of time. Would that deter you, assuming you have a mind to try to do something to me for something you didn't like, would that tenure deter your interest in getting even with me?

Gen. SENNEWALD. I don't think so. If I'm going to act dumb I'm going to act dumb, whether it's tenure or not. I think if you're tempted to do that sort of thing, if you're putting tenure out there as protection or maybe a perception that we want to reinforce, I'll give on that point. But if you're putting it out there because you want to protect the judge from the commander, that's a mistake. Because if the commander is that dumb that he doesn't understand that he's got a situation that he is just going to have to live with and do a lot of smiling and turn the other cheek, then he's going to attempt to do that whether tenure is an issue or not.

Col. MITCHELL. Should perceptions control the course of events in military justice?

Gen. SENNEWALD. I think there are some fundamentals that they ought not get involved in. But in today's world you have to work with them and I would submit to you that I would rather try to change those perceptions as opposed to changing the court-martial system.

Col. MITCHELL. Can you really satisfy the objections of those people who never see anything good as long as it has military before it so as to eliminate criticism of the system?

Gen. SENNEWALD. I guess in the final analysis you've got to do what the Bible says, do what most logical men think are right, is right. We ought not look out there on the margin, there are going to be people who object to any justice system. No justice system is absolutely totally correct, or absolutely totally and completely justice, but it's the best system that we can find, and I'll submit to you that it works pretty well. And whether we ought to convince everybody regardless of your bias, I think we're just wasting our time.

Col. MITCHELL. Do you think this concept of tenure, if implemented, would create in the mind of the average soldier any idea that the military judge is more independent of his uniform than he represents by his uniform?

Gen. SENNEWALD. No I don't think so. I think if you ask most of the soldiers, and I don't really know what soldiers think any more—that tells you he does, is misinformed.—I don't know if anyone has conducted a poll lately and I would submit to you that most of the soldiers would say that they think they get a pretty fair shot. We work like hell as a commander serving in Korea, we used to have little shorts on the AFK News, Armed Forces Korea News, that says go see your lawyer, be sure you've got all the facts before you let them do this to you. I'm paraphrasing but it was an advertisement to try to ensure that the soldier knows that there are ways in which he can ensure his rights. So I don't perceive a great groundswell of dissatisfaction.

Col. MITCHELL. That's all I have, thank you.

Col. HEMINGWAY. Captain Byrne?

Capt. BYRNE. General, my name is Captain Byrne. A number of questions we've asked you were not on the questionnaire that you received, and so therefore I realize that you perhaps may not have been as well prepared for those as you were for the other issues.

Gen. SENNEWALD. Is that an excuse for the shallowness of my answer?

Capt. BYRNE. No Sir, your answers are excellent.

What I do want to explore, since they were asked, I do want to explore a little bit further and I feel I'm compelled to explore a little bit further a few areas.

Perhaps we'll go to wartime first, and let's discuss something that perhaps hasn't been mentioned yet but it's something that I at least as an individual feel con-

cerned about, and ask you if this is something that you would be concerned about, and it also has to do with the question that was asked, do you have any other suggestions or changes to the UCMJ, and it has to do with technical representatives who are working on your sophisticated equipment and who in time of war—

Gen. SENNEWALD. Civilians?

Capt. BYRNE. Yes Sir. And who in time of war would not be subject to the UCMJ. Now thinking of, since you were asked the question, anything else, and since I view that as something that concerns the UCMJ, would, if you had an opportunity to think about it, would you perhaps have said you would favor something like, if the President declared a national emergency, these tech reps would be subject to the UCMJ?

Gen. SENNEWALD. I appreciate you bringing that to my attention. Not only are the tech reps, but I think you would go to any theater in the world, Korea, Europe, and there are a number of civilian positions filled by civilians that are absolutely critical if we're going to prosecute the war. So it's not only on sophisticated equipment, but there's a lot of civilians doing a hell of a lot of other things that are very vital.

Yes, absolutely. Yes, I think that would be the ultimate in terms of relationships between the civilian in wartime to have them come under the Uniform Code of Military Justice. I think so, yes. I would advocate that.

Now maybe there are some alternatives to that.

Capt. BYRNE. But if we couldn't think of any alternative, you certainly would favor that one?

Gen. SENNEWALD. You need to have a system that would have them sponsored. There are other aspects of that problem that are equally significant and that is to ensure that the man stays in his position. When you've had the civilians make a declaration that they'll remain there when war begins, but no one has ever tested that. And I think the general concensus is that there's not much teeth in that little statement that they signed that says we'll remain there if we go to work. So we really start back from the war, we start with the question of whether it will be present when the war begins or not.

Capt. BYRNE. Subject to the UCMJ, they'll be given an order that they'll stay in their positions and that will resolve it?

Gen. SENNEWALD. That's right. As you see, those tech reps on the Nimitz, it's a little different problem. They're not going anywhere, especially if it's afloat.

Capt. BYRNE. Of course if it's alongside and the ship announces it's getting underway, they could depart the ship quite rapidly.

Gen. SENNEWALD. You could demand to be put ashore some place I would suspect, that's right. That's a good point and I didn't think about it.

Capt. BYRNE. So you would favor that?

Gen. SENNEWALD. That's right.

Capt. BYRNE. I have no further questions.

Col. HEMINGWAY. Captain Steinbach?

Capt. STEINBACH. You mentioned service on the court as a junior officer. Was that purely as a court member? Did you also participate as a counsel—

Gen. SENNEWALD. On the special, yes.

Capt. STEINBACH. As counsel also?

Gen. SENNEWALD. Yes.

Capt. STEINBACH. Do you think that service helped you in administering military justice?

Gen. SENNEWALD. Yes. Absolutely.

Capt. STEINBACH. We're taking away part of that—officers duties on that court. Would there be a hole in his career development so to speak?

Gen. SENNEWALD. I think so without a doubt, and again it's that involvement and that responsibility that you're reinforcing as well as education and background.

Capt. STEINBACH. Can you see any way in making up that deficiency?

Gen. SENNEWALD. I thought you were talking about eliminating panels.

Capt. STEINBACH. Exactly. How would you give the officer the benefit of that experience, an equivalent benefit?

Gen. SENNEWALD. Never, unless we have, theoretically as we do now—in the various service schools, you talk about military justice. I think each commander, each service has a pre-command course. I know the Army does. We go down and come up to speed on the recent changes and how the system works. But I think participating at each level, and especially as you become a captain, and a company commander, when you start administering Article 15s without some experience on the court before, you know, you jump right in without much background. So I think it's part of a growing, if you may, of junior officers, and I think it's necessary.

Capt. STEINBACH. Is it a fair statement that you can't substitute the experience, the loneliness of the deliberation if you will—

Gen. SENNEWALD. That's right. I don't think you can ever duplicate the responsibility. You're dealing with an individual out there and you're going to either find him guilty or innocent and it's going to be dependent upon your vote and how you judged and how you listened and you talk about all of that, but it's like going to war, it focuses your attention.

Capt. STEINBACH. —acting on recommendations of military judges and also to suspend without their recommendations? Did you ever get into a situation where you thought the military judge may have been stepping into your tree as the commander, as the convening authority, with the types of recommendations or the scope of recommendations you got?

Gen. SENNEWALD. I took those as recommendations and I treated them as recommendations. Those that I thought were appropriate I complied with and those that I didn't I rejected. In that particular area he was doing what he thought was right and I was going to do what I thought was right. A great deal of emotion that people spend over that is a waste of time.

Capt. STEINBACH. In response to the earlier question, General, of how the system of military judges was working, you very quickly indicated good. But without getting into a lot of detail as to the basis of your reaction, is this purely a personal one or to some degree in communications with other commanders and convening authorities?

Gen. SENNEWALD. First of all, I've sat on courts with military judges and from my personal assessment I thought they ran much smoother and I think it was a much more professional court environment from beginning to end. From my personal experience and also again as a general court-martial convening authority, I had no complaints in terms of the operations, the handling of the court and those sorts of things. My sense is it also helped us administratively, the way that we—administratively in the way we did business. It's my sense—you probably know more than I.

Capt. STEINBACH. In your current duties as a commanding general over many officers exercising general court jurisdiction do you get expressions of let's say something less than an—criticism of a court judge, expressions of frustration or maybe just anxiety if you will?

Gen. SENNEWALD. Not from the commanders. I find sometimes that there is a frustration by the prosecuting group there, by the lawyers, and I would suspect that's normal. Their opinion didn't carry the day.

Capt. STEINBACH. Sometimes there could arguably be a very fine line in expression of anxiety and direct criticism of defense counsel, military judge or anyone else. In light of your comment, it's dumb to—with, do you think it may be appropriate for a vehicle to vent some of this anxiety before doing something dumb, whether it's on the part of a convening authority or somebody else in the system?

Gen. SENNEWALD. I don't understand the vehicle.

Capt. STEINBACH. You—up one chain let's say rather than get into a chain that may look like influence. I can't identify a vehicle in a given system other than the next individual on the chain of command. Has he got a good ear to chew on so to speak.

Gen. SENNEWALD. Is there a wailing wall for the commander? I don't think we really need one of those. If he doesn't want to be a commander and he has really a lot of problems with that, we have a thousand people who would like to step in line.

Capt. STEINBACH. I guess we're back to the "do a lot of smiling" thing.

Gen. SENNEWALD. That's right, and he ought to be Goddamn happy he's a commander.

Capt. STEINBACH. In some of your discussions of the uniqueness of the judge's role and the uniqueness of the commander's role, would your perceptions there be any different, would your thoughts be any different if that judge had duty and experience as a commander?

Gen. SENNEWALD. Obviously that would attenuate some of the differences. Again we're kind of working on the margin it seems to me on the, what if. I think the system, again I go back, seems to function pretty well. I support the judges on the point I mentioned, trying to go out and give certain judges command experience so that they have command experience and more legitimacy I think kind of begs the fundamental issue of the commander and his responsibility. That's what I have to come back to.

Capt. STEINBACH. You mentioned the facts of life as pertaining to the counsel selection or recommendation of selection of trial by judge, trial by member.

Gen. SENNEWALD. (Inaudible)

Capt. STEINBACH. Apparently all of us have been defense counsels, Sir.

As you're aware of whether or not the trial is, the motion for trial by judge alone is granted, is discretionary—he can go either way on it, would a limitation on that discretion do you think do anything to improve the odds against—

Gen. SENNEWALD. No I don't think so.

Capt. STEINBACH. And one other final question. It may or may not be relevant to what we're doing here. Should judges of one service sit as military judges for the other services?

Gen. SENNEWALD. I would not favor that and I'll tell you why not. We'd have to give them a course in acronyms. You'd have to give them a course in the fundamental phrases, terminology, and I think there is also, the judge does have an understanding of the environment in which they operate and so on. —because obviously it's more efficient or more economical to do that. I could not favor that. There's a lot of minuses to that sort of thing.

Capt. STEINBACH. Thank you very much.

Col. HEMINGWAY. General Sennewald, we've about beat this to death I think. Is there anything you'd like to say in closing?

Gen. SENNEWALD. I think probably I've said too much already.

Mr. HONIGMAN. General, I just have two very quick questions. First, do you believe it would be helpful to the commission if we heard testimony from enlisted members?

Gen. SENNEWALD. I don't have any problem with that as long as you're capable of separating where they come from. I guess that I would say as long as you're capable of separating from where they come and also understand the difference in responsibilities.

Mr. HONIGMAN. And secondly, can you give us your view as to a system in which the members were to adjudge a sentence but the military judge would have a vote with the members in coming to a proper sentence.

Gen. SENNEWALD. I don't know how you would do that because one of the things you'd do is bring the judge into the members' description and discussion of the evidence and these sort of things which everyone is a party to and I don't know how you would bring a judge into that discussion. And again I would say why do we do this? And I can't come up with any real reason except some sort of perception that the judge adds dignity and class to what otherwise is a less than significant operation.

Mr. HONIGMAN. Thank you.

Col. HEMINGWAY. Thank you very much for your time.

(Whereupon, at 11:45 a.m. the hearing was adjourned.)

Col. HEMINGWAY. Our first witness this morning is Chief Judge Cedarburg from the Coast Guard Court of Military Review.

Welcome to the Commission.

Chief Judge CEDARBURG. Thank you very much.

Col. HEMINGWAY. I understand you have a prepared statement.

Chief Judge CEDARBURG. I do, indeed. Even though I'm the Chief Judge of the Coast Guard I think most of my testimony, if you will, will be predicated on my experience as the Navy/Marine Corps Court of Military Review Chief Justice. I've only been with the Coast Guard for a very few months.

REMARKS OF CHIEF JUDGE OWEN L. CEDARBURG, COAST GUARD COURT OF MILITARY REVIEW

Good morning. I'm Captain Owen L. Cedarburg, JAG Corps, U.S. Navy, Retired. I served as the Chief Judge to the Navy Marine Court of Military Review from June 1975 to June 1983. I also served as an Associate Judge of that Court from August 1974 to June 1975.

I have had extensive trial experience both as a prosecutor and a defense attorney from 1953 until my assumption of judicial duties. My service includes five years as a line officer on billets afloat and ashore.

I am currently the Chief Judge of the Coast Guard Court of Military Review, having assumed that position in April of this year. I'm pleased to be invited to appear before the Commission to give my views on the issues under consideration.

My background and experience prepares me to respond to some of the issues more confidently than others. I have this short prepared statement after which I'll be happy to answer any questions.

I would first like to address the question of tenure, or a guaranteed term of office for military judges. The obvious objective of the proposal is to enhance the independence of the trial and appellate judiciary.

Although my experience has been primarily as an appellate judge, my review of countless cases extends my awareness into the trial arena. Quite frankly, I'm convinced that the judiciary in the military—and this is both the trial and appellate judiciary—is notably independent.

I have little confidence that adoption of an guaranteed term of office, a stabilized tour if you will, will have any substantial impact upon the independence of trial or appellate judges.

We do not run a two-track system of lawyers and judges in the military. The promotion field consists of everyone in the promotion zone in the JAG Corps. Judges are not considered only in relation to other judges and lawyers in relation to other lawyers.

Therefore, stabilizing a judge in his position as a trial or appellate judge does not, in any way, enhance his promotion opportunity. The quality of his fitness report is the key to promotion, not a guaranteed term of office.

In fact, the guaranteed term could work to the detriment of the judge whose performance, as reflected in his fitness reports, is not up to standard. If he does not perform well as a judge, his evaluations are likely to reflect this during the entire term of his judicial service.

The current system permits a judge who is not objectively performing well in that capacity to be rehabilitated, if you will, in a different position more suitable to his talents. The present system insulates both trial and appellate judges from line commanders and convening authorities.

There's an independent trial judiciary activity under the Judge Advocate General and the Courts of Military Review report directly to the Judge Advocate General. Under past practice, the trial judges available for appointment by convening authorities came from judges assigned to circuits within the trial judiciary activity. Under the practice militated by the Military Justice Act of 1983 even the appointment of trial judges—of no practical moment considering the method by which judges were made available for appointment—will be taken away from the convening authority.

In my nine years on the Navy/Marine Corps Court of Military Review I know of no judge who directly or indirectly was cautioned or censured in any way or whose

tenure as a judge was terminated or shortened as a result of any decision rendered by him.

On the questioning of sentencing only by a military judge in noncapital cases, on balance I would not favor restricting the authority to sentence in noncapital cases to military judges alone. In effect, it denies an accused the option that he currently has. Under the present system, he can be sentenced by a military judge alone if he elects trial by a military judge.

The present system of options to be tried by court members of judge alone can be a substantial benefit if defense counsel do their homework and evaluate the potential sentencing information of court members contrasted with the particular military judge assigned. It presents an opportunity to chose the more favorable forum as determined by the accused and his counsel.

On the other hand, sentencing by judge alone might very well bring more uniformity to sentences awarded in similar cases. The trial judges presently appointed have good formal qualifications and experience, and are likely to award more uniform sentences than court members.

Judges also, unlike court members, are not subject to appointment by the convening authority and the attendant appearance of some command control. I do not express a strong feeling one way or the other on this particular issue.

As to the power of suspension for military judges and Courts of Military Review, once again on balance I would favor giving the power of suspension to military judges and the Court of Military Review. On a number of occasions, not numerous, I have sat on a case where I could not say the punitive discharge or the amount of confinement or forfeitures was inappropriate, but I thought the potential for rehabilitation was demonstrated in the record.

The major factor militating against the Court of Military Review having the authority is the delay between trial and consideration on review, and the widespread use of appellate lead. Courts of Military Review, especially, would have to use the authority sparingly and with circumspection.

Trial judges would have one more tool available to them in fashioning a sentence appropriate to the offense and the offender. They could make much more widespread use of the authority than Courts of Military Review; but, once again, depending upon the total picture presented to them at trial some restraint would have to be exercised.

It might place additional burdens on commands because they would be charged with administering the suspension. Presently they control their own destiny in that respect.

If judges had the authority, they would no longer control the use of some of their assets or their resources necessary to carry out these suspensions.

On the increase of jurisdictional maximum punishment of special courts martial to one year, I would e in favor of this proposal to bring it more in line with the traditional distinctions between felonies and misdemeanors. Many of the distinctions between generals and specials which existed when I was first introduce to the UCMJ no longer exist.

For all practical purposes, you have a judge and lawyers for both the defense and government in both forums. The real practical difference is the necessity for an Article 32 investigation which can add time and resources necessary to dispose of a case.

On the Article III status for the courts of military appeals and a fair and equitable retirement system for them, I'm reluctant to address these issues except in a most general way. I believe the Commission has a formidable task before it.

I would suggest that certain questions have to be asked and answers obtained to come to the proper conclusion. What is intended to be accomplished by a change to Article III status for the Court? Is it an effort to enhance independence? If so, is there a problem with the present degree of the Court's independence?

Since the Constitution makes specific nations between the nation's court system and the system for regulating and governing the land and naval forces, is there not a continuing constitutional basis for maintaining separate Article III courts for the national court system and an executive branch court marshall system?

What checks are there on Article III judges? Do we want some system of accountability to the executive on decisions which can substantially on the readiness of the nation's armed forces?

What's going to be the scope of jurisdiction of any new Article III court?

As to the second question, the fair and equitable retirement system, obviously we all want a fair and equitable retirement system which will attract outstanding jurists to the Court of Military Appeals and enhance its stability. I do not have specific information to render an informed opinion.

That is the extent of my prepared statement. I'll be happy to answer any questions.

Col. HEMINGWAY. Captain Steinbach?

Capt. STEINBACH. I'll pass.

Col. HEMINGWAY. Okay.

In regard to the power of the court of military review to suspend sentences, if we continue to use, as you call it, appellate lead, I could envision a situation, given the length of time it takes out appellate system to work, where an accused would secure employment, in essence

star second career, and the Court of Military Review suspends his sentence, calls him back on active duty, and an individual who initially may have had great potential for rehabilitation comes back in the service against his will.

I think that is really a great risk when the appellant court suspends the sentence.

Chief Judge CEDARBURG: I agree it is. Perhaps something could be written in to permit suspension at the election of an accused.

I'm reminded of a case that goes back some years in the Navy/Marine Corps Court of Military Review, *United States* vs. *Silvernail*, if you will, where the—I guess it was still just the Navy court at that time.

The Navy court decided that they would test whether they, in fact, had suspension authority and they suspended the BCD for Pfc. Silvernail. Silvernail was outraged.

(Laughter.)

He wanted his BCD. He didn't want it suspended.

Capt. BYRNE. Wanted to be nailed.

Chief Judge CEDARBURG. So, very definitely, this is a problem. As I say, perhaps the alternative, if we do want to give suspension authority to the appellate courts or the Courts of Military Review, is to provide for some waiver of suspension by an accused if the factual situation described takes place.

Col. HEMINGWAY. In my perception, most of the commanders who have come before the Commission have indicated that they don't want to lose the power to suspend that they currently have, that the convening authority has.

Do you envision the joint exercise of this power or the sole exercise? Let me add one more question to the batch. Who vacates the suspension under the system that you proposed?

Chief Judge CEDARBURG. Okay. I would envision a continuation of the power to suspend in the convening authority. The chance, if you will, for clemency action still is with the convening authority.

I think that's a matter which has been recognized by the courts almost from the inception of the Uniform Code. Obviously, suspension is a matter of clemency which should not be taken away from the convening authority because he's the one who's more likely to exercise it than anybody else.

Now, the vacation. Quite frankly, the person who's administering it, I would assume, would be the officer exercising jurisdiction over the man, the officer exercising general court martial jurisdiction. He's the one who's charged with the administration of the suspension.

I would think that, once again, if you have the normal hearing procedures that we currently have that they would continue; that the suspension authority would be reposed in the convening authority or the officer exercising general court martial jurisdiction.

Col. HEMINGWAY. Do you think any expansion or enlargement of the kind of evidence that is presented during the sentencing phase of a trial would be necessary if this power were given to the trail judge?

Chief Judge CEDARBURG. Well, I think what you find is if it doesn't come in under whatever set of rules you have, if the record doesn't demonstrate a potential for rehabilitation, it's not going to be suspended.

I would be in favor of an expansion and a relaxation of the rules of evidence in respect to the information available to the—well, perhaps even the sentencing authority, but certainly those who are taking action to suspend so that they would have more information available to see whether they're making an informed judgment as to whether the sentence should be suspended or not.

Col. HEMINGWAY. Captain Byrne?

Capt. BYRNE: Captain Cedarburg, I am Captain Byrne.

Again addressing the matter of suspension, assuming that the military judge established conditions in addition to perhaps the condition on the suspension that the accused must commit some other offense in order for the suspension to be vacated, would this cause some form of difficulty between the convening authority and the military judge?

The military judge sets up conditions for suspension that include, say, some form of work program or some other form of conditions on suspension and then he doesn't supervise it, normally. I believe that the convening authority would so, and the convening authority says, "I really can't administer this kind of program."

Do you see any possibility of difficult in convening authorities' administration of the kind of suspension conditions that the military judge would establish?

Chief Judge CEDARBURG. I do; and over the years I've seen some creativity in the concluding statements of military judges, and I think I addressed that in a general way in my opening remarks.

To a certain extent, the convening authority will not be able to control his assets or his resources in responding to the conditions of suspension which someone else has placed upon him.

You know, I think we have to expect that there'll be a good faith effort and I wouldn't expect an overabundance of peculiar and unusual conditions being placed on suspension by military judges, you know.

I suppose that if the terms of the suspension are just too onerous, perhaps the convening authority could just disapprove the whole thing.

Capt. BYRNE. Captain, you mentioned that you didn't feel that you could really address Article III and retire-

ment until the further ramifications of each issue had been spelled out.

Now, did you have an opportunity to look at the questionnaire that the Commission sent out to a great number of various people functioning the military justice system on the other issues?

Chief Judge CEDARBURG. Yes, I did. As a matter of fact, I completed it and sent it in.

Capt. BYRNE. If we had completed, perhaps, such a questionnaire on Article III and retirement, could it perhaps have been easier for you to have addressed those issues?

Chief Judge CEDARBURG. Yes, it would, because quite frankly without an awful lot of individual research—which I must admit I was reluctant to go into—I really wasn't in a position to address it.

As I say, I can think of some questions, but I don't know what the answers are. Is there a problem with the independence of the Court of Military Appeals presently? What is the scope of jurisdiction that would be anticipated if it were an Article III court?

You know, there is a specific provision for setting up the nation's federal courts in the Constitution, and yet there's another specific mandate to Congress to establish rules for the regulation and government of the land and naval services.

It seems that there was a contemplation, at least, that you would have a separate system and if you're going to meld them into one system, you know, aren't we, in effect, blurring any distinctions that there are between the land and naval forces governing and regulation, and the court system for the nation as a whole?

You know, I don't know the answers to these questions. I have always been of a mind that the Court of Military Appeals is pretty independent. I haven't seen anything that convinces me otherwise and the current system works pretty, and it's a specialized system. It's a specialized court.

It is a criminal justice specialized court; and, you know, we have these in a lot of states. We have a Court of Criminal Appeals and that's virtually the last word for criminal cases arising within a state.

I think that the present setup is pretty much that. We have a three-judge civilian court, for all practical purposes a civilian court, which oversees what the military system does. Unless somebody tells me that it's not adequately functioning right now, it's not adequately performing its duty, I wonder why there's a need to go to an Article III court.

Capt. STEINBACH. Thank you, Captain.

I have no further questions.

Col. HEMINGWAY. Mr. Sterritt?

Mr. STERRITT. My name is Chris Sterritt from the Court of Military Appeals.

Let me turn first to sentencing by members. You spoke of it in terms of a right of an accused, I believe.

My research shows to me that the reason we had sentencing and findings in which enlisted members can participate, which came in the 1948 and then the 1951 bill, was a reaction of the American serviceman to being sentenced, primarily sentenced by officer members. In other words, it was a counterbalance given to the serviceman to further his perception of justice.

With that assumption in mind, what type of right are we eliminating if we eliminate not only enlisting sentencing but officer sentencing as well in terms of a judge alone?

Chief Judge CEDARBURG. Precisely what was intended to be satisfied by permitting sentencing by members and enlisted members.

What we do is we narrow it even more. We give a single person, the judge, the authority to sentence. So what you've done is eliminated an option.

Presently, if an accused wants to be sentenced by a military judge he can ask for it and, for all practical purposes, he gets it and he also get tried by a military judge. You know, there might be a breakdown which permits trial on the merits by a court and sentencing by a judge if he wants it that way or vice versa, trial by judge and sentencing by members.

But I perceive it as the loss of an option which an accused presently has.

Mr. STERRITT. In your opinion, is suspension of sentence a part of the sentence itself or a clemency action?

Chief Judge CEDARBURG. Well, I really don't know, and I really don't know if we need to make a distinction. Ultimately, we're looking to the appropriateness.

You're fashioning a sentence that is appropriate to the individual and the events, and if he's presented an awful lot of evidence of rehabilitation potential and you weigh the offense and you weigh that, then the appropriate thing might be to give him an opportunity to avoid the sentence which is otherwise appropriate.

So, you know, I don't know whether it a part of the sentence or a matter of clemency; but the end result is appropriateness and appropriateness is the end result when the record demonstrates that he has the potential in balance with the offense.

Mr. STERRITT. Now, turning to tenure for a minute, Article 37(c) of the Code states as follows, in part: "He may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court martial when such duties are assigned to him by or with approval of that Judge Advocate General or his designee."

That particular provision concerns general court marshall duties.

Do you see a problem with understanding the idea of tenure now or the concept of removal unless for poor behavior? Do you see a conflict with that? Is that tenure in your mind, the Judge Advocate General has the authority to remove a trial judge?

Chief Judge CEDARBURG. Well, I don't think it's tenure. If the Judge Advocate General can reassign him any time, obviously he doesn't have a guaranteed term of service.

Mr. STERRITT. In practice is it the same, in your experience?

Chief Judge CEDARBURG. Well, as I say in my entire experience of nine years on the Navy/Marine Corps court, I know of no judge who was removed or cautioned or censured in any manner for any decision that he rendered.

Now, some judges did not serve a full tour; but I'll say this. It is my considered judgment they perhaps were not performing as well as they should have as a judge and this was more an effort to rehabilitate them than it was to take an adverse action against them, and it wasn't because of any decisions they rendered. It was more a lack of decision.

You know, we had a very busy court. We had 6,000 cases in 1983 and we had 15 judges. But even with 15 judges handing 6,000 cases people have to turn to and they have to make a decision; and some people just can't make a decision.

You know, if anybody was removed it wasn't because of anything they said or did in a particular decision. It was because they couldn't put out the work.

We have standards we have to abide by. The ABA talks of 60 days to get a case out once it's been briefed. There were judges who just can't make decisions in 60 days.

Mr. STERRITT. Let me ask one followup, then. My reading of the legislative history of the 1968 Act that created the military judge reveals some discussion over this problem of removal of a judge because his opinions favor an accused.

The history as I look at it lends support to a decision that was drawn at that time that, we will decide to leave this decision in the Judge Advocate General's hands. In other words, trusting him to not remove anyone because his decisions favor the accused. That's the language in the text that I read.

You would say as far as you know that's been complied with?

Chief Judge CEDARBURG. I would think so. I know of some judges who've been very controversial and they haven't been removed.

Mr. STERRITT. Okay. A few other questions.

Col. HEMINGWAY. Excuse me, Mr. Sterritt. I just with to ask Captain Cedarburg.

Captain Cedarburg, are you addressing yourself both to the trial military judges and CMR appellate judges on your remarks? Could you perhaps clarify that for the Commission a little bit, if it needs clarification?

Chief Judge CEDARBURG. There have been some controversial decisions rendered by the Court of Military Review; but the more controversial judges are the trial judges.

When I mention there have been controversial trial judges and they have not been removed, I have particular reference to trial judges and I will not get into names or incidents. But I do know of judges who rendered opinions that were not favored by line commanders, if you will, but they were not removed and they were supported.

Col. HEMINGWAY. When you were talking about the 60-day provision, were you referring to appellate judges?

Chief Judge CEDARBURG. Right. Yes, I was.

Col. HEMINGWAY. Excuse me, Mr. Sterritt.

Mr. STERRITT. Okay. My final two questions are with respect to the Code of Military Appeal.

The Article III question first. You spoke of the indication of separate systems as the result of the different clauses of the Constitution used to created judicial power.

How do you think the decision of Congress to give certiari to the Supreme Court from a court of military appeals decision impacts that theory, or your opinion of that theory; the separateness of the two systems?

Chief Judge CEDARBURG. Well, ultimately the Supreme Court and its decisions is the supreme law of the land. So even if you establish a system or rules and regulations for the government of the land and naval forces, they can't escape Supreme Court review whether from a collateral standpoint or a direct standpoint.

So this just provides a specific vehicle.

Mr. STERRITT. At one time in the past court martial cases were reviewed exclusively on jurisdictional grounds. That scope of review has been expanded and probably will be expanded further. That's the aspect cert' that I was trying to get at.

Chief Judge CEDARBURG. But, you know, you could always get into constitutional questions on a collateral attack coming through the federal court system.

Mr. STERRITT. Well, I think that is a recent development. The original practice from 1800 to 1900 was much more limited.

Chief Judge CEDARBURG. Probably so.

Mr. STERRITT. I'm trying to see if there's a progression there.

Chief Judge CEDARBURG. But, you know, there's been an expansion of jurisdiction, if you will, in the federal system that has been particularly noticeable within the past 20 or 30 years.

Mr. STERRITT. The final question is: Do you think the opinions of the Court of Military Appeal should be assessed in terms of their responsiveness to military discipline and order or service policies to determine, in some way, the nature of the retirement system they should receive?

Chief Judge CEDARBURG. That's a tough question. Quite frankly, you know, I've spent time as a line officer; I've had experience with dealing with people; and I know what the demands of military life in the line are and I know that decisions of courts can have a substantial impact on the readiness of a command.

You know, oftentimes it's very hard to articulate just how it happens, but you can lose control. You can lose control very quickly and it's something that is very subtle, how you lose these things.

Obviously, court decisions aren't the only thing that do these things, but court decisions are one thing that does that, that can impact on readiness. You know, I think there ought to be some kind of a check/balance.

We live in critical times where timeliness, where rapid response is very important and anything that degrades that perhaps ought to be subject to some type of a review.

Mr. STERRITT. Do you think the nature of the retirement should be that check?

Chief Judge CEDARBURG. Well, I'm not sure. If you have somebody who has a 15-year term, you're talking about a big envelope.

I'm not sure, having been a military officer with a retirement system and not being a civil servant with a retirement system, most of those are predicated upon length of service. As a matter of fact, I think they're all predicated on length of service.

Maybe the idea of just giving somebody carte blanche 100 percent for service on a court and not—I'm really getting into an area I don't know anything about because I don't know what the alternative retirement systems are.

Mr. STERRITT. My particular focus is whether the quality of the decisions, as affecting military discipline and order, should be a determining factor in the nature of the retirement provisions. In other words, how much and when is provided for the judges of the court?

Chief Judge CEDARBURG. Oh, all right. Then I'd have to say no. But I might say that the term of office is a check.

Mr. STERRITT. No more questions.

Col. HEMINGWAY. Mr. Saltzburg?

Prof. SALTZBURG. Captain Cedarburg, I have a few questions for you. In putting them I'd like to just start by saying, the reason I'm only going to ask about two areas is not that I mean to disregard in any way testimony given in other areas.

I think that from my perspective what has happened is that we've heard a number of witnesses and the testimony has been rather similar on some points. I'd rather focus our attention this morning on the areas in which I think you might have a different perspective or at least have given us some new ideas.

I hope you'll forgive me for not asking questions about the other areas. Other people may choose to get into them again.

I think the most striking note in the testimony for me was the favoring of the suspension power in the hands of the trial judges and the courts of appeal. Again, others may have a different view, but most of the witnesses, I think, have expressed more reservations and particularly the commanders, who have indicated they oppose that for the most part.

Now, I understand the reasons why one might favor it and I think no one has said that they are no good reasons. As you, they sort of strike a balance and I think some others have stricken the balance a little differently.

My question is: If we were to come out the other way and we were to recommend no suspension power, would you regard that as a great disservice to the military?

Chief Judge CEDARBURG. No. As I say, the number of cases over the years that I have looked at where I would have liked to have had the suspension authority because perhaps then the sentence would have been a little more appropriate have been few in number.

I don't consider it an issue of great moment. There are a few cases where I would have felt better, like in *Silvernail*, saying "Well, give that poor kid a chance," but not a whole lot.

But it might be a more important tool in the hands of a trial judge because the trial judge is awarding the sentence and he is faced with either awarding a BCD—What we're talking about most of the times is a punitive discharge.

It can affect confinement, can affect forfeitures. It can affect reduction. But primarily it's the punitive discharge.

He looks at it and says, "Well," you know, "the offenses really justify the imposition of a punitive discharge, but I think this kid—Give him a chance and he'll come back."

So he either gives him the BCD or he doesn't give him the BCD because he thinks that "The result I'm trying to achieve is going to be obtained that way."

Prof. SALTZBURG. Two other questions, a couple that are about one other area.

The only time the trial judge's recommendation would become crucial to make a change would be where the trial judge and the commander would disagree. The way the system now works, the commander can suspend the bad conduct discharge.

Now, the trial judge can recommend to the commander, as he now can do, that there be a suspension and the commander rejects the recommendation. Do we have any reason to think that the trial judge is better able than the commander as the convening authority to make that judgment?

Chief Judge CEDARBURG. Well, you know, the convening authority could even talk to a guy named Joe in terms of whether to disapprove any portion of the sentence. So perhaps he is in a better position to know whether to suspend it or not.

Prof. SALTZBURG. One of the things the commanders have suggested to us—I believe this is a fair statement—is that were we to recommend suspension power in the trial judges, we might in fact be pitting trial judge against commander in some instance, which might not be good for either side.

Is that a legitimate concern?

Chief Judge CEDARBURG. Well, you know, you don't like to have your commanders at odds with your judges all the time and an 'us and them' attitude. It's a consideration.

Prof. SALTZBURG. Switching to another area just quickly. It has to do with the Court of Military Appeals.

I get a little worried that there's a time when we want information and there's a time when we make a record as we go through the hearings. I think what I'm now doing is making a record, since I don't really think the questions I'm going to ask you are informational as much as they are clarifications of things you've already said because I don't want this record to later be read to say anything that you didn't really mean to say.

I'm going to ask as leading questions. There'll be no doubt I know they're leading, it would take someone totally asleep to not know these are leading, and you will certainly, based on your experience, know that they are leading. I don't want any possibility of error in interpretation of what you said.

First, you understand, do you not, that when we are looking into the question of Article III status for the Court of Military Appeals, we're not considering at all recommending, no one's proposed changing the status of military judges or the judges in the court of review and making them civilians or making them Article III people.

That's clear, isn't it?

Chief Judge CEDARBURG. Sure. Absolutely.

Prof. SALTZBURG. Okay. I wanted to make that clear.

Mr. Sterritt asked you about the certiori jurisdiction has now been given to the Supreme Court to review cases that come from the Court of Military Appeals, jurisdiction which previously existed only to the most limited extent.

My question is: When Congress passed the statute for the power in the Supreme Court to review these cases, to the best of your knowledge did they issue any kind of a questionnaire to the judges on the court of review, to the lawyers in the military to solicit their views as to whether it was a desirable statute?

Chief Judge CEDARBURG. No. I think the judges on the Court of Military Review are very seldom asked questions about anything.

(Laughter.)

Prof. SALTZBURG. Now, that's probably too bad. Today we've remedied that to some extent—

Chief Judge CEDARBURG. Yes.

Prof. SALTZBURG. —and are continuing to do that.

When you are asked questions about whether a questionnaire, if it had been distributed, might have helped you in coming up with answers today, I take it any time someone gives you a questionnaire or a background paper to research it would help you in making an educated response to any question.

Are you suggesting to us that if we were to make a recommendation, whether it be for or against Article III status, and we were to make it on the basis of research into Article III and its policies, research into the legislation history of the Court of Military Appeals, consideration of the testimony given to us by judges, such as yourself, lawyers and anyone else who cares to comment that we're not in a position to make a recommendation to the Congress about Article III?

Chief Judge CEDARBURG. I'm sorry, maybe I did not understand your question; but let me give you an answer.

I think you are in a position to make a recommendation irrespective of what I have to say and without reference to the questionnaire that has been circulated to all of the witnesses. It's just a question of whether you get the assessment, if you will, of all the witnesses who have appeared before you on those two discrete questions.

Prof. SALTZBURG. I thought that the suggestions you made for myself were very helpful in terms of considering what Article III status might mean. I take it those are the kinds of questions you would like to see the Commission examine.

Chief Judge CEDARBURG. Yes, indeed.

Prof. SALTZBURG. Whichever way, you know, if it's going to make a recommendation at all. We're not bound, I think, to make a recommendation on this. It's not in the charter, although some people hope that we will.

I thank you.

Col. HEMINGWAY. Mr. Ripple?

Prof. RIPPLE. Thank you, Colonel.

Captain, I would like to explore a little bit with you the question of leaving sentencing authority in the court martial as opposed to the military judge.

Two objections which one hears with respect to the present situation are as follows: Number one, that allowing the military court martial or military jury, as it's sometimes called, to sentence really is inviting in many cases the so-called brokered verdict; the court martial who finds someone guilty knowing that it can impose a very, very light sentence as a result so that rather that meet the standard of 'beyond a reasonable doubt' they, in effect, compromises themselves.

Secondly, it is sometimes argued that the military jury is more prone, in the sentencing process, to take into consideration sentencing criteria which ought not to be considered.

For instance, we had one witness testify before us in a general court martial convening authority of a case within his command involving an horrendous murder of a civilian where the jury returned a very light sentence, apparently because they made an independent judgment or the moral worth of the individual involved.

Those of us who were involved in military justice through the Vietnam era certainly heard a good deal about the so-called 'mere gook' rule with respect to the murder of Vietnamese nationals.

I would appreciate your comments with respect to both of those considerations. Do you think, in fact, by leaving the status quo we do invite brokered verdicts? Secondly, do we invite sentencing on criteria that ought not to be taken into consideration?

Ought military juries have the right to consider those factors, or ought sentences be guided by a higher standard?

Chief Judge CEDARBURG. I think there's less of a question of brokered verdicts. I have not seen many instances of what I considered to be a brokered verdict.

These criteria exist and they exist in the civilian community. That's why you see, after the press has been on drunken driving, people convicted of murder, manslaughter, get hit with hard sentences. Those are bad criteria and are administered not only by juries, but they're administered by judges, too.

It depends upon the milieu, if you will, that you find yourself in at any given time. I don't know that you can avoid these and I don't know that by adopting a military judge, alone, sentencing that you're going to avoid that in the same was as disparate sentences.

You have disparate sentences that are handed down by juries and by courts martial, but you have disparate sentences which are handed down by judges.

Prof. RIPPLE. Do you think one would minimize that latter danger by placing the sentencing authority in a military judge as opposed to a court martial. In other words, is there less chance of the judge considering an inappropriate criterion than there would be for a military jury?

Chief Judge CEDARBURG. Well, yes. I know that there are judges who hammer and there are other judges who are lenient; but I also know that the hammerers under the present system don't get a chance to sentence because they don't go before them. They choose the trial by members.

Now, it's an evaluation and assessment of what I'm going to get in one as opposed to what I'm going to get in the other.

Prof. RIPPLE. Of course, we do have to factor in here, I suppose, the statutory authority of the CFRs to, in effect, act as a leveler with respect to those sentences.

One more question, if I may, on the same topic. Although one, I suppose, can make an argument that in the civilian community it is appropriate for extraneous societal interests to, in some way or another, affect the sentencing process, is that true in the military?

In other words, ought the military to hold its membership to a higher standard and sentence accordingly? For instance, ought we to tolerate or ought we to find acceptable in the military a low sentence because—in the case of the murder of a Vietnamese national simply because the men are officers of the local company—feel, "Well, everybody does it. This happens in war. So what?"

Or, indeed, ought the sentencing process in the military be so structured that it doesn't permit that local conventional wisdom to affect the standards which are armed forces are held to?

Chief Judge CEDARBURG. Well, I'm afraid that judges would be affected by this, too. You have the sense of the community which extends to judges, too; not as much because I think judges make a conscious effort to structure their sentences on the basis of the entire record.

They have a reputation, if you will, to worry about and they don't want to be so far out of line. So, yes, I think you would have more uniform sentences and you would have sentences in which criteria that should not be considered would not be given the same degree of consideration as with court members.

Prof. RIPPLE. One last question, if I may, on another topic. That is tenure for military judges.

Do you think the armed forces could live with a system which required that a military judge be retained in his office for a guaranteed term except under two circumstances.

One, if he requested transfer prior to the end of his term; or, two, if he were removed for a stated reason reviewed by an independent authority, for instance, if he were short toured perhaps on recommendation of the

Judge Advocate General with the approval of the Assistant Secretary?

Chief Judge CEDARBURG. I'm sure we could live with it. What I'm really saying is that tenure really doesn't have a substantial impact because if you're looking at the key consideration it's promotion and tenure doesn't affect promotion whatsoever because the thing that determines your promotion is your fitness report.

If you have a lousy fitness report, if you have a guaranteed term you're going to get a lousy fitness report during the entire time, you're not going to get promoted.

Let me say this just so I'm not misunderstood. We have a JAG Corps organization and everybody competes for promotion within that JAG Corps organization. People are evaluated and, you know, if the system works ideally the best guys are going to get promoted.

Those who are less qualified are going to get promoted up to a certain point and those who are not qualified, they're not going to cut it. They're either going to require as a Lieutenant Commander or they're going to be terminated before their time.

But these people still have to be evaluated whether they're serving in a judge's position or not, and perhaps that raises the question: Well, can you guarantee judges promotion? Well, that wouldn't work.

It wouldn't work because it's unfair to everybody else who's coming up in a different track.

So I personally don't think that a guaranteed term of service enhances the independence of court members at all.

Prof. RIPPLE. Thank you, Captain.

Col. HEMINGWAY. Mr. Honigman?

Mr. HONIGMAN. For the record, my name is Steven Honigman. Captain Cedarburg, thank you for your testimony and it's a pleasure to be with you today.

Captain Cedarburg, let me ask a broad question to begin. Apart from the changes and proposals that we're considering in our charter, are there any additional changes that you would recommend to be made in the Uniform Code? If so, what are they?

Chief Judge CEDARBURG. Steve, I really haven't considered it. So in a broad doctrinal framework I can't given it to you.

Mr. HONIGMAN. Given that disclaimer, Judge, are there any changes in the Code that you think would be appropriate for the naval service or the Coast Guard in terms of the functioning of the Code on small ships at sea?

Chief Judge CEDARBURG. Minor offenses and matters which should be handled summarily, I think there has been over a period of time a layering on of review and review and the lack of finality.

We ought to accept the fact that we do have something which is so minor in its punishment authority that you ought to dispose of it summarily. Let's not get it into the system.

If you want to make this Article 15, Article 15 is a good example. If you want to elevate it to summary court martial which has increased punishment authority, maybe so.

But let's keep the layering of review and the close scrutiny of what goes on at the level of something where the punishment is, you know, fairly substantial.

Mr. HONIGMAN. In other words, you would eliminate review and keeping the record of punishment in favor of an immediate resolution.

Chief Judge CEDARBURG. Right, because it's very significant. You know, if a guy does something aboard ship the immediacy of some action and punishment and getting the thing over with is very significant.

I'm not saying this isn't significant in the Army and Air Force, too; but it's particularly so. You can't have a guy roaming around on a ship when you're under operating conditions with pending things and "Can I get to see a lawyer?".

Then, after the captain imposes the punishment, "Can I get to get a lawyer to appeal the thing?"; and this sort of thing. You have a limbo both before and afterwards. Let it be summary.

I have not found too many line commanders who are all that arbitrary and capricious. Obviously, there are some how are, but it works against them. You know, the word gets out.

"The captain, he's not fair"; and it gets out and that doesn't improve morale.

Line officers, line commanders are end oriented and they want their ship to function in the best possible way. I mean, if you've got poor morale because you're unfair at captain's mast, you're not going to have good morale and you're going to have people dragging at doing their jobs.

So it's counterproductive for a captain to be arbitrary and capricious in meting out minor punishments.

Mr. HONIGMAN. One proposal that's been made before us is that the number of judges on the Court of Military Appeals should be increased from three to five. Do you have any opinions on that question?

Chief Judge CEDARBURG. Well, over the years we've seen the court reduced to two and sometimes one, and bringing in senior judges just so you can have decisions.

I would think if you have a greater number you would have an avoidance of this problem; and also, perhaps, you would not have a pronounced change in the direction of the court with the change of one member.

Mr. HONIGMAN. Judge, in your experience as trial judge, can you give us some rought idea of the number of instances in which you recommended that a sentence be suspended or a portion of the sentence be suspended

and the number of instances in which the convening authority followed your recommendation?

Chief Judge CEDARBURG. Zero. Zero. Let me explain that.

I have very limited experience as a trial judge, and it just didn't come up.

Mr. HONIGMAN. In your experience as an appellate judge, can you give us some idea of roughly the number of instances in which the record has contained a recommendation, either by defense counsel or a military judge, and the number of instances in which that recommendation has been followed by the convening authority?

Chief Judge CEDARBURG. I think it's fairly frequent. You know, this is just an impression. I could not statistically support what I say, but I think that very often the recommendation of the military judge is followed, especially when it has a well documented basis in the record of trial.

Mr. HONIGMAN. Have there been instance in which a military judge, in an effort to formulate a strong persuasive recommendation for suspension, has gone so far as to impeach his own sentence?

Chief Judge CEDARBURG. Pretty close.

Mr. HONIGMAN. Have there been cases where sentences or convictions have been reversed because of such an impeachment?

Chief Judge CEDARBURG. Yes.

Mr. HONIGMAN. Can you give us an idea of whether that's a frequent occurrence?

Chief Judge CEDARBURG. I would say it's infrequent, but I can recall a number of instances in my experience where the sentence was reversed because of impeachment.

Mr. HONIGMAN. Do you know whether statistical records are kept which would enable us to find out the number of instances in which that's happened?

Chief Judge CEDARBURG. I do not believe that they are. I would think that you would have to go through every case in which there was a modification to sentence by the Court of Military Review, and the modification would not necessarily be based upon an impeachment.

I might say that there are numerous modifications to sentences that result at the Court of Military Review level. So I would think that it would be a very onerous task, one which they just have to look at the records to try and determine that.

Mr. HONIGMAN. Can you give us an idea of the frequency with which, at the Court of Military Review level, an assignment of error is made which alleges that command influence has taken place? By that, I would include allegations of influence over the military judge or over witnesses or potential witnesses.

Chief Judge CEDARBURG. A very, very small percentage.

Mr. HONIGMAN. Turning for a moment to the proposal for increasing the jurisdiction of special courts martial, would you foresee a danger of what I guess I would call sentence inflation in which an accused who is now tried by a special court and is sentenced to, say, two-thirds of the maximum would find that if his trial took place after the increase in jurisdiction, he would also get two-thirds of the maximum and the result would be a longer sentence?

Chief Judge CEDARBURG. No. Because I think the sentence imposed in the great bulk of court martial cases now is below the maximum. What I would anticipate is that what would happen is that more cases that are going to general courts right now would be going to general courts. For a couple of reasons.

You have to go through the Article 32 and, you know, that takes time and resources; and time and resources are an important consideration.

Mr. HONIGMAN. We've heard as justification for changing the sentencing system and for reposing in the military judge, in every case, the role of the sentencing authority that the military judge has professional training that the members may not have, he has experience in judging sentences in similar cases with similar accused in the same situation.

What would be your view of a system in which the military judge participated in deliberations with the members of the court martial and perhaps even had one of a number of votes on the question of what the sentence should be?

Chief Judge CEDARBURG. I think he becomes the oracle, then; and I would not think that that would be good.

Mr. HONIGMAN. Finally a question about the Court of Military Appeals. You made the point that the court is essentially a court of limited jurisdiction, limited to criminal appeals.

Do you believe that to attract the highest quality jurists to that bench it would be an advantage if they had an opportunity, on occasion, to sit by designation on other federal courts in which they could consider civil law issues?

Chief Judge CEDARBURG. Well, I view it from my own standpoint. I would not like to do that.

If you're a specialized court and you spend the bulk of your time doing a specialized area of the law, it takes you too long to get up to speed to feel confident in another disparate area.

Mr. HONIGMAN. I have no further questions. Thank you very much.

Col. HEMINGWAY. Colonel Raby?

Col. RABY. Yes, I have a couple.

In reference to tenure, you've testified that tenure gives no assurance of judicial independence to military

judges substantially and you set out several scenarios, with which I agree, that it certainly would not.

But I do have one scenario that I would like you to consider; and that's: How about the very good 06 who's no longer competitive for 07, who we very often find sitting on the Court of Military Review and as general court martial trial judges; say, one who's got three children in school—one at William and Mary, U. Pa., George Mason—has his home in Washington, D. C. with a $125,000 to $130,000 mortgage at 13 percent; he no longer vies for promotion; he doesn't worry about his OERs except for personal pride; but is not the threat of change of duty station a real threat to her or him?

Chief Judge CEDARBURG. It's a threat to his removal, but it's not a threat to him. If he's a very senior 06, he's ready for retirement anyhow or virtually ready for retirement. So he retires one or two years early.

Col. RABY. I know some in this category that would have at least six more years of service remaining.

Chief Judge CEDARBURG. Well, I certainly do not disagree that tenure, in that particular instance, would enhance that particular individual.

Col. RABY. But on the whole you still believe that it would provide no significant assurance of independence?

Chief Judge CEDARBURG. Right.

Col. RABY. Okay.

You mentioned a minute ago that you've seen several cases that you believe or you know where sentences were overturned with military judges in each of their sentences. That surprises me a little.

As former Chief of Criminal Law for the Army, I read Army CMR and COMA case written from July '81 to July '84. As Senior Judge of CMR, I'm still reading them and I don't recall a single setaside, based on the military judge impeachment of a sentence, in the Army in the last three years. So I assume your remarks are tailored specifically to your knowledge of Navy cases.

Chief Judge CEDARBURG. Navy, right.

Col. RABY. Okay. One other thing.

You suggested there was a need for timely command action, especially in the Navy, on board ship so you didn't know about the Army.

I'd just like to state for the record that with the Army commanders there is a clear need for timely action; artillery battalions in Europe, camp troops on the border and a whole bunch of stuff.

I don't mean that you meant to testify that the other services had no need for timely action.

Chief Judge CEDARBURG. No. As a matter of fact, I thought that I qualified that I'm not speaking for the Army here. They probably have the same problem.

Col. RABY. In reference suspensions, you've testified that they are a matter of clemency and tie it in with clemency.

Doesn't the history of the UCMJ suggest that if commanders were given remission and suspension powers far beyond that of mere clemency that they can exercise those for no reason at all to assure a proper mix of soldiers and sailors and airmen in time of war just to return troops to the battlefield, for example?

Chief Judge CEDARBURG. Sure.

Col. RABY. Does that not remain a—

Chief Judge CEDARBURG. There's no reason why it couldn't be exercised under what I proposed; that it be retained as a power in the convening authority. As I said, he can talk to a guy named Joe in determining whether to disapprove any portion of the sentence or not.

Col. RABY. But under your system, in time of war the military judges could suspend and cause individuals to remain in the service who commanders did not want.

Chief Judge CEDARBURG. Well, yes. You know, as I say, I expect that the power of suspension would be exercised with circumspection. As I said, the alternative may very well be for the guy not to award a punitive discharge.

I didn't refer to it exactly in terms of clemency because I think, in respect to Mr. Sterritt's question, I indicated that whether you call it 'clemency' or 'inappropriateness', the end result is: What is an appropriate sentence at any given time?

Col. RABY. Now, basically in the military right now, although we have some court cases, clearly we can have some suspension with probation type requirements tacked onto them. We know that from the judicial opinion.

Basically, we have a suspension as opposed to a probation system. By that, I mean the commander now who suspends, he suspends a sentence and the vacation proceeding can be had and legally upheld if there's good cause; that is, accused has committed some other offense that warrants a suspension.

But if we go to the court system, it seems like in all the other courts—federal and state—theirs is not just a suspension system. They have a regular probation system.

You then get into detailed conditions of parole and this means that somebody has to monitor this, and there has to be perhaps accounting and reports and judges could starting ordering people to report to some officer to ensure that they're obeying the terms and conditions of the probation.

Somebody will have to monitor it and that means manpower, dollars and time.

Now, in Army statistics for '83—and I don't want to bore you with them but, just for an example, I'll take general courts martial—military judges convicted 1,158 soldiers in 1983. Our statistics show that in only 12

cases, 1.1 percent, did the military judges recommend that the discharge be suspended and in only 23 cases, 2.1 percent, did they recommend that the confinement be suspended.

My question to you is: Do we really need an elaborate probation system or to create the power in the military judges which could lead to that system just for 12 cases, in the case of discharge suspension recommendations, or 23 cases for confinement at hard labor?

I recognize, I might add, that judges might exercise this a little more frequently, but I'm assuming that they're being honest in their recommendations.

Chief Judge CEDARBURG. Well, what we're really talking about is the percentage, as you say perhaps a little greater percentage, of cases in which a suspension would be exercised by the military judge.

So we're not constructing an elaborate system. We're talking about those particular cases where it's likely that suspension would have been attached to the sentence imposed to the military judge where he made the recommendation.

So we're not talking about a big, elaborate system; and, as I said, these things would have to be exercised with caution and circumspection, and the imposition of conditions of probation would also have to be exercised with good judgment by the military judges.

Col. RABY. So your recommendation for vesting this power is not a recommendation for a probation system that mirrors the civilian system.

Chief Judge CEDARBURG. No. It is not.

Col. RABY. Okay.

Chief Judge CEDARBURG. No. It's simply a question, sometimes the record demonstrates that while the offense is serious enough to warrant the imposition of a punitive discharge, there also is very substantial likelihood of rehabilitation of this individual and that makes it the appropriate sentence to be awarded by the military judge.

Col. RABY. I just have two more questions.

In regard to suspension power on the Court of Military Review you noted that there's a greater time lag and that there were only a few cases in your memory where it would really have been, you felt, worthwhile to have that power.

Does not the Court of Military Review of the Navy—I know the Army does—have the vehicle that if it feels strongly a sentence should be suspended that it can make a recommendation, through its Judge Advocate General, for the exercise or that clemency power under Article 74?

Chief Judge CEDARBURG. That is correct.

Col. RABY. Witness one of those unexecuted questions that remain.

Chief Judge CEDARBURG. As a matter of fact, I think we returned a case—once again, creativity, if you will—returned a case to the Judge Advocate General before we acted upon it for his consideration of suspending the sentence.

He returned it to us and said, "You take your action and then we'll entertain a recommendation if such is what you come to at the conclusion of your review."

Col. RABY. And what happened?

Chief Judge CEDARBURG. I believe that we recommended suspension and I believe that suspension was, in fact, exercised as a matter of clemency in that particular case; but what we were doing is we were trying to say, "All right, so that we know when we take our action that there's an appropriate sentence, take whatever clemency action you think is appropriate on the record before you."

But the Judge Advocate General—and I think rightly so—returned it to us and said, "You've got it for review. You determine on the basis of the entire record whether the sentence is appropriate. Then if you have a recommendation as to the clemency go ahead and make it."

You know, sometimes you try to do things to change the system a little bit. That's what it was.

Col. RABY. For the record, I was referring to Article 74, particularly Article 74A, of the Uniform Code of Military Justice, which invests certain clemency power in the Secretaries of the services concerned with power to delegate those authorities to an Assistant Secretary to the Judge Advocate General of the services.

It allows for the clemency action on certain unexecuted sentences.

Now, one final question. I find it so interesting now that the tables are shifted. When the military judges came in years ago it was feared that they were giving too light sentences compared to court members. Now we're talking about court members giving light sentences.

But if court members will give a light sentence, based on the so-called unwritten law, if we take away the Defendant's option to be sentenced by court members when they adjudicate findings of guilt in those cases where the accused goes before the court and he has a lot of extenuation or factors which would evoke the sympathies under the unwritten law of majority of the court member, is there not a danger that those court members will not now, then, convict because they can't control a perceived appropriate sentence later on in the proceedings?

Chief Judge CEDARBURG. I don't think so.

Col. RABY. You don't think we're trading one danger and substituting it for another.

Chief Judge CEDARBURG. I really don't. I think if the evidence is there to convict, they'll convict.

Col. RABY. But previously you've given scenarios that have answered the questions that you felt that they might give compromised sentences based on the unwritten law.

Chief Judge CEDARBURG. I said very, very infrequently; but the compromised sentence was, if you will, after a conviction.

Col. RABY. So basically you believe that court members do follow their instructions.

Chief Judge CEDARBURG. I think so. Yes, I do.

Col. RABY. And do not, just knowingly and intentionally, violate either instructions on findings or on sentencing; intentionally.

Chief Judge CEDARBURG. No. I think that court members are just like everybody else. They're the product of their entire environment and they have feelings; but they also take an oath to perform their duties. They say they're going to follow the instructions.

I think, with very rare occasions, they do precisely that.

Col. RABY. Thank you, Judge Cedarburg.

Mr. HONIGMAN. Mr. Chairman, I have one quick question, a clarification of what the witness has already testified to.

Col. HEMINGWAY. Make it quick. Admiral Butterworth is here.

Mr. HONIGMAN. Sure.

Captain Cedarburg, say members award a sentence. Could they suspend or could the military judge suspend under your recommendations?

Chief Judge CEDARBURG. Well, I find it very difficult to give the power of suspension to a committee, if you will. I think it's rife with problems.

Col. HEMINGWAY. Thank you.

Let's take a quick five minute recess.

(A brief recess was taken.)

Col. HEMINGWAY. The next witness is Admiral Butterworth, the Commander of Sub Group II. Welcome to the Commission.

Commodore BUTTERWORTH. Thank you.

Col. HEMINGWAY. If you would, please, give us a little background of the service that you've had and particularly your responsibilities as a convening authority.

Commodore BUTTERWORTH. Let me make one correction already. It's Commodore Butterworth. I am now at a one star rank, equivalent to Brigadier General.

REMARKS OF COMMODORE R. M. BUTTERWORTH, COMMANDER, SUBMARINE GROUP II

Commodore BUTTERWORTH. I'm the Commander of Submarine Group II located in New London, Connecticut and have been the Commander of the Submarine Group for approximately 17 months.

I graduated from the Naval Academy in 1958, have been a line officer since. My first assignment was on an attack transport for approximately two years before I went into submarine duty, submarine training, nuclear power training; and, from 1960 through 1972, had the normal progression of events, all of which were seagoing billets on various nuclear submarines both fleet ballistic missile submarines and attack submarines; division officer, engineer officer in new construction of submarines.

I did have one three-year tour of assignment in Idaho Falls, Idaho out at the National Reactor Testing Station in the development and testing of a new nuclear propulsion prototype.

In 1972, I left my executive officer tour on a fleet ballistic missile submarine and went into prospective commanding officer training for a period of about four to five months both here in Washington with the Naval Sea Systems Command and at Flight Commanders' Headquarters.

From 1973 until 1976 I had command of an attack nuclear submarine in New London, Connecticut; a three-year command tour of which about one year was spent in shipyard overhaul. That's a command consisting of about a dozen officers and about 110 enlisted; all male.

In 1976, I was relieved of my command, completed my command tour and reported to Pearl Harbor on the staff of the Commander and Chief, U. S. Pacific Fleet; and I was the senior member of the Nuclear Propulsion Examining Board for two years, examining all the nuclear power plants in the Pacific.

In 1978, I assumed command of a submarine squadron in San Diego; ran Submarine Squadron III. I had eight submarines, nuclear type submarines, and one submarine tender under that command.

In 1980, I was transferred to Pearl Harbor where I was the Chief of Staff and ran their submarine corps in the Pacific Fleet; a position I held for two years. In that position, I was selected for flag rank.

In May of 1982, I was transferred to the Pentagon, my first Washington duty. I lasted there for nine months working for the Deputy Undersecretary of Defense for International Programs and Technology Transfer; and, in March of 1983, was assigned and relieved as Commander of Submarine Group II.

In my present capacity, I am the senior submarine officer and the senior naval officer in the three-state area of Connecticut, Massachusetts and Rhode Island. I am the Commander and Chief Atlantic Fleet's Regional Area Coordinator for that area.

In my immediate command structure in the New London area, I'm responsible for approximately 15,000

military personnel; three attack submarine squadrons consisting of about 24 submarines, operating submarines, approximately half a dozen submarines' crews in construction, five submarines in overhaul at the Portsmouth Naval Shipyard submarine base; and the submarine school.

I have no prepared statement for today's testimony. However, I have filled out the questionnaire that was provided to me a few minutes ago. I guess I could give you the bottom line on the four items that were asked in that questionnaire.

As far as I'm concerned, on the guaranteed terms of office for military judges I follow the opinion that I'm in opposition to that. I'm also in opposition to the sentencing only by military judges in noncapital cases.

I'm opposed to the power of suspension for military judges and the Court of Military Review; and I favor the increased jurisdiction punishment for the special courts-martial.

Col. HEMINGWAY. Sir, at the present time do you exercise general and special court-martial convening powers?

Commodore BUTTERWORTH. Yes, I do.

Col. HEMINGWAY. With what frequency are you called upon to address military justice issues?

Commodore BUTTERWORTH. In the course of my review, on a daily basis.

Col. HEMINGWAY. Captain Byrne?

Cap. BYRNE. Commodore, simply to qualify or amplify what you've stated, insofar as suspension is concerned, are you opposed to suspension by military judges at the trial level and by Court of Military Review judges at the appellate level?

Commodore BUTTERWORTH. Yes, I am.

Capt. BYRNE. Perhaps you could explore with us a little more what you think about why you would prefer not to have only the military judge sentence and prefer to leave the accused with an election as to whether or not the military judge or members would impose the sentence in cases in which the accused makes that decision.

Commodore BUTTERWORTH. Perhaps I'm a traditionalist. I think that's what we have done before, the accused has the right to choose. That's the provision we have now.

I'm aware generally that most of the court-martial cases go before a military judge only, but I think that's an option that should be retained. The accused has the right to proceed that way. It is perhaps some right or privilege that the accused should exercise.

Capt. BYRNE. There has been some testimony that when the accused exercises this option, he or she does so of course not to get an appropriate sentence but to get—from the accused's point of view, which is quite natural—the lightest sentence of the two and, therefore, is electing based upon that; which, of course, if you or I were representing the accused we would recommend that he or she do so.

Do you think that this presents a problem?

Commodore BUTTERWORTH. I guess my experience—which is rather limited because of the nature of the duties I've had—hasn't shown that the sentences have been that much less than what I would say my experience has shown.

Perhaps this is not service-wide, but that has been my experience.

Capt. BYRNE. Sir, addressing the issue of tenure, now we have defined 'tenure', as Congress has assigned us to look into it, as a guaranteed term of office. That means, like the military judge would have, say, three years and even though, say, the military wanted to move him unless he consented, for example, we could not move him out to another job.

Would you perhaps explore with us a little bit your background as to why you would oppose his not having tenure or a guaranteed term of office?

Commodore BUTTERWORTH. As I understand the issue of the guaranteed tenure, a military judge would be a military judge for a substantial portion of his career. In my opinion, he does not have the breadth of exposure and experience that he should have in other areas whether it be in a naval legal service office, as a defense counsel, or as a Staff Judge Advocate. He's simply on the bench, exclusively.

I think that those other potential assignments are valuable to them. They broaden their experience.

Capt. BYRNE. Addressing, now, the issue of extension of the jurisdiction of special courts-martial up to one year's confinement at hard labor.

Now, as you know, one of the things we have for general courts-martial is the requirement for an Article 32 investigation. If we extended the jurisdiction of special courts-martial to one year, do you think that we should also require that an Article 32 investigation be ordered in order to be able to sentence the individual up to one year's confinement?

Commodore BUTTERWORTH. No, I don't.

Capt. BYRNE. Commodore, this is not on the questionnaire and I just suggest this. If you feel you're not ready to respond or haven't had an opportunity to think about it, fine.

Do you have any thoughts that you would like to share with the Commission concerning what you consider should be an appropriate role of the military justice system insofar as it meets the needs of high morale, good order and discipline in the military?

Do you have any thoughts on it that you'd like to share, or would you prefer to defer?

Commodore BUTTERWORTH. That's a pretty broad question.

I have been in the military for 26 years. I'm very pleased with the role that our paramilitary justice system plays in the maintenance of morale.

Capt. BYRNE. Thank you, sir.

Col. HEMINGWAY. Captain Steinbach?

Capt. STEINBACH. Commodore, is there a military judge located at your installation in New London?

Commodore BUTTERWORTH. Yes, there is.

Capt. STEINBACH. I'm assuming, but correct me if I'm wrong, that he's totally separate from your command structure?

Commodore BUTTERWORTH. Yes.

Capt. STEINBACH. How does he fit into the military community there or the military community functions?

Commodore BUTTERWORTH. Socially, you mean?

Capt. STEINBACH. Yes, socially.

Commodore BUTTERWORTH. I must admit that in the numerous social functions that I have been to, I've only seen him once and that was at a judges' outing that the base sponsors for the state and the federal judges of the State of Connecticut.

That's the only time that I've ever seen him other than the two or three occasions when I visited or toured the legal offices at the post.

Capt. STEINBACH. Have you come to any conclusions why you don't see him more often?

Commodore BUTTERWORTH. No. Never even thought about it.

Capt. STEINBACH. Okay.

Commodore BUTTERWORTH. There are a lot of people up there.

(Laughter.)

Capt. STEINBACH. I understand that.

He's not consciously separated or intentionally separated.

Commodore BUTTERWORTH. I don't believe so.

Capt. STEINBACH. With regard to this tenure issue, if you're in a situation where you do get the results of a court-martial that are not toally to your liking, do you have an avenue that you can indicate or express that disagreement or disparity or displeasure with the outcome of the court?

Commodore BUTTERWORTH. Well, certainly not to the judge and not through his chain of command. I guess, no. As far as I know I don't have an avenue officially, other than if I talk to my boss.

Capt. STEINBACH. Do you believe that you should have such an avenue?

Commodore BUTTERWORTH. No, not to the extent that I would have any direct relationship with it.

Cap. STEINBACH. Let me tighten up the hypothetical a little bit and put it in terms of actual either malfeasance or misfeasance by a judge.

If it comes to your attention that you've got an alcoholic or worse, just an incompetent,—

Commodore BUTTERWORTH. Yes.

Capt. STEINBACH. —then do you have any avenue to raise that issue?

Commodore BUTTERWORTH. I believe I do. I should.

Capt. STEINBACH. That was my next question: Should there be one?

Do you have any way of affecting the time this military judge stays at your base; i.e., can you effect his transfer?

Commodore BUTTERWORTH. Not that I'm aware of.

Capt. STEINBACH. How about his promotion?

Commodore BUTTERWORTH. No.

Capt. STEINBACH. Concerning the special court-martial one-year sentencing jurisdictional authority, do you feel that the expansion of that authority, if it were instituted, would serve to lessen the general court workload; and, if so, how significantly?

Commodore BUTTERWORTH. Oh, I think it would, but only slightly just based on the number that we have. We only have a handful of general court-martial cases and I would think that maybe only one of those, maybe of a half a dozen, would have gone to a special court-martial with increased jurisdiction.

Capt. STEINBACH. If you don't think it would lessen the general courts, what benefit do you see for the system in expanding the jurisdiction?

Commodore BUTTERWORTH. Well, I think, servicewide, there would be a lessening. Even if only slightly, it's a saving of personnel and expense.

I just feel that the special court-martial should be able to give a greater confining sentence.

Capt. STEINBACH. But if there's no benefit as far as lessening the load of the general courts, is it possible that the special court trend may start to be just stiffer sentences because they have more authority? Do you foresee a trend there?

The flip side of the coin, if there's not a significant lessening or workload saving of the general courts, then what other results could we see? Would there be one such as just a stiffer punishment?

The same case that went to special under the old system, if it were to go under the proposed system where the court could give him the one year do you think that the trend of punishment, stiffer sentences, would start to go up?

Commodore BUTTERWORTH. I don't think so. In my opinion, I don't think you would tend to see a trend.

Capt. STEINBACH. That's all I have, sir. Thank you.

Col. HEMINGWAY. Mr. Honigman?

Mr. HONIGMAN. Commodore, let me ask a broad question first. Are there any changes to the Uniform Code other than the ones that we are considering that you would recommend?

Commodore BUTTERWORTH. Not at this time.

Mr. HONIGMAN. Do you believe that there should be any changes made to the Code specifically addressed to the naval or the Coast Guard system in terms of maintaining ships at sea in isolated situations?

Commodore BUTTERWORTH. I have no information at this time.

Mr. HONIGMAN. Do you believe that any changes should be made in Article 15?

Commodore BUTTERWORTH. No.

Mr. HONIGMAN. Commodore, let me turn to the suspension issue. In your experience as a convening authority, can you give us some rough idea of the frequency with which you receive requests or recommendations for suspensions either from the military judge or the defense counsel?

Commodore BUTTERWORTH. It's a fairly low percentage.

Mr. HONIGMAN. And what do you personally do when such a recommendation or request is made?

Commodore BUTTERWORTH. I consult with my staff judge advocate and I receive assistance from my staff in the decision.

Mr. HONIGMAN. Do you personally interview the sailor's noncommissioned officer or division officer, or anything like that?

Commodore BUTTERWORTH. I have not.

Mr. HONIGMAN. Can you give us an idea of the frequency with which you grant or adopt a recommendation or request for suspension?

Commodore BUTTERWORTH. There have been very few cases. I think I've gone with virtually all of them.

Mr. HONIGMAN. You've gone along with virtually all of them.

Commodore BUTTERWORTH. Yes.

Mr. HONIGMAN. Have you ever, on your own initiative after reviewing, reading the record of trial or summary, suspended a sentence in full or in part?

Commodore BUTTERWORTH. Not that I recall.

Mr. HONIGMAN. If you retained your authority to suspend the sentence and if the military judge also were given that authority, would you view such a system as in any way a diminishment of your authority as a commander?

Commodore BUTTERWORTH. Somewhat; yes, sir.

Mr. HONIGMAN. Could you live with such a system?

Commodore BUTTERWORTH. Sure.

Mr. HONIGMAN. If such a system were to be adopted, what kind of system do you think would be appropriate for vacating a suspension? Would you wish to have the sole authority to vacate?

Commodore BUTTERWORTH. As a convening or supervisory authority, yes.

Mr. HONIGMAN. Let me turn to assignment of members to courts-martial. We have heard testimony—and I think it's been a very broad spectrum of witnesses—that there is a problem in which the assignment of members sometimes does not include the best and the most capable officers because there's a perception that they're more valuable in their operational capacity and, instead, often or frequently, members are assigned because they're the ones who can be most easily spared.

Has that been your experience?

Commodore BUTTERWORTH. Not personally. In fact, all of the members that I've assigned to courts have usually been a wide spectrum based on experience and age. I would say in no case have I assigned a court where the senior officer who was a member was less than a commander; in most cases, a captain.

I have three captains on my staff, incidentally.

Mr. HONIGMAN. I take it, then, that what you seek on a court is a cross section with different ranks and also a balance of line officers and staff officers with different perspectives?

Commodore BUTTERWORTH. Well, on my staff I have all line officers except two. So the preponderance are line officers.

Mr. HONIGMAN. Do you personally make the decision as to who to assign to be members on a court-martial?

Commodore BUTTERWORTH. Yes, I make the decision when I sign it. No, I do not look at my roster and decide who to put on there.

Mr. HONIGMAN. In other words, there's a recommendation from your Staff Judge Advocate that you approve.

Commodore BUTTERWORTH. Yes, through my Chief of Staff.

Mr. HONIGMAN. Are the names that you approve often or exclusively officers with whom you're personally acquainted?

Commodore BUTTERWORTH. I am personally acquainted with all the officers on my staff.

Mr. HONIGMAN. Would you view a system in which there were a series of standards—for example, in a court-martial you would have a certain number of members of a particular given rank—and in which the individuals themselves were selected by lottery as in any way a diminishment of your authority or a system you could not live with?

Commodore BUTTERWORTH. I would not be in favor of that.

Mr. HONIGMAN. Why not?

Commodore BUTTERWORTH. I don't like a lottery system. That seems to take out the specially selected court based on a particular case. It just seems to random to me.

Mr. HONIGMAN. Well, would you view a system in which members were assigned at random, within a given set of parameters, as appearing to be a more fair system than one in which members are assigned with a particular interest in their orientation or background or experience or perspective?

Commodore BUTTERWORTH. I don't think that would be a problem at a small command, but if you went to a very large command it could become unfair.

Mr. HONIGMAN. I have no further questions. Thank you Commodore.

Col. HEMINGWAY. Col. Raby?

Col. RABY. Sir, I'm Colonel Raby from the Army Judge Advocate's Office.

You testified in favor of expanding special court-martial jurisdiction to one year. Would you favor/not favor limiting this increased power to a general court-martial convening authority with a more ready access to a Staff Judge Advocate

Commodore BUTTERWORTH. Limiting that to a—

Col. RABY. A general court-martial convening authority. In other words, keep the special court as it is with the subordinate commanders, but the increase of one-year power in the hands of the general court-martial convening authority.

Commodore BUTTERWORTH. I don't think that's necessary.

Col. RABY. All right. You believe that subordinate commanders, that special court-martial convening authorities now have the capability of handling that type of increase satisfactorily.

Commodore BUTTERWORTH. Yes.

Col. RABY. You have testified in favor of sentencing under the current system where the accused has the option of selecting who will sentence him when they hear his case on the merits.

In our system of justice, general deterrence—that is a sentence which helps prevent other soldiers, sailors or airmen from committing the same offense—is an important consideration along with rehabilitation and others.

Have you formed any opinion, when a court sentences, suppose, an offender who was convicted of, well, let's say, jumping overboard and he's sentenced to a BCD and a year, let's say, by a military judge; and you have the same case where a court with members sentences the sailor to the exact same sentence?

In the eyes of the sailors in your command, does the sentence by the court members have more general deterrence because it's members of the command that have imposed the sentence, or is it about the same when they hear of a sentence?

Commodore BUTTERWORTH. I've never conducted a survey on that line. My gut feeling would say that they would lend more credence to the members' sentence.

Col. RABY. The officers who they tend to associate with in the discipline chain.

Does your command have a system where you publish the results of courts-martial?

Commodore BUTTERWORTH. Yes, we do.

Col. RABY. How does that work?

Commodore BUTTERWORTH. We publish it on a quarterly basis by a notice which is distributed to all commands. Those commands selectively promulgate the results either on a bulletin board or in the plan of the day, plan of the week.

We do it anonymously.

Col. RABY. But it's a means by which the sailors definitely find out what's happening to people who commit crimes.

Commodore BUTTERWORTH. Yes.

Col. RABY. For clarity of your testimony about a sentence suspension, have you ever suspended a sentence based on your Staff Judge Advocate's recommendation where the military judge did not recommend suspension, hadn't recommended suspension?

Commodore BUTTERWORTH. I don't believe so.

Col. RABY. Have you ever recommended suspension based on a subordinate commander's recommendation for suspension where the military judge had not recommended suspension?

Commodore BUTTERWORTH. Yes, in one case.

Col. RABY. Do you know of any commander, over the years, who has ever tailored a court-martial membership just to get a given result in a court-martial?

Commodore BUTTERWORTH. Not that I'm aware of.

Col. RABY. Thank you, sir. I have nothing further.

Col. HEMINGWAY. Commodore, I understand that the assignment to the submarine service is fairly selective.

Do you find that this makes your disciplinary rate lower than it is across the board in the naval service?

Commodore BUTTERWORTH. Yes, it is.

Col. HEMINGWAY. What is your impression of the perception of your enlisted personnel of the military justice system as it exists now?

Commodore BUTTERWORTH. I think for the most part the great majority think it's very fair.

Col. HEMINGWAY. Mr. Ripple?

Prof. RIPPLE. Thank you. Most of my questions have already been answered, but I do have one or two if I may.

First of all, with respect to the increase in the possible punishment in the special court-martial what is the grade

of your resident military judge, Commodore, at New London?

Commodore BUTTERWORTH. He's recently been transferred. He was a Lieutenant Commander; 04.

Prof. RIPPLE. I gather you'd have no problem giving authority to an officer in that grade to confine one of your men for up to a year, alone.

Commodore BUTTERWORTH. I'm sorry. Let me make a correction. He was a Commander; 05.

Prof. RIPPLE. Okay.

How would you feel about a judge advocate officer, senior 03 or an 04, sentencing one of your petty officers to a year's confinement?

Commodore BUTTERWORTH. I wouldn't have any problem with a Lieutenant Commander or a senior, experienced lieutenant that qualifies.

Prof. RIPPLE. Going on to another topic we talked about very briefly at the beginning of your statement, the tenure for military judges, suppose that tenure were limited to nothing more than a guaranteed full tour; assign a man to New London as a military judge for a three-year tour; he's guaranteed he stays as a military judge for three years unless he's, in effect, relieved for cause, very comparable to a commanding officer being relieved for cause.

How would that impact adversely on his career path?

Commodore BUTTERWORTH. I don't think it would because that's, in essence, what's done now.

Prof. RIPPLE. Could you live with a system whereby the law said, "We will assign a military judge to New London for three years who may not be relieved of that assignment before term unless he's relieved for cause with the approval of an Assistant Secretary"? Could you live with a system like that?

Commodore BUTTERWORTH. Yes.

Prof. RIPPLE. Thank you.

Col. HEMINGWAY. Mr. Saltzburg?

Prof. SALTZBURG. Commodore, my name is Steven Saltzburg. I teach law at the University of Virginia. It's nice to meet you. I only have a couple of questions.

Something has been puzzling me as we've gone through these hearings. It has to do with the percentages of people who chose judge-alone sentencing and those who choose sentencing by members.

The percentages that we've heard testimony about suggest that in the Navy 85 percent of the naval personnel who come before general courts-martial end up being sentenced by military judges. Now, the suggestion has been made to us that that can cut several different ways for our consideration.

One way it can cut is to say there are only a small handful, literally, of people who are asking for sentencing by members and it isn't worth it anymore to do it when 85 percent of the sentences are judge-alone anyway.

Do you have any speculation or are you able to speculate as to why it is in the Navy that so many of the sentences are judge-alone sentences?

Commodore BUTTERWORTH. Well, I would think that they probably do that because there is some history on that particular judge. The defense counsel advises them that this is the most probable sentence based upon the history, and they feel more comfortable about it.

Prof. SALTZBURG. When you have to convene a court and the request is made for the court to be trial by members, I take it it's a burden of convening and selecting, and so on, that you're willing to bear. As I understand it, it's a burden that you would prefer bearing to a system that, let's say on the sentencing side, encouraged people to have just judges to it.

Am I correct that it's a burden of picking the members and convening the court that you're willing to bear?

Commodore BUTTERWORTH. It's quite a job. I don't look it as a burden.

Prof. SALTZBURG. Maybe 'burden' is the wrong word. It's a responsibility that, I take it, is an important part of the military justice system.

Commodore BUTTERWORTH. Yes.

Prof. SALTZBURG. There's been speculation that there's more sentiment in the Navy, perhaps, than in other branches for judge-alone sentencing, maybe because of just the high percentage of judge-alone sentences that are now conferred.

Based on your experience talking to other commanders, talking to other convening authorities, do you believe that the view that you've given us—that the person who comes before a court-martial should have the choice—is a view that's still widely shared in the Navy?

Commodore BUTTERWORTH. I'll be honest with you. I haven't talked that much with other convening authorities, so I cannot give you what their feeling is.

Prof. SALTZBURG. Fair enough. I thank you.

Col. HEMINGWAY. Mr. Sterritt?

Mr. STERRITT. My name is Christopher Sterritt. I'm from the Court of Military Appeals. I have two questions.

By the way, I'll tell you I was in the Navy a few years back and I tried cases at New London, and I have some familiarity with that base.

You made a statement, I think in response to Colonel Raby, about the results of courts-martial being published. Is that in the order of the day or in the local newspapers, or how would that be done?

Commodore BUTTERWORTH. Not in the local newspaper. It is by official notice which my staff prepared and distributed to each of the local commanders. They are free to either post that on a bulletin board or promulgate

it in their local plan of the day; for example, on board a ship.

Mr. STERRITT. Are you familiar with whether these publications show whether the trial was by members or judges?

Commodore BUTTERWORTH. That distinction is not made.

Mr. STERRITT. My second question concerns the perception, again, on member sentencing. I don't know if you're aware of this, but in the federal courts and in the majority of the state courts sentencing is done by a judge alone.

I realize that there has been a tradition of member sentencing in courtrooms for many years.

Do you think your modern sailor today appreciates that tradition still in view of the civilian background he probably comes from?

Commodore BUTTERWORTH. I would say the average modern sailor does; yes, sir.

Mr. STERRITT. Thank you. I have nothing further.

Col. HEMINGWAY. Are there any other questions?

(No response.)

Col. HEMINGWAY. Commodore, thank you very much for your time today.

Commodore BUTTERWORTH. Thank you.

Col. HEMINGWAY. We appreciate your sharing your thoughts with us.

Commodore BUTTERWORTH. Glad to.

Col. HEMINGWAY. We will take a brief break.

(A short recess was taken.)

Col. RABY (Presiding). In my role as acting chairman of this august group, at this time I'd like to welcome Captain Derocher, Staff Judge Advocate from Command Surface Force, Atlantic Fleet. Anyway, that's how you're listed here.

Capt. DEROCHER. Yes, sir. That's reasonably accurate.

Col. RABY. I wonder if you'd give us a little bit of information about your background, please, Captain; and then your remarks.

Capt. DEROCHER. Yes, sir.

REMARKS OF CAPTAIN DEROCHER, STAFF JUDGE ADVOCATE, COMMAND SURFACE FORCE, ATLANTIC FLEET

Capt. DEROCHER. Good morning, gentlemen.

I am a graduate of the University of Notre Dame and Cleveland State Law School. I began my naval career as an instructor in the School of Military Justice, Naval Justice School, in Newport, Rhode Island.

Subsequent to that, I was Staff Judge Advocate to the commanding officer of an attack aircraft carrier. During the major portion of that tour, we were engaged in combat operations in southeast Asia.

Subsequent to that, I became Staff Judge Advocate to the naval station in Pearl Harbor. I then went to postgraduate school in ocean law at the University of Miami and served a tour of four years as Special Assistant involving sea matters to the Assistant Secretary of Defense for National Security Affairs.

During that time, I was a member of the United States' delegation to the United Nations' Law of the Sea Conference.

Subsequent to that, I was the Staff Judge Advocate to the naval activity in Taipai, Republic of China; ultimately or then became the Executive Officer and subsequently Commanding Officer of the Naval Legal Service Office in San Diego, which is the Navy's second largest trial activity.

For the past two years, I have been Staff Judge Advocate to the Commander, Naval Surface Force, United States Atlantic Fleet, which is a command comprising approximately 200 naval ships ranging from the battleship Iowa down to minesweepers and composed of approximately 65,000 enlisted personnel and 7,500 officers.

In that capacity, of course, I am responsible for the general administration of legal affairs for that command reporting to Vice Admiral Grace who is, of course, the Commander.

That tour, as a matter of information, has given me an exposure to approximately 1,200 bad conduct discharge special courts-martial which we have reviewed as supervisory authority in this two-year period of time. The Force, which I described to you, has generated approximatley 57 general courts in that period.

So it's largely from that perspective that I have drawn the opinions and the views that I have on the issues before the Commission.

I also have not prepared a particular prepared statement, but let me just run down the issues with you and sort of give you my views.

I think the most important of the proposals before the Commission and the one in which I'm most strongly in favor is judge-alone sentencing. On the issue of suspension power for military judges, I am in favor of it with a caveat or reservation that we need to currently change the system to bring before the judge substantially more background information than is currently the case; something in the nature of a presentence report.

On the issue of expanded jurisdiction for special courts, again I'm marginally in favor. I think the thing that gives me some reservation is the statistical data that I've been developing looking at the caseload that's gone through our office which suggests to me, somewhat contrary to my own logical expectations, that there's little or no need for it.

On the issue of tenure for military judges, I very candidly think this is a solution in search of a problem.

Having said that, I'm happy to respond to questions you may have.

Col. RABY. Do you care to expand any further on your rationale for basing your conclusions in any of these four areas before I open it up to questioning by board members; like you stated you were strongly in favor of judge-alone sentencing.

Would you care to go into a little more detail about your reasons for your conclusions in these four areas before I open it up?

Capt. DEROCHER. Yes, sir; at least in that area, initially.

In the data I have examined—and, again, based on a fairly broad, I think, sampling in this 1,200-case load that we've examined in the last two years—and as a subset of that and somewhat in preparation for these hearings and somewhat ancillary to other issues, I took the first 100 cases which came in the office in calendar year 1984 and did a little bit more detailed review of them, and then compared that with some other figures we had.

First of all, there are special courts-martial caseloads. They are predominantly unauthorized absence caseloads. 77 percent of those trials are for unauthorized absence cases.

In those unauthorized absence cases, the rate of member sentencing was less than 1 percent. In the special courts-martial cases which I examined as a whole in this entire 100-case sample, the rate of member sentencing was 3 percent.

In the general courts-martial caseload—I examined all 57 of them that originated somewhere in the surface force in the last 18 months—the rate of member sentencing was 35 percent.

I think that targeted in on something that had always been a very subjective perception of mine. That is that the real weakness of the current system is inadequate, disproportionate, and inappropriate sentences from member courts in serious felony cases.

A direct result, in my view, of the inexperience in sentencing of our general population of potential court members. The serious felony cases obviously come up somewhat rarely, comparatively rarely.

The members appointed, regardless of statutory qualifications, experience, best fitted, et cetera, come to that task very, very infrequently with no prior experience whatsoever in imposing criminal sentences. In a disturbingly large number of cases over the years that I have observed the results have bordered on the absurd.

The sentence for an attempted murder where the member's sentence is in the nature of one year; 18 months for an extremely aggravated rape with serious injuries to the victim and where most of the data—of course, not all of which gets to the court under our present system—would suggest the accused is an incurable sociopath.

I find these results extremely disturbing. Because of their overall infrequency, if you will, and because there is no one line command anywhere in the Navy that I am aware of that is either aware of these trends or is responsible for monitoring them, I don't think that this is a problem that has surfaced as a conscious concern with the system. I think that it's an unknown.

But I believe firmly that it exists and that the proposal for judge-alone sentencing will provide a reasonable solution; and, I might say, a solution with very few valid objections to it that I can see.

With respect to the other issues, as I say, the provision for judge alone sentencing, I think if one analyzes that as to the present system it's obvious that there are going to be a number of cases that come before any military judge where his honest appraisal of the overall situation is that the sentence ought to include a suspended portion.

Under the present system, my view is that his only proper option in that case is to not award that portion of the sentence which he would otherwise suspend if he had the power.

So if he is accorded that power presumably we will see longer sentences, more discharges adjudged with that increase being suspended. If that's a correct analysis, obviously the proposal ought to be supported by the strictness of the hearings, although I doubt very much whether it will be.

I think it's largely speculative, frankly, whether that is a correct analysis or not; and I'm not totally sure what the final result of such a proposal would be. But I think it merits certain further review and, in my view, it's worth incorporating in a provision that will allow judge-alone sentencing.

I have much greater reservations with respect to appellate suspension largely because my own experience with it has been so unsatisfactory. By the time the case reaches almost any appellate level, these days the accused is on appellate leave.

Under this circumstance there is no reasonable basis to return him to military jurisdiction if he chooses not to. Granted, as a matter or theory you can order him to return to duty and when he does not come you plug him back into the UA computer roll and sooner or later he'll be arrested for some traffic violation; get him back in the military.

Then you are faced with the same problem of approving receipt of orders that you have with recalling reservists. It becomes too hard and the net result is that in those situations that I have seen, the individual is mailed a general discharge.

We receive relatively, I would say, a low rate of recommended suspensions by military judges. Now I am not looking at hard data, I'm talking subjective perception. My perception is that approximately 25 percent of the military judges' recommendations are accepted by the convening authority.

Now, these are subordinate commanders well down the chain of command from the level at which I'm operating. These are people who are immediate unit commanders of the individual and presumably have an idea of his potential.

But by the time they get to us I look at what remains—those recommendations which are unacted upon and those that I consider have potential merit; and, very frankly, some of them I dismiss in my own mind—and in perhaps 75 percent of them I will direct someone on my staff to determine where he is now, what he has been doing since the trial, what did his confinement record look like, trying to get some additional input of that nature in which to assess the suspension recommendation.

I invariably find the man on appellate leave. On at least five occasions, I have made phone contact with an individual whom, for one reason or another, the record suggested to me was worth some extraordinary effort in this direction and who may have made a very empassioned plea for retention at trial or whatever, and I've called him up with a kind of general, "Hi. I've got some good news for you. We're thinking of suspending your BCD"; and the response has been, in an admittedly small sample, very unfavorable.

(Laughter.)

"No way am I going back to the Navy."

On one occasion, the response was very positive. We did suspend the BCD at which point the individual said, "Thank you very much. I'm not coming back"; and we were faced with precisely the situation I described.

We ultimately mailed that individual the honorable discharge and I chalked that off to experience for the future.

So that's, in a nutshell, the drawback that I see in the appellate suspension beyond the obvious; that by that time all you have is the record of trial, which was totally inadequate to work with in making those decisions, I felt.

I had some opportunity to probe in other directions to get additional information. I think that opportunity would be very sharply constrained at the Court of Military Review level.

With respect to the issue of expanded jurisdiction for special courts-martial, logically it would appear to be and certainly did appear to me for years that there ought to be a group of offenses where the appropriate punishment falls into the range of six months to one year confinement. So, therefore, there ought to be a group of offenses that very logically would be appropriate for that jurisdiction.

I have been unable to find them. In this sample of 100 cases which I referred, which was as random as you can get—it's the first 100 we looked at in calendar '84—there was one sentence which represented a maximum sentence of a special court-martial.

The average confinement awarded was 2.8 months confinement, which after the convening authority took mitigating action—which he did in an average of 50 percent of the cases that came to me—the average approved confinement stood at 1.85 months.

I draw from that that there is no particular pressure from the bottom up. We're not bumping against the upper limits of the system.

That data suggests to me that there is little or no risk that if one expanded special court-martial jurisdiction from six months to one year that there would be some kind of grade inflation, if I can borrow an academic term. I just don't see it.

So then I tried to examine the flip side of that and we looked at these 57 general courts that we dealt with and said "How many of those might reasonably have gone to a special court-martial under an expanded jurisdiction concept?"

Again, surprisingly enough, I was only able—obviously with a very, very subjective assessment—to identify possibly three or four of that 57 that might well have been the top if a special court had had an increased rate of sentencing power.

That is not to say that there weren't sentences that fell in that range; but that is to say that looking at the case from the perspective of the convening authority making a decision where to refer it that the decision to refer it to a general was, in my view, the only reasonable one at that time.

One of the messages that I try very hard to get across to my subordinate commanders and our commanding officers of our ships is that, preparing for and conduction a general court is not really that difficult. It is not an extreme administrative burden and, in serious common law felonies, it deserves to be seriously considered.

The organization which we have set up in the Navy today in terms of the naval legal service officers and their geographic dispersion are able to provide excellent support in this; and those people who have tried it, if you will, have not come away dissatisfied.

So, as I said, contrary to my expectations I have been unable to identify a real factual basis to suggest a serious need for this expansion; but, nonetheless, it may be there. I am also, frankly, unable to identify any serious drawback to it.

That is, I may add, from the perspective of a system which has no non-lawyer trials. All of our special courts have legal expertise devoted to them.

I would certainly agree that a verbatim record would be a requirement for the exercise of an expanded jurisdiction, given those two restrictions. It seems to me it has merit.

With regard to the issue of judicial tenure, as I say, I frankly do not know what that is directed to. I have had, over the years, innumerable conversations with judge advocates with regard to the desirability, if you will, of serving a tour as a military judge either in general or with reference to some particular proposed assignment.

I have never once, in any context, had anyone express to me reservation, concern or recognition that there is any problem whatsoever with respect to the tenuousness of that assignment. I am not aware of any military judge who has ever been reassigned in a context that one could think of or was perceived as being punitive.

I think it has some very serious disadvantages from the perspective of the Judge Advocate General, who can far better explain his views than I. But it seems to me that what assignments consist of in the judge advocate corps is a process of reallocation.

Long experience and extreme competence are not in unlimited supply. Even the Navy can't make that claim. It's a zero sum game.

More experience, more expertise here means less there.

I think that the individual who is charged by law with the responsibility for making the entire system work and work properly ought to have complete discretion to make those resource allocation judgments in the fashion that he deems best.

That's my primary objection to it.

Col. RABY. Thank you.

Chris?

Mr. STERRITT. Yes. I'm Chris Sterritt from the Court of Military Appeals.

You mentioned that strict disciplinarians might be opposed to member sentencing. Can you posit a reason why they might be?

Capt. DEROCHER. Because I think there is a perception among line commanders that member sentencing is more appropriate, which usually translates to more severe. I don't think that perception is accurate, though.

To the extent that it is accurate, in the areas that it may be accurate, in the military offense category member sentencing is not being opposed by anyone of significance.

Mr. STERRITT. Several commanders have spoken about the identification of command with the military justice process through the use of member sentencing. Can you give me a comment on that?

That's sort of institutional reinforcement.

Capt. DEROCHER. I understand the point. It's one, frankly, that has never been terribly persuasive to me.

Now, obviously my perspective is somewhat different. It is, I think, an extremely speculative area to try and assess the perception of the class of individuals—that is people who become accused—with respect to the system or which portions of system the influence may be in or not.

I don't know of any way to get a firm handle on it.

Mr. STERRITT. You were in the Navy at the time, in 1967, when they went to a military judge?

Capt. DEROCHER. Yes. I was.

Mr. STERRITT. Was there a perception at that time in the line commanders that you knew that somehow the disciplinary aspect of the court-martial was lessened by putting judges in there at all rather than the law officer member?

Capt. DEROCHER. I certainly encountered that perception among line officers and line commanders. I think it was there, yes.

Mr. STERRITT. Do you think it survives today, that same perception?

Capt. DEROCHER. In isolated instances, certainly. I don't think it's an institutional perception. I think that, by and large, that the system is accepted.

Mr. STERRITT. Thank you.

No further questions.

Col. RABY. Mr. Saltzburg?

Prof. SALTZBURG. Captain, I'm Steve Saltzburg. I have a couple questions.

The judge-alone sentencing, I guess, is the area on which I'd like to focus. It's interesting that most of the witnesses who have testified in favor of judge-alone sentencing have pointed out something which is virtually the opposite of what we see in my home state, Virginia, and some other states which have jury sentencing and the criticism there.

We've heard, and heard from you, that this problem with member sentences, is that we have light sentences, inexperienced sentencers impose sentences not in accord with the offense, generally light. The reason that's the problem is that if they're heavy, they have a chance to correct that on review; but light sentences cannot be disturbed.

In Virginia, the attack on jury sentencing is jury sentences are out of all portion to the offense in that they're extremely heavy, far heavier than judges impose.

The question I suppose I have is: Do you believe that the problem with member sentencing is less today in light of changes in the manual concerning sentencing information than it was perhaps a couple of years ago?

Could it be made better by giving members even more information than they now have concerning the accused?

Capt. DEROCHER. Well, I would say this, first of all, that any change which increases the amount of information going to the sentencing authority, whomever, is all to the good.

Would it be sufficiently good to remove my objection to member sentencing, I would say no because what I see with member sentencing is not that they're excessively lenient or that they're excessively severe, but merely that they are excessively random, if you will; that the same category of offense may be excessively severe which, if nothing else, one has an opportunity to correct, as you point out, whereas in another case it may be excessively lenient.

It's one of these cases where the average means nothing because all you have is extremes in a sense; and it's those significant number of lenient sentences that, as I say, that I find disturbing.

Prof. SALTZBURG. Do you find, when you look at the sentences that are imposed by special and general courts coming from different convening authorities, that there's more consistency within a given convening authority than, say, across the board? Or is the disparity even very evident within one convening authority's court-martials?

Capt. DEROCHER. Well, the cases where I see a broad spectrum of convening authorities, which are the special courts by and large—as I pointed out there aren't enough member sentencing cases to make much of a judgment, 3 out of 100, and I frankly did not see what their internal consistency was or even if they were the special case—almost all those cases are judge sentences.

In the cases where there has been member sentencing, as I said I think the factual background has been so different that it would be very difficult to assess whether there has been a disparity.

I saw nothing on, say, a general trend that the sentences were substantially different among the members in Charleston, South Carolina than they were in Lakeland, Florida or other places. I've seen cases from various areas, each convened by separate trial officers.

I saw nothing even suggesting there was a trend.

Prof. SALTZBURG. One of the things that I find interesting—and I don't know if this is 100 percent accurate, but it's close—is that there is more of a feeling, I sense, among the Judge Advocate General personnel that the disparity is a big problem that ought to be corrected by, perhaps, judge-alone sentencing than, as you point out, among the line officers who perhaps want to have more faith in the member sentencing, want to preserve the command authority and want to believe that it works well.

Am I correct in these numbers because it seems to be very interesting, if I have the numbers right, that in the special courts-martial that you mentioned 1 percent and 3 percent were the figures where there was actually member sentencing.

Capt. DEROCHER. There was 1 percent of UA cases, 3 percent of special courts-martial overall.

Prof. SALTZBURG. Overall. Yet even though the judge, then, is sentencing 97 to 99 percent of the time, the convening authority is reducing the sentence 50 percent of the time—

Capt. DEROCHER. That's correct.

Prof. SALTZBURG. —suggesting to me that there may very well be a different perception on the part of judges and on the part of convening authorities about what appropriate sentences are.

Capt. DEROCHER. Well, there certainly is a different perception, to broaden that, in what's happening because I would venture to predict that if you asked 100 convening authorities what they saw to be the most serious drawback the judge sentencing which they encountered they would tell you that it's too lenient. That is what I hear in the Officers' Club.

But I do not think they recognize and I do not think there's a mechanism, other than some occasional crying in the wilderness which I do, that has tried to bring to their attention what I consider, as I say, to be the hard fact that in 50 percent of the cases they do reduce the sentences.

Now, that is not a reduction. In 44 percent out of that 50 the reduction is directed at length of confinement. Only 6 percent of the time are we talking about a rule; only 6 percent of that constitutes approval or disapproval of suspension.

Why are they doing that? I made no distinction between cases where it's the result of pretrial agreement and those cases where it's not; but if you go back and you recognize that in almost 80 percent of the aggregate we're talking about unauthorized absence cases, the bargaining process in a pretrial agreement situation is that the convening authority, if he understands what's going on, is not often forced into a pretrial agreement he would just as soon not have in an unauthorized absence case.

The impact is not much, as I said. It's going from a 2.4 average down to 1.85 in terms of confinement and this is all BCD cases.

I think what's happening is a kind of a perception, "Well, okay. We've got the discharge. Let's get him off the rolls, make him a civilian and move on with it."

I think there's kind of a reluctance to tie up resources in allowing longer confinement where clearly you are not engaged in a rehabilitation exercise, but all you are engaged in is general deterrence.

So I think in individual cases, when a case actually gets on Captain so and so's desk, that those are the kind of issues that are operative even though if you ask him what his general philosophy is it would be well within the additional confinement type of sentencing in terms of purposes.

So I think, again, it's a question of the system operating in a way perhaps significantly different than it's perceived.

One other thing came out of it. I don't know exactly how pertinent it is to your considerations, but just to illustrate my point—perception versus reality—I think that we would all agree that we would expect to find greater clemency action in less serious offenses than in those cases where the accused had a reasonably good record. That is precisely the opposite of what I found.

The worse the record, the longer the absence, the more likely an individual is to receive clemency from his convening authority; and that trend matches whether you're talking about clemency with respect to confinement or clemency with respect to discharge.

There are not very many people in the military today that would believe it if I told them that's what's happening.

Prof. SALTZBURG. Two other fast questions. I don't want to trespass on others' time. Somebody is giving us information I think we've not heard before. I have no reason not to believe it. So let me just ask you two other questions.

One is: In your opinion if convening authorities picked members who might, in the zero sum game you described, be members with more experience, a better feel perhaps for what a sentence ought to be, do you think that member sentencing could work better than it now works?

Capt. DEROCHER. I don't know what you look for if you're looking in terms of just looking at your average line officer. How can you tell that the individual has the judicial temperament, the background of experience, the relatively intimate knowledge of the correction system that I consider to all be components of someone who is well equipped to award appropriate sentences?

I don't know of a large pool of individuals, regardless of what the selection criteria are, who can fill that bill.

Prof. SALTZBURG. Last question. If the military judges got tougher in their sentences and weren't regarded as, perhaps, lenient sentencing alternatives and if a greater number of people chose member sentencing, might you not get perhaps more experience among the various people sitting on courts, perhaps a little more consistency?

Capt. DEROCHER. Perhaps that's so. First of all, I don't know that it's correct to say that judges are perceived as lenient sentencers. I don't think that's a correct general term.

First of all, we have to, I guess, identify whose perception are we talking about because here the relevant perception is perceptions of defense counsel because they're the ones who are at least advising our key players in the option process.

That is a question that is something that is subject to infinite variation if decisions are going to be made on that basis.

Even if you did something, whatever it might be, to structure more elections for member trials, I think in overall terms as we're moving toward a professional force we're not going to arrive at a situation where our line officers have wide experience sitting as members of trials.

That's not their function. If we ever get there we're in serious trouble.

Most line officers have things better to do. They have primary responsibilities in other areas.

Prof. RIPPLE. Colonel, I think the Captain has answered all of my questions. Therefore, I'll pass with just a thank you to the captain for his time.

Col. RABY. Steve?

Mr. HONIGMAN I'll ask just a few quick ones.

Captain, I think we've all been struck by the statistics that you've come prepared with and, I think, your very thoughtful analysis of the issues which is reflected in the statistics that you've come up with. I think it might be helpful if you could provide them to us in written form.

Capt. DEROCHER. I would be happy to.

Mr. HONIGMAN. Let me just ask a few broader questions.

Apart with the changes that we've been tasked with considering, are there any changes that you would recommend for the Uniform Code?

Capt. DEROCHER. While I couldn't say that I am totally satisfied with it in its present form, I haven't devoted enough time and thought to other changes to go on record about them.

Mr. HONIGMAN. One change that we've been considering, I think, is the possible expansion of the Court of Military Appeals from three judges to five judges.

Do you have any opinions on that possible change?

Capt. DEROCHER. I really do not. I do not know enough about that.

Mr. HONIGMAN. I have no further questions.

Col. RABY. Ed, do you want to go now or do you want to go last? I'll give your choice since you're a brother in arms.

Capt. BYRNE. I'll go last.

Col. RABY. Then I'll just go.

Mr. HONIGMAN. Rehabilitate the witness after these questions.

(Laughter.)

Capt. DEROCHER. I don't think I'll have that problem.

Col. RABY. In the judge suspensions when you, were talking about those, you mentioned in your testimony that, yes, balancing it out that the military judge would need more information. Specifically you mentioned, for example, presentencing reports.

We've had some testimony about presentencing reports before the Commission and the question comes up, if we're talking about a presentencing report that tends to follow the formats found in the federal or state report systems, that it can be rather extensive.

Who is going to prepare those reports? We have some problem because in the state and federal system you have a probation office. It's an independente organization tied neither to the prosecution nor to the defense.

Unless we create resources in the military judge's office or something comparable to that, where would we get the personnel to do the investigation and prepare the presentencing report?

Capt. DEROCHER. Well, that's certainly not an easy problem to address because one of the components, it seems to me, that would be highly desirable in that area is to somehow factor into the decision process some kind of information from this individual's command which responds to or reacts to his trial testimony or to his unsworn statement, which usually addresses itself to how he got in trouble in the first place.

As I say, it's usually unsworn so it does not even get into a kind of a probing cross examination analysis and it is almost invariably unrebutted because it is not conceived or thought to be an issue worth taking a recess in order to assemble the necessary witnesses and what have you.

So you have this story before you, which may be either completely true and absolutely valid and may in many cases impune the command's leadership posture or may be a total figment of someone's imagination.

I think the difficulty I've had—and I've encountered this very frequently, particularly in these recommended suspension cases—is trying to get some way of striking a balance or getting at a rough approximation of the truth in those types of cases.

The admiral that I work for is far more inclined to suspend or to take other mitigating action where the actual facts are that the Navy, in some fashion, let this person down or did not respond in a proper way to some initial problem that then accumulated to mushroom and eventually you had the situation before you.

If we can become convinced that really they're his fault, they're his failure of leadership we're reasonably inclined to take some mitigating action; but that's very difficult information to come by.

The answer to your question is I frankly know where those resources would come from and I really having nothing to suggest.

Col. RABY. One thing concerns me. You mentioned, if I understood your testimony correctly, that right now you're trying a substantial number of AWOL cases in the special courts-martial arena, for example.

Capt. DEROCHER. That's correct.

Col. RABY. That doesn't happen to be the Army's experience at this time; but nonetheless I'd like to get down more here to where we tried a lot of AWOLs in special courts-martials.

We had distinct information gathering problems. Military personnel records would be not readily available within the command. We could not refute or verify statements made by the offenders before the courts-martial.

It just seemed like to get the type information you're talking about—especially in a war scenario where we might have an increase, we would be expected to have an increase in AWOLs and failure to repair a missing link in related type cases—that we could delay courts-martial proceedings immensely if we come to some complex mechanism for the collection of the desirable data; and that I'm thinking in war time or peace time.

What do you think?

Capt. DEROCHER. Well, I would certainly concur.

Taking that one step further, I think one of the more urgent things that the military judge advocates ought to address themselves to is to identify precisely where all of the features are of our present system that would become either unworkable or extremely complex in that situation.

I don't think we've done that; but I think it could be done, that you could have a list of those features, those provisions that you might give either legislative or executive relief from perhaps even in the very early days of the conflict.

This may be one of them.

Col. RABY. In your testimony about suspensions, I gathered from your remarks that you're of the school where you consider the suspension a proper vehicle in the determination of an appropriate sentence as distinguished from those individuals who advocate that a suspension is primarily or solely a clemency vehicle and that the sentencing authority should arrive at an appropriate sentence without bringing in the suspension factor; that it's only after they've done that that suspension should be used.

Capt. DEROCHER. That's what I attempted to say, yes.

Col. RABY. Do you know what I'm asking?

Capt. DEROCHER. I think I understand what you're driving at.

I would say this. I think that in trying to determine what an appropriate sentence is—and I have a great deal of sympathy with trial judges in this respect—I'm not sure there a difference between clemency and appropriateness. At least if there is, I'm not sure I know what it is.

From the judge's perspective, clemency is not awarding a sentence which you think is more severe than it ought to be. From a reviewer's perspective, it's not approving a sentence which you think is more severe than you think it ought to be.

Now, there are cases where, as I say, either as a reviewer or as a judge I would say, "Well, I think the appropriate thing here is to get something suspended, the discharge."

Col. RABY. We've been operating in the military justice system since the Revolutionary War without military judges having suspension powers. In fact, most of those years there were no military judges and they've been adjudging sentences.

Under your scenario, you speculated that with the power to suspend we might see longer confinement being adjudged and more discharges being adjudged with suspensions.

If we've been going so long giving appropriate sentences without that and we're just talking about maybe a more appropriate sentence, is this really in an accused's best interests because now they'll have these longer sentences hanging over their head and if they commit some minor infraction they're going to face a vacation proceeding and maybe end up with a much more severe punishment than they can now receive.

Capt. DEROCHER. I think you have to go back to the question of appropriateness. I think if it is appropriate to this offense and this offender, whether it's in his best interests or not is not really a question that arises.

His best interests are probably served by no sentence or sentence with no punishment; at least, I can't conceive of a case where his best interests would not be served by that whether it's often appropriate.

Col. RABY. Okay. I've got a final question.

That is, you mentioned your statistics and I just wondered: Do you have a feeling for how your statistics compare with Navy-wide statistics?

Capt. DEROCHER. No, sir. I don't.

Col. RABY. Okay. Thank you.

Capt. BYRNE. Captain Derocher, for the record my name is Captain Byrne.

Capt. DEROCHER. Good day.

Capt. BYRNE. Addressing military-judge-alone sentencing again, assume that, for example, military-judge-alone sentencing was not passed by Congress but then we were considering whether or not there should be suspension power and assuming that you had a situation where members awarded a sentence, would you consider then that the military judge should have the power to suspend a sentence awarded by members or should the members themselves have the power to suspend a sentence they award?

Capt. DEROCHER. I assume we're talking about a situation where we will still have military-judge-alone sentencing.

Capt. BYRNE. Yes, sir.

Capt. DEROCHER. But with the military judge where he did not elect members, he would have the authority to suspend his own sentence.

Capt. BYRNE. Yes, sir. He would have the authority to suspend his own, but now you've got a members' case. The members would like to suspend part of their sentence.

Would you consider that to be something that should be done by them?

Capt. DEROCHER. It's very difficult to address a scenario which I'm not really in favor of.

I appreciate that, but I would think that if a military judge has the power to suspend his own sentence, I would also favor him having the power to suspend a sentence awarded by a members' court over which he presided.

I would not favor a members' court having the power to suspend their own sentence for very largely the same reason that I am not especially in favor of members courts awarding sentences at all.

Capt. BYRNE. Well, sir, again concentrating on the military-judge-alone issue, assuming that we did have military-judge-alone only sentencing and that the accused no longer had the election to choose members who would not only do findings but sentencing, what about other matters that flow or could flow when you have a situation very similar to a civilian situation?

For example, random selection of members. How would you feel about that if one of the things is, if we had military-judge-alone sentencing then it would follow that we would feel compelled to have a random selection of members? Have you thought about that?

Capt. DEROCHER. I would not concede that one follows from the other. Even if we restrict members to a fact-finding role, I think that the special nature of the military and the military justice system fully justifies a selection process. I would not favor the random selection process in any scenario that I can conceive of.

Capt. BYRNE. A number of the Commanders have mentioned that if we did away with members sentencing that the line officers would be deprived of certain educational opportunities to become more familiar with the needs of discipline.

Would you mind elaborating on that, what you think about it?

Capt. DEROCHER. My view on that is that to the extent that service as a court member does function as an educational opportunity and experience—and I think it certainly does in precisely the same way that service on a jury may turn out to be an excellent civics lesson in civilian society—I think it happens with sufficient infrequency today that I could not see a logical argument that it was any necessary component of professional development and its loss would not be a serious loss.

Capt. BYRNE. Addressing the statistics that you've presented the Commission with, I noticed that your focus was on general courts-martial. Assuming that we were so disposed to recommend, would you recommend the Commission favor military-judge-alone sentencing in GCMs, only?

Capt. DEROCHER. I haven't really given any thought to that type of a proposal. I guess my first reaction is to its somewhat unnecessary complexity. No particular benefits strike me and the question arises why there ought to be the difference.

I can't think of anything that would, as I say, suggest itself to me in that favor.

Capt. BYRNE. Again I'm going to switch a little bit on you and we're going to discuss suspension.

Assuming that military judges were authorized to suspend their sentences, do you think that this should change the individuals who are authorized to vacate such suspensions—like, for example, it should go back to the military judge to decide whether the suspension should be vacated—or should that be left with the convening authority?

Capt. DEROCHER. I would not favor any system which increased the difficulty, time or complexity within a current vacation proceeding; and I would take it as a given requiring any sort of review of that.

To the extent that all of this discussion is premised upon a feeling that there ought to be more suspensions than there are—and I honestly think that that's what underlies the entire consideration of this issue—and to the extent that the law is changed to take account of that fact and if the change does, in fact, result in more suspensions than there are today, then I think it's essential that we retain a reasonably convenient, reasonably responsive means of vacating those suspensions for subsequent misconduct.

Capt. BYRNE. I think I have only one last question and it's a matter of clarification.

You mentioned that insofar as I believe it was the special courts-martial is concerned, your survey indicated that convening authorities were reducing sentences about 50 percent of the time.

Capt. DEROCHER. That's correct.

Capt. BYRNE. Do you know how many of those 50 percent are attributable to pretrial agreements?

Capt. DEROCHER. I don't have a precise figure. My subjective impression was that perhaps as many as half of those reductions were driven by pretrial agreements, perhaps more.

Capt. BYRNE. Thank you very much.

Col. RABY. Are there any other questions, gentlemen?

(No response.)

Col. RABY. Captain, thank you very much for being with us today and we appreciate your testimony. Particularly we appreciate your obvious preparation for appearance before us.

Capt. DEROCHER. Thank you, sir.

Col. RABY. The next witness, as you see, by the agenda is at 1400 so we will recess until then.

(Whereupon, the Commission meeting recessed to reconvene at 1:55 p.m., this same day.)

Afternoon Session (1:55 p.m.)

Colonel RABY (presiding). The Commission will come to order.

Commander Coverdale, I'm Colonel Raby, the acting chairman of the Commission. I believe you are aware of the major areas of our inquiry.

Lt. Gen. COVERDALE. Yes, I am.

Col. RABY. Do you have a prepared statement or remarks that you'd like to present?

Lt. Gen. COVERDALE. Yes, I do, Mr. Chairman.

Col. RABY. Before you do, would you please for the record give us a little bit of your military background in the years that you've been in the Air Force?

Lt. Gen. COVERDALE. Yes. I'll be very happy to.

REMARKS OF LIEUTENANT GENERAL ROBERT F. COVERDALE, VICE COMMANDER IN CHIEF, MILITARY AIRLIFT COMMAND

Lt. Gen. COVERDALE. I came into the Air Force in September of 1952, entering pilot training just shortly after that, in November. Since that time, I have served on continuous active duty service including tours in Europe, the Pacific area, Tactical Air Command Headquarters, our Tactical Fighter Reconnaissance element in the Air Force, various staff jobs in command positions.

I have, since 1971, served in various command positions as a Vice Commander. I have commanded three wings, an air division, a numbered air force, and now currently serve as Vice Commander of the Military Airlift Command.

Col. RABY. For further clarification, sir, as a wing commander you had special court-martial jurisdiction in each occasion?

Lt. Gen. COVERDALE. Yes. That's right.

Col. RABY. And as a numbered division Air Force Commander?

Lt. Gen. COVERDALE. As a numbered Air Force Commander, I had convening authority.

Col. RABY General court-martial.

Lt. Gen. COVERDALE. General-court martial.

Col. RABY. You got in, sir, you said in '52. You must have served some time as member of a court-martial or as counsel in your younger days.

Lt. Gen. COVERDALE. Yes, sir. I did.

Col. RABY. Sir, at this time, would you please go ahead and present your prepared remarks.

Lt. Gen. COVERDALE. Okay. Thank you very much.

Mr. Chairman and members of the Commission, I appreciate the opportunity to appear before you today and impart my views on the questions chartered for your inquiry by congressional mandate.

As my biography indicates, I'm the Vice Commander of the Military Airlift Command, an organization of approximately 79,000 military members.

For purposes of court-martial jurisdiction, the Command is divided into five general courts-martial jurisdictions; the principal ones being 21st Air Force, 22nd Air Force, and 23rd Air Force. The remaining two are the 76th Airlift Division at Andrews Air Force Base which exercises general court-martial jurisdiction over both Andrews and Bolling Air Force Bases. The other is a small general court martial jurisdiction located at Lajes Air Base in the Azores.

Averaging the number of courts martial in the Command over the last several years, we find that the average general courts-martial caseload is about 45 per year and the average number of special courts-martial tried is about 227 per year for a total average caseload of 272.

I understand that compared to the other services this is a relatively light caseload.

Prior to assuming my current position, I was Commander of the 22nd Air Force located at Travis Air Force Base, California. There were approximately 36,000 personnel under my command.

As such, I was the convening authority of the busiest general courts-martial jurisdiction in the Military Airlift Command.

The 22nd Air Force has wide geographic responsibility ranging from the Mississippi River west and throughout the entire Pacific area. However, the courts-martial jurisdiction I exercised was only over bases located within the continental United States.

In our overseas areas courts-martial jurisdiction is exercised pursuant to agreement by other commands.

The 22nd Air Force averaged approximately 145 courts-martial per year with about 25 being general courts-martial and 120 being special courts.

In my position as a convening authority as well as throughout my career, I have had close contact with the administration of military justice in the Air Force. Therefore, I have formed certain views and opinions with regard to the four principal issues being evaluated by this Commission.

I will address the four issues in the following order. First, the tenure for military judges; sentencing by military judges; the suspension power for military judges and for Courts of Military Review; and lastly the increasing jurisdictional limits of special courts-martial.

In regard to the tenure issue and as a basic proposition, I do not think an assignment should be absolute, particularly in a military context. The very essence of the military requires a degree of flexibility to maximize the best use of military forces.

Within that context, I do no believe it feasible or advisable to place a military officer in a lengthy guaranteed position. There are a number of other career considerations—for example, career enhancement, career growth, considerations in upward mobility—that become very important factors in determining position assignment and length of tours. A lengthy period of assignment for a judge advocate officer would be too limiting.

I do not find it objectionable that a normal tour life in a military judge position be directed as long as there remained the safeguards for removing an incumbent from that office for misconduct, misfeasance or other just cause. I'm unaware of any situation where a military judge has been removed from a military judge assignment because of dissatisfaction with his judgments.

In the final analysis, I believe the current system is operating well and I see no compelling reason for it to be disturbed.

In the second area of sentencing by military judges, I'm not in favor of a system mandating that military judges sentence in all courts-martial cases. In my view, while an accused does have the right to elect trial by military judge alone, to remove any military community involvement in the sentencing process removes the military command structure one step farther away from disciplinary matters; an essential element of the military organization.

In sentencing by court member there is reflected a broad based experience in all aspects of the military organization. This potentially brings to the courts-martial process another perspective that judges may not always have.

In sum, it brings a mixture of experiences in the military community. I believe this perspective is important.

In addition, I believe tradition is an important matter to be considered in this regard. Traditionally, enlisted members have had the right to have enlisted peers involved in rendering judgment on them.

While this may not be a frequently used right, I do not believe it is diminished in importance.

In regard to the suspension power for military judges and for Courts of Military Review, I am not in favor of the power of suspension of sentences being vested in military judges. In my opinion, this is a matter directly tied to the convening authority's broader knowledge and perspective of the command.

This broader picture is indispensable in evaluating the individual sentence of a member of the command. The convening authority has more information at his disposal and is no taking the narrow view of a particular case within a very limited timeframe.

Additionally, I view this proliferation of the authority to suspend as being another step to remove military command from the all important disciplinary concerns. In this regard, it must be remembered that commanders do not exercise these powers in isolation.

Rather, they have available to them professional assistance and advice from a broad spectrum of disciplines including that of a Staff Judge Advocate. I have less concern with regard to suspension powers being exercised by the Court of Military Review inasmuch as they have available to them much of the same information available to the convening authority.

Further, their power could only be exercised by more than one person since the courts are comprised of multimember panels.

Again, I do not see any problem or criticism of the way the system runs now; and, therefore, do not see any need for change in the suspension of sentence authority.

In regard to increasing jurisdictional limits of special courts-martial, I am in favor of this proposal inasmuch as I envision that it will reduce the number of general courts-martial cases. I believe there are enough cases that are on the borderline between special and general that ultimately end up in a general court-martial because of the current sentence limitations.

General courts-martial are more time consuming and costly proceedings because of formalized investigations and greater personnel requirements. I believe a one-year maximum confinement period under the circumstances is a better break point between the two courts-martial.

Given the much greater potential punishment in a general courts-martial, I believe that the proposed increase in special courts-martial would enure to the benefit not only of the military but also the accused. There is no question that a greater stigma attaches to a general court-martial conviction than that of a special.

Presupposing the increase is adopted, I do not see any need to increase the minimum of numbers to serve on a special court-martial. My experience in the Air Force is that rarely, if ever, does a minimum of three members end up sitting on a case. I would guess the average number to be closer to five.

Considering the proposal to allow sentencing by one person alone—namely the military judge—I fail to see much argument mustered to say that three members are not enough to decide an appropriate sentence.

These observations I offer as a result of my experience in the command administration of military justice.

I will be happy to answer any questions you may have. Thank you for this invitation to appear before you today.

Col. RABY. Thank you, sir.

Ed, would you like to start?

Capt. BYRNE. Yes, sir.

General, my name is Captain Byrne.

Directing your attention to the question of tenure, you indicated that you might be—and if I'm incorrect in this statement please clarify it for me—in favor of a normal tour length for a military judge and that that would be a mandatory tour length except for misconduct, mis or malfeasance, or some other cause for removal of the judge.

Well, let's say that you had a military judge that was assigned for three years and he started his tour in September. But in July, for example, MAC needed an SJA and this particular military judge was considered to be, as far as the Air Force was concerned, the most qualified individual to fill that SJA billet.

Now, under a guaranteed term of office unless the officer perhaps consented he could not be removed from the military judge slot and put in the SJA slot even though that's what the Air Force considered best for the Air Force.

What do you think about that?

Lt. Gen. COVERDALE. In my judgment, for any specific job we probably would find more than one, a number of people who would be equally qualified to fill that position.

Therefore, if there was a three-year tenure we wouldn't insist, in fact we probably wouldn't even consider that individual to fill that position recognizing the importance of his current position.

By the way, I can draw a parallel to that in that we have certain positions within our command that we do provide tenure to, especially key positions such as commanders' positions. For example, a squadron commander in which we plan that he fill that billet.

His tenure is a minimum of two years, usually two years. Only under the most extreme conditions do we interrupt that for some reason.

You know, nothing is absolute; but, again, I wouldn't see, you know, an assignment action because that individual happened to meet those requirements, we consid-

ered him qualified for that; but as the consumer we wouldn't select that individual to fill that billet.

Capt. BYRNE. Perhaps I was talking a little bit, when I expressed it, about the difference between two years, nine months and three years simply because summer rotations, as I'm sure you're aware, do kind of go on different tracks.

Lt. Gen. COVERDALE. Well, I think that we have to be very flexible and if an individual would be within three months and that right assignment came up, then he should be there and you would assume that having served two years and nine months on a three-year assignment would be adequate.

But, again, you know, for some reason I locked into yours that he had only served approximately nine months.

Capt. BYRNE. No, sir. I was talking about he had served two years, nine months—

Lt. Gen. COVERDALE. Two years and nine months.

Capt. BYRNE. —and he was going to take that, say, SJA job.

Lt. Gen. COVERDALE. We're in the ball park now—

Capt. BYRNE. Yes, sir.

Lt. Gen. COVERDALE. —of the reassignment process.

Capt. BYRNE. Yes, sir.

Lt. Gen. COVERDALE. To clarify, if it's nine months we think he needs to continue to serve. As we all know, there's a learning curve in this process and he's probably, at nine months, just getting his feet on the ground.

Capt. BYRNE. Yes, sir. I was really addressing the two year and nine months.

Lt. Gen. COVERDALE. Two years and nine months, I would consider him available for assignment if that right assignment came along.

Capt. BYRNE. I have no further questions. Thank you.

Mr. HONIGMAN. General, my name is Steven Honigman. General, let me start with a broad question.

Apart from the proposed provisions to the Uniform Code that we are considering, are there any other changes that you would advocate?

Lt. Gen. COVERDALE. We recently reviewed, in some great detail, the most recent changes. In my judgment, I think we have a very good menu at this time.

I really do not foresee any changes in their future or requirement for changes.

Mr. HONIGMAN. Would you be of the opinion that changes should be considered to make the Code more workable in any respect in a war time situation as opposed to a peace time situation?

Lt. Gen. COVERDALE. In my judgment, the Code should primarily be oriented towards the purpose of maintaining the force not only in war time but also in peace time.

We should not focus on something specifically for maintaining something in peace time that would not necessarily fit or be workable in war time. If anything, the other way around.

Mr. HONIGMAN. And it's your view that the Code as it's presently constituted is adequate for war time and, therefore, necessarily is serving well in peace time.

Lt. Gen. COVERDALE. Yes. It is.

Mr. HONIGMAN. General, let me address the issue of whether the military judge on the trial level should be vested with the power to suspend a sentence.

Can you tell us in your experience as a convening authority in special courts-martial situations and general courts-martial situations, was it a frequent occurrence for a military judge to recommend to you that a sentence be suspended in whole or in part?

Lt. Gen. COVERDALE. It was not. In fact, I can't remember a time when it was necessary that we make that recommendation.

Mr. HONIGMAN. On your own initiative, have you suspended sentences in whole or in part?

Lt. Gen. COVERDALE. Yes, I have.

Mr. HONIGMAN. Can you tell us the process that you go through in making the decision on your own initiative as to whether a sentence merits suspension?

Lt. Gen. COVERDALE. The very important process in this area is the review that would be conducted within my headquarters and by the legal staff that's represented there. Based on their review and then my judgments, that determination was implemented.

But the legal review and the recommendations I provide there are extremely important.

Mr. HONIGMAN. When you say 'the review', do you mean the review of the record of trial or of the record of trial and, in addition, other facts that they gather in some other way?

Lt. Gen. COVERDALE. Primarily it's on the review of the facts of the trial and there are some other factors that are considered, especially in my area of responsibility as to the area of the law, responsibility for the morale and discipline of the command.

Mr. HONIGMAN. Do you think that it would be possible for the prosecutor who represents in essence the command that has invoked the criminal justice process to make the military judge aware of those factors that you just described relating to the morale and the wellbeing of the command itself?

Lt. Gen. COVERDALE. No. I don't believe so because he doesn't sit in the position that we do that provides him the broader overview and experience that we have in this matter.

Mr. HONIGMAN. Is there anything that you could think of which would provide those concerns, bring those concerns to the attention of a military judge, short

of having yourself testify in every case, which would be an important thing?

Lt. Gen. COVERDALE. No.

Mr. HONIGMAN. Can you give us your view of a system in which you, as the commander, would retain the suspension power but the military judge would also have an opportunity to exercise that power? In other words, the military judge at the sentencing portion of the trial would have an opportunity to suspend and then you would also have the opportunity at the time of the review.

Would that be, in your view, a workable situation?

Lt. Gen. COVERDALE. No. I don't believe it would.

I think that our military judges should focus or confine their responsibilities as they are now and not expand them further beyond that. I don't think there should be.

I like the system so well the way it is right now that I feel it's an extremely fair system.

Mr. HONIGMAN. We have heard testimony from other witnesses which dealt with the question of whether it is possible, in some instances, to frame an appropriate sentence that doesn't include some element of suspension. In other words, a military judge upon hearing the evidence may decide that the degree of the offense, the quality of the offense merits a punitive discharge, but that there may be extenuating factors that would make it inappropriate to execute that discharge.

Do you think that the system, regardless of how well it now works, could work better if the military judge had some opportunity to take that type of consideration into account in his initial decision on when an appropriate sentence would be?

I guess what I'm saying is would it make sense to give him another tool to work with?

Lt. Gen. COVERDALE. In my judgment, I don't think it's necessary. The current process is quite adequate enough to handle these variances, the differences that occur.

Mr. HONIGMAN. General, do you personally assign members to sit on courts-martial as members?

Lt. Gen. COVERDALE. I select those personnel from a list of people who are usually provided me and are nominated to serve on a court-martial.

Mr. HONIGMAN. Do you select only persons who you personally know or are acquainted with?

Lt. Gen. COVERDALE. No. In fact, probably very seldom do I know these people personally.

Mr. HONIGMAN. When you detail officers to sit on a court-martial, do you generally have in mind that you want to select a cross section of members including a certain proportion of senior officers and junior officers, and so on?

Lt. Gen. COVERDALE. Yes, we do.

Mr. HONIGMAN. Would you view it as a system that you could not live with if this kind of a system were adopted, one in which you as the convening authority decided that you wanted a certain number of colonels, a certain number of majors, a certain number of captains, but that the individual members of those particular ranks were sergeants or whatever would be selected at random from those officers of those ranks under your command?

Would that be an acceptable system to you?

Lt. Gen. COVERDALE. Would you restate that, please?

Mr. HONIGMAN. What I'm thinking of is a system in which you would decide that "For this court-martial I want one colonel, one major, one captain, one sergeant"; but you didn't select or your Staff Judge Advocate didn't say, "It's going to Colonel Jones and Major Smith and Captain," somebody else; but the colonel who would fit that slot would be selected in a lottery system or by picking a name at random from a pool of eligible colonels.

Lt. Gen. COVERDALE. I think, you know, that as we do it now—people are nominated and selected based on their judgments, their availability—what we would expect from them as far as representation to insure that we have a very objective, very fair court.

The random, I think, could possibly leave out a bit of the process of gaining that type of representation. In other words, we have people who select, who nominate to insure that we have the best support for this system.

Mr. HONIGMAN. Do you think that such a system, however, would gain in the perception of impartiality? In other words, what you're saying is that a subjective decision is made to pick an objective person.

Would you gain in terms of the way that the system appears to operate if you picked people at random and there wasn't a judgment made as to their personal character or qualifications or perspective, or so on? Do you think that's a factor that has merit?

Lt. Gen. COVERDALE. It might help the perception, but I'm not sure it would necessarily help the process, I mean enhance the process because there are some people who we wouldn't necessarily place on a court.

Mr. HONIGMAN. Well, those, I suspect, would be subject to challenge by one side or the other.

Thank you very much, General.

Lt. Gen. COVERDALE. Sure.

Mr. STERRITT. My name is Christopher Sterritt. I'm from the Court of Military Appeals.

The only questions I have are with respect to sentencing by a judge alone and your opposition to it, as I recollect it.

The Federal courts and most state courts provide for sentencing by a judge alone. To me, that means that the majority of people who come from those areas who

enter the Air Force are going to be familiar with that system.

Do you think that providing a service person an option could be viewed by the American public as an attempt to evade the normal practice which is in their jurisdictions, in other words sentencing by judge alone? This is, again, a perception question.

Lt. Gen. COVERDALE. Well, no. I don't think so. Not to evade the judge alone.

I'll tell you, my personal feeling is I hope that the perception would be that the military system is better than the civilian system—

Mr. STERRITT. Because it gives something extra.

Lt. Gen. COVERDALE. —because we offer an individual not only a judge alone but also a court by members of his peers.

Mr. STERRITT. Okay. My second question is in the same vein. I'll sort of give a predicate which you can accept or deny.

Some have suggested before this Commission that a judge, as distinct from a lay member of a court, is a better professional determinant of an appropriate sentence because of his training, his experience in seeing different type of cases in a long time span.

The idea of presenting an accused an option of going to the lay member to some might look like we're providing him a gamble. In other words, "You," accused, "have the option to go with a professional judge, the expert on sentencing, or you can gamble on the nonexpert giving you a less sentence."

Do you think that's a good idea, to have a system like that for the American serviceman? In other words, should we ask him to make that decision?

Lt. Gen. COVERDALE. It is obvious that in our system there are some that request a judge alone. Therefore, they must think that for some reason that they'll receive a less harsh assessment than they would from a court.

Mr. STERRITT. Let me rephrase it. Do you see it as that big of a difference between a judge's sentence and a member's sentence that it would be considered a gamble?

Lt. Gen. COVERDALE. No. I don't personally see it.

My experience would be that in some cases I have felt that a court would bring a stiffer sentence than a judge alone would have; and in other cases I have felt that maybe the judge was may be a little too tough.

Mr. STERRITT. A little.

Lt. Gen. COVERDALE. By the way, just so we understand this, I have never seen a decision by a judge that I felt strongly enough that it was either too harsh or not harsh that I felt it was necessary for me to take an issue of it either through my JA or through The Judge Advocate General of the United States Air Force. I haven't seen that, not to that degree.

Mr. STERRITT. How about members'?

Lt. Gen. COVERDALE. I haven't from a member court either.

I guess I have to look at it and say that we probably the military system is the fairest system that I know right now.

Mr. STERRITT. This is one last question on this and it's sort of an historical question, I guess.

My readings indicate to me that the major objection or complaint against the military justice system since the beginning of this country right up to the present has been the severity of sentences given by court members, which was a big thing, point of discussion after World War II.

If we eliminate sentencing by court members, the object of that complaint, and put in place a professional system with the military officers skilled in law and military experience as well, wouldn't we be doing a great service towards ending these complaints once and for all and getting the support of the American people behind the military or enhancing it?

Lt. Gen. COVERDALE. I'm not sure I share that same observation as to the severity of those judgments in that in what relationship are we comparing that to the military judgment? Is it compared within the military or is it compared—

Mr. STERRITT. With the civilian.

Lt. Gen. COVERDALE. —against a civilian community?

So now I have to back off and say that, one, the military way of life is different, a lot different than the civilian way of life and our disciplines, our standards, in my judgment, are much higher in the military; that which we expect of our people. It's necessary because of the job that they perform and may be required to perform in war time.

So I wouldn't share that, that our judgments are more severe in comparison against the civilian community. For example, we pursue the drug abuse in the military. I'm not sure that happens in the civilian community.

I'm not sure that United States Steel or General Electric, you see, worries too much about what that individual is doing out there on his own time; maybe a little bit in the job arena. But we do and we're going to pursue that and we're going to prosecute those individuals.

My headquarters when I was Commander of the 22nd Air Force was in California and I found some cases in the civilian community where our people who were involved were not going to be tried, yet we without exception tried those; and, as a result of that, we attempted to gain jurisdiction and did in many cases so we could.

Mr. STERRITT. Are you suggesting that there would be another alternative, namely to explain to the American public why the sentences are severe, rather than lowering the sentences through some other method? In

other words, the complaints exist. I'm not saying whether they're right or wrong. What I'm saying is, is there another way to address it by educating the American public as to why they are severe in the military community as compared to the civilian?

Lt. Gen. COVERDALE. I have no reason to doubt that. You've stated that there is this perception and it would certainly be worthwhile to explain it.

Mr. STERRITT. I have no further questions.

Col. RABY. Mr. Ripple?

Prof. RIPPLE. Thank you, Colonel.

General, my name is Kenneth Ripple. I'm a Professor of Law at the University of Notre Dame.

I'd like to cover several points with you if I may, first with respect to tenure for military judges. If you were unhappy with the conduct of a military judge in terms of misfeasance, malfeasance in office, gross misconduct, physical disability to perform, to whom would you report that matter or to whom do you think you want to report that matter in the chain?

Lt. Gen. COVERDALE. I would discuss that first with my Judge Advocate to see if they would share the same concern that I have. If they did, then we would bring it up to The Judge Advocate General.

Prof. RIPPLE. Of course, I'm not trying to imply any impropriety here. One of the things we may have to do is recommend a reporting structure for this kind of thing.

I guess the next problem that confronts us is, you are senior to The Judge Advocate General. He gets a report from a Lieutenant General that the Lieutenant General feels one of his judges is not performing.

Isn't that, in effect, pressure on that Judge Advocate General? Is that a satisfactory way of ensuring the professional independence of that military judge?

Lt. Gen. COVERDALE. I find two things. One that our Judge Advocates are very independent; when we ask them for their independent assessment or judgment, that they're going to provide that whether that necessarily or unnecessarily agrees with an assessment that I have discussed with them, if I have discussed that assessment.

I may just state the case, but not provide my own assessment so that I do not in any way influence his judgment or his assessment. But even if I did I would doubt that he would come back to me and provide an assessment that he thought that I like.

I think that he would provide an assessment that he felt was fair in his best judgment.

Prof. RIPPLE. Could you live with or would you be in favor of a reporting procedure whereby, perhaps, you would make initial complaint to The Judge Advocate General, but where if The Judge Advocate General were to concur with you before the military judge were removed someone else—for instance, an Assistant Secretary of the Air Force—had to approve of the relief of the military judge?

Lt. Gen. COVERDALE. I really don't think that's necessary. I think it would be the basic responsibility of TJAG and, based on his investigation or, if necessary, the gathering of whatever facts were necessary, that judgment could and should be made by him; and I don't think it's necessary for it to be made above him because that then removes it from the normal military chain.

Prof. RIPPLE. I guess what we're concerned with here is not only unfairness, per se, of course, but the perception of unfairness; of making a record and having an independent decision maker approve of something which everyone, both in the military and without, can live with.

Lt. Gen. COVERDALE. I guess in the military system we find that in most cases we don't have to have an independent assessment; that we do those assessments within our current military organizations.

By the way, by assigning someone from outside an organization and within the military chain, we receive I believe very, very good assessments.

Prof. RIPPLE. Let's the move on to the next point. I'm going to preface this a little bit to give you a feel for my concern and then, rather than giving you a pointed question, let you really structure the answer the way you'd prefer to.

This has to do with sentencing by military judge alone or giving the accused the option of having the members perform the sentencing function.

One of the arguments which has been made against sentencing by the military jury of the court-martial, the members, is that not only do they sometimes, as my colleague indicated, overreact, sometimes they deliberately underreact because, well, in that particular military environment, quote, everybody does it, unquote.

I'm thinking of circumstances like this: We all either read in the paper or experienced firsthand during the Vietnam experience the so-called, quote, mere-gook rule, unquote, where the value of the loss of life of a Vietnamese national was at least in some quarters, apparently, not considered as valuable as the life of one of our own people and, therefore, the going rate, sentence-wise, was considerably less.

Some of us have also experienced in military justice matters an analogous situation with respect to serious assaults or murders particularly on females of dubious virtue around posts, things of this nature, the so-called "mere prostitute" rule where the loss of that life or the battering of that person should somehow not be considered as serious.

One of your brother flying officers mentioned a case like this he had had recently which had disturbed him

very much where the murder of a person like this brought a four-month sentence.

You just spoke a few moments ago about the fact our standards must be higher than the military. Should we allow that, quote, community input to pollute or bring down those standards in the sentencing function or ought the person, indeed, be sentenced according to the higher standard no matter how excusable the local color feels his conduct is in the matter; the local officers he serves with because, "Oh, well, everybody does it if, indeed, members of the armed services aren't supposed to act that way."

I don't mean to give you a speech, but that's the general concern we have and I wanted to get to it.

Lt. Gen. COVERDALE. Is your question relating to a jurisdiction whether it's a civilian or military?

Prof. RIPPLE. Just to a military. If you allowed military jury or member sentencing, how do we curb this very real abuse of military members deciding to go easy on one of their own because in the local environment that, well, they consider that to be quasi-acceptable conduct even though certainly the standards of the United States Air Force in general, certainly your standards, would say that was intolerable conduct?

Lt. Gen. COVERDALE. In some cases, disappointing judgments have been made are the results of courts not feeling not quite as severe. We see a parallel, in my judgment, to a greater degree in the civilian community, lesser judgments that what we would find in the military.

But I guess that in either case we have to say that that's the relative fairness of our judicial systems in order to match up to what we think they should be. In those cases, in my own thinking, say we didn't sit there on that case; we did not hear the testimony. So we lack a representation for maybe a more severe judgment.

Prof. RIPPLE. Would there be a possibility, though, that a military judge sentencing in that case would be more prone to disregard the conventional wisdom of the particular environment and say, "No matter what the local folks might think about this kind of conduct, the fact of the matter is it does not meet Air Force standards and I am going to sentence accordingly"?

Or would not a military judge, for instance, be more willing to say, "The life of any human being, caucasian or oriental, is a life"?

Lt. Gen. COVERDALE. I would think that that possibly could happen where a military judge could hand a more severe punishment; but, again, in my experiences in some cases I've seen a military judge handle a decision that I felt was not severe enough.

So therefore I'm not sure that a military judge—

Prof. RIPPLE. It's a balancing matter.

Lt. Gen. COVERDALE. That right.

You know, I always have to keep going back and say that this is kind of the American way. This is our judicial system.

It may not be fair in some cases, it may be unfair in some cases, but that's the system. Maybe because it is unfair it's been fair to somebody, too.

Prof. RIPPLE. Sir, if, in fact, the Congress were to change the sentencing structure so that the military judge sentenced alone, would you still feel comfortable with increasing the punishment available to the special court-martial from six months to one year, even if that judge were fairly junior officer? Could be a Captain or a fairly junior 04.

Lt. Gen. COVERDALE. Yes. I would be comfortable with that for this reason.

One of our great concerns is that we take the young sons and daughters of this nation into the military service and one thing that we always have liked to and do say, you know, is that you want to treat those young sons and daughters as their parents would as far as the judgments, in some cases, that have to be made, how well we treat those young people.

We've tried in many cases the individual that's having the problem, before they make the big mistake because they're not compatible with military service, we want to stop them at the small mistake and discharge them without a disgraceful record.

I think by having that opportunity to sentence through a special rather than a general court-martial would better fit this perspective that we have.

Prof. RIPPLE. That's very helpful. Thank you, General. Appreciate it.

Col. RABY. Sir, I'm Colonel Raby from the Office of Judge Advocate, Department of the Army.

Professor Ripple has discussed a hypothetical with you a minute ago involving the so-called 'mere gook' rule. Getting away from hypotheticals to actual practice, are you personally aware during your years of military experience of any cases in any command you were ever in where the members of the courts-martial who were sentencing and hearing sentences engaged in patterns—that is repeated instances—of announcing sentences which showed a clear disregard for the value of human life?

Lt. Gen. COVERDALE. No, I'm not.

Col. RABY. Based on your years of experience in your military looking at the system as a whole, how do you generally view military justice right now? Are they acceptably doing the job which has been given to them at this moment?

Lt. Gen. COVERDALE. In my judgment, our military judges are extremely capable. I would find no cause to challenge them.

Col. RABY. How about court members? Are you of a view that they're doing an acceptable job when they're assigned to those duties at this time under the current system?

Lt. Gen. COVERDALE. Yes, I am.

Col. RABY. You have held numerous command positions where you've exercised court-martial jurisdiction, I know. Have you seen any patterns of conduct on the part of courts-martial members which causes you to lose any confidence in their ability to hear cases and render just verdicts and just sentences?

Lt. Gen. COVERDALE. No, I have not.

Col. RABY. I'll use Army statistics without quoting them at great length just to give you an example. Our statistics show that across the board judges appear to be giving confinement and punitive discharges more often than court members in the cases they've heard; I mean, percentage-wise.

Of course, we also do not know the amount of mitigation and extenuation that were presented to the judges and the court members.

For the sake of a hypothetical only, suppose it is a fact that in the Air Force military judges are giving more severe sentences, considering your previous testimony about the necessity for keeping commanders engaged in the system, are you willing to accept the lesser sentences in order to keep officers and future commanders engaged in the military justice system?

Lt. Gen. COVERDALE. Yes, I am, because I think it's a very valuable experience for them in their development as an Air Force of the future.

Col. RABY. You're saying they're development. Do you feel that there are legal constraints and legal rules to be followed, that that goes beyond the courts-martial application and affects them in their other performance of duties?

Lt. Gen. COVERDALE. Yes. Surely. It expands their knowledge of the Air Force, specifically, the judicial system. Certainly, we all feel it will enhance their performance in the future.

Col. RABY. Is there more respect for the law across the board, like in the environmental area and so forth; just broadens their appreciation for legal requirements and regulatory matters?

Lt. Gen. COVERDALE. Yes. I believe that. I believe it helps them, also, then, in their leadership role with their people.

Col. RABY. Sir, in your many years in this business, have you ever worked for a commander or seen any of your subordinate commanders who selected courts-martial members in order to achieve specific results; that is, a conviction or acquittal in the case when they were selecting members?

Have you ever heard that charge?

Lt. Gen. COVERDALE. No, I have not.

I just don't believe that that control exists in an individual that we could predetermine the outcome of how he's going to judge that specific case.

Col. RABY. If you could be given that type of control, would you really want that type of control?

Lt. Gen. COVERDALE. No. I think it would be counter to the judicial system and the American way of life.

Col. RABY. Sir, you were asked a question about random jury selection. In your view, would random jury selection work well in war time; that is, where the commander could not select the specific individual who would be made available to sit on the court?

Specifically, my brother on my left, my colleague, talked about a lottery system where you draw names out of a hat. I'm thinking what if your squadron commander's name come up in war time, this type of thing, where you couldn't control whose name would come up.

Would that be acceptable to you as a commander?

Lt. Gen. COVERDALE. I think we would have to have some way, based on the specific military need, for withdrawing that individual, if we felt it was necessary in order for him to perform his primary duties.

Col. RABY. Do you view the selection of juries as an inherent responsibility of command?

Lt. Gen. COVERDALE. Yes, I do.

Col. RABY. Is it important to you?

Lt. Gen. COVERDALE. Extremely important.

Col. RABY. The reason I asked that, we've had some testimony that there is a perception that commanders do not select their best or brightest officers to serve on courts-martial, but instead those who are the most readily spared.

When you select yours, how important do you consider that in the overall maintenance of discipline and morale?

Lt. Gen. COVERDALE. Our first priority is our most capable. The availability isn't a prerequisite, but those that we think can perform that responsibility to the highest degree.

Col. RABY. Do you ever recall, sir, getting a recommendation from the military judge to suspend a sentence in your years as a convening authority?

Lt. Gen. COVERDALE. Not to my knowledge. I cannot remember.

Col. RABY. Do you recall ever suspending a case where a subordinate commander recommended that you suspend the sentence?

Lt. Gen. COVERDALE. No, I cannot recall.

Col. RABY. How about your Staff Judge Advocate? Do you recall him ever coming and recommending you suspend a sentence?

Lt. Gen. COVERDALE. Oh, yes.

Col. RABY. And he's made those recommendations at times when, obviously, the military judge didn't because you don't remember the military judge so recommending.

When you get a recommendation from you Staff Judge Advocate, do you give this serious consideration? Are you asking questions about it or calling subordinate commanders, or just how to you handle that?

Lt. Gen. COVERDALE. I normally would discuss it with him personally where he would have the opportunity to answer any questions that I would have that would come up as a result of his recommendation; but it would be a very extensive process.

Col. RABY. Does the Staff Judge Advocate, when he makes those recommendations to you, give you quite a bit of background, checking into the individual, et cetera?

Lt. Gen. COVERDALE. Yes. He has. He's been, in all cases in my judgment, extremely thorough.

Col. RABY. I have one final question, sir, that's strictly hypothetical. I want to take you back to your younger days as a young pilot.

Supposed you'd had the misfortune of being caught, let's say, for bringing in a few cases of duty free alcohol in your plane and you found yourself facing court-martial, would you personally have wanted the option to select whether a judge or court members would sentence you, or would you want the system that mandated who would sentence you?

Lt. Gen. COVERDALE. I would want the option.

Col. RABY. Thank you, sir. I have no further questions.

Prof. SALTZBURG. Mr. Chairman, I have one other question.

Col. RABY. Yes, Steve.

Prof. SALTZBURG. General, whenever I hear war time mentioned and whenever I hear any other recommendations concerning changes to the UCMJ, I start to think about an issue that has concerned me for many years as a citizen and as a member of the military.

So realizing you said that you could think of no changes to the UCMJ, but kind of, if you will, changing your thought process to another area that at least tangentially is a military justice concern, let me ask you this question.

Do you favor putting civilian technical representatives who are keeping up equipment used for Air Force operational units under military orders enforceable under the UCMJ at those times when the President declares a national emergency?

Lt. Gen. COVERDALE. Yes, I do.

Prof. SALTZBURG. Thank you.

Mr. HONIGMAN. Do you mind elaborating on why?

Lt. Gen. COVERDALE. I find that we're doing this more and more now, civilian contract assistance, and for a number of reasons, or some reasons. I believe that those who are going to do that who are responsible for working directly on that equipment and especially in war time that they should be required to maintain the same standards, the same performance and be judged under the same system as a military individual because, in effect, there's not much difference, especially in war time.

Mr. HONIGMAN. Thank you, sir.

Col. RABY. Anything else, gentlemen?

(No response.)

Col. RABY. Sir, we appreciate your being with us today. Thank you for coming.

Lt. Gen. COVERDALE. Thank you very much for giving me this opportunity. I'm glad it worked out very well that I was coming here and was able to be here with you.

Col. RABY. Thank you.

At this time, we'll take a ten minute break.

(A brief recess was taken.)

Col. RABY. The Commission will come to order.

Colonel Brahms, I'm Colonel Raby from the Judge Advocate General's Office of Army and I understand you're the Staff Judge Advocate at Camp Pendleton for the Marine Corps now. Is that correct?

Col. BRAHMS. I'm on the Marine Corps base at Camp Pendleton. We have some folks out there who would probably take umbrage at my being designated king of the hill at Camp Pendleton.

Col. RABY. I wonder if you'd be so kind as to give us your military background and then I see you have a prepared statement. If you'd care to address the basic issues under consideration by the Commission, we'll let you address them then we'll ask specific questions if that's acceptable.

Col. BRAHMS. Fair enough.

REMARKS OF COLONEL D. M. BRAHMS, STAFF JUDGE ADVOCATE, CAMP PENDLETON MARINE CORPS BASE

Col. BRAHMS. I graduated from Harvard College in 1959 so I had the privilege of going back to my 25th reunion. I suggest to those of you who are younger than I am, don't miss that opportunity. It's a delightful experience.

My parochial education continued by my going on to law school where I graduated in 1962. In 1963 I entered the Marine Corps where I have continued my parochial education remaining today. Additionally, I have a master's degree in criminal law from the National Law

Center at George Washington University which I got in 1977.

My military career has been fairly usual for a Marine Judge Advocate. I started with the 2nd Marine Division, did the usual trial and defense work, and was Legal Assistance officer there.

I then had the pleasure of spending three years with the Navy at Pearl Harbor. I was in the Naval District again trying cases for a period of three years doing mostly defense work, which I loved I think because I was the only one; and, as is ordinarily the case, members of one service have the feeling that members of another service are either more independent or more expert.

Following that I went to Colonel Raby's fine institution down at Charlottesville and spent a year there studying things that they teach at Charlottesville; from thence on to the combat zone in Vietnam where I was a Deputy Staff Judge Advocate in the 1st Marine Aircraft Wing.

That was a particularly interesting experience because most of the marines pulled out of the area leaving my shop to do all of the work and the Navy was on demand over there so we got to do that, too, once again.

Although as a Deputy Staff Judge Advocate I also tried cases, I was a military judge and sentenced in cases; that principally because of the realities of a combat zone. The brand new Code had gone into effect at that time and we found ourselves in remote locations with three people and oftentimes switched rules, and I was more competent than some of my juniors and would be prepared to take defense cases to trial because I could get the job done back in an era when caseloads were abominably high and every single case could pose a very serious threat.

Following Vietnam I went to a small Marine Corps camp down in Albany, Georgia then known as the Marine Corps Supply Center and I was a Staff Judge Advocate at Albany for two years and then the rest of my life was to be spent in Washington, D. C. at various schools in the Judge Advocate Division.

My last job there for two years was as a Deputy Director to Brigadier Tiernan who will testify before you tomorrow. At his insistence, although I was moved to retire, I went to California. I now believe, as one of my counterparts said before I left yesterday, that a day spent away from San Diego is a day lost for the rest of your life.

(Laughter.)

Even a New Englander can become a Californian, one who believed there was no life west of the Charles River.

(Laughter.)

I have come to now understand there is no life east of I5.

I am a Staff Judge Advocate at a Marine Corps base. It is the most unusual command, I think, in the armed forces. We do more things there than anyone else.

We don't try as many cases because the administrative discharge process is the preferred way to go, putting discharges on trial. We have 300 discharges on trial out of what is a very small command, 3500 people, and about another 200 administrative discharges.

The character of the discharge is not a matter of concern. It's a matter of status.

All we're trying are serious cases. We have a lot of incest cases. We had a rape case last week. We simply do not try unauthorized absence cases and minor disciplinary infractions. We hand them over to the NJP.

We are, as I will not later, really in a golden era in which we do not have to worry about end strengths, a constant bugaboo in which the total makeup of the service requires us to keep people we might otherwise not want to, and administrative discharges are in the ascendancy.

So good people and the policy of those who don't want to stay go. By the way, that poses a problem for us because we no longer have a training ground for counsel in unauthorized absence cases. It's a particularly good way to learn your skills.

Notwithstanding the fine efforts of the Naval Justice School, there remains polishing which needs to be done. We are really scrabbling to find a way to train our young counsellors.

That tells you where we're at. A little about Camp Pendleton, if I may. I have 23 lawyers working for me and 5 nonlawyers working for me. That includes the military magistrate who works for me and also does housing hearings, is being trained to be an arbitrator who will arbitrate disputes between people in the community and marines and sailors.

We have legal assistance, obviously. They saw 2,000 clients last month and that includes in-court work in the County of San Diego under what's known as an Extended Legal Assistance Program.

We have a full time labor lawyer who takes care of the 3500 civilian employees. We have a full time environmental lawyer; absolutely essentially when you're taking about a base that's 125,000 acres of prime California land full of God knows what affected species.

Mr. HONIGMAN. Is that larger than Harvard?

Col. BRAHMS. Not in my part.

(Laughter.)

Thank you for the question.

I was originally asked by Charlie Mitchell, since I have a stable of young studs all of whom are *Law Review*, to do a little work on the Article III issue. We have done that.

I apologize that we did not have time to make this a *Law Review* article. We are still working, but I understand it is going to be delayed until some time in December. We will have a *Law Review* quality article.

This was typed up at the very last minute before I left. I think it does give you the flavor and provides a good beginning, perhaps a matrix for analysis of the Article III issue. As noted in there, my young man chatted with some members of the Commission as well as some others who might know something about Article III and discovered that nobody knew anything about Article III and that there had been very little work done with respect to it.

So we have made what I hope is a beginning and with a promise to flesh it out later. Hopefully, it would be helpful to you in the deliberation of Article III. I think it stands on its own merit and to rehash would be surplusage. I know you'll have a chance to read that later.

I hope it serves as a catalyst for further research for this rather important issue.

Rather, what I'd like to do this afternoon is to share with you a view from the Hustings, one unpolluted by the mentality of Washington that knows that there is no intelligent life outside the Beltway.

These are my views, I hasten to add. They're not institutional views, nor are they the views of my commanders. It's a pastiche of the views of my commanders, but not necessarily representing any one of their ideas; a pastiche which has been developed with the aid of Miller Lite and various other kinds of lubricant.

(Laughter.)

Our people truly are officers and gentlemen. If you were to ask them what they thought about military justice, you'd get a very polite answer.

Their true views may have best been expressed by a sign that I saw in the back of a pickup truck. I'm always suspicious of people in pickup trucks, but nonetheless I was, God forbid, at the golf course—yes, it's struck even me—and on the back of the truck was a handprinted sign that said, "Like most I have little use for want ads."

Now, being curious I went around to front to see who this dastardly being was and there was an eagle sitting on the front of the truck. Discretion included my going no further.

I tell you that story because I rather think that those who are not lawyers in the military service have that feeling born of frustration principally with respect to the military justice system because this is a system which impacts on their day to day ability to discharge their responsibilities; a frustration which may even be coming to the point of unwieldiness.

"There ain't nothing we can do about this bloody system. You lawyers have got it down, have screwed it up so badly, I'm just too tired to even carp about it anymore"; and I'm beginning to get that kind of feedback.

A few of these commanders would be, as I am today, prepared to sound the death nell to military justice. Military justice, if it's not dead, has suffered grievous wounds over the last 15 years, military justice as it was envisioned by the framers of the military code.

I rather imagine that those grievous wounds are going to prove fatal the next time a shot is fired in that direction.

It works today. It works because we are in this golden era. We have, in the Marine Corps, bright eyed and bushytailed young people who are dedicated, who have the kinds of thought processes that I had in '50 when I first thought about joining the Corps. They're patriotic. They are a select group.

But that select group, in the next few years, is going to end. The demographics are such that the pool of 17- to 20-year-olds is going to dry up. We're not going to be able to be as select.

The kinds of tensions that we had during the '60s and '70s—the racial tensions, the disaffected individuals—simply aren't present in the armed forces today; at least not in the armed forces as I know them. The kind of tensions that lead to violent actions, the kind of tensions that lead to disciplinary problems are not there.

We are in a golden era and we can send people who don't want to be Marines and sailors out without much ceremony, without even a need to characterize them as unsatisfactory. If you don't want to be one of us leave because there are three or four more standing in the wings.

But the golden era will end. With the end of that era military justice is once again going to be sorely tested.

Since the advent of the UCMJ in 1950—a system designed to accommodate a balance between, if you will, the competing considerations of discipline and readiness in the fighting force in basic constitutional law—in my view it has been so skewed in favor of the lot, so engrafted with tortuous procedures and rules to the end of the protecting of those rights that we've made it, again in my view, a useless commitment to serve good order; a system which commanders avoid whenever possible if they can find another way to achieve their end.

But military discipline is an important business when we think about the purpose of the armed forces; and that's an unpleasantness to think about. In the vernacular of the Marine Corps, our mission is to kill people and to break things.

That's not something we discuss in polite society. That's not something we want to talk about. And that's what we're training young men to do: to kill people, to be killed.

But that is not the kind of business that IBM or General Motors is in. The rules which are applicable and appropriate for civilians are simply not applicable and appropriate in the military service. We've forgotten that.

We've forgotten that in the rush to make military justice the best system of justice in the world; more just than just; and I think we've done a disservice to the armed forces in that rush to make it such a system.

We have got to remember the sine qua non for mission accomplishment is an able commander with the ability, the authority and the power to work his will tempered only by the minimal restraints necessary to preserve historical fundamental rights; those fundamental rights guaranteed by our Constitution.

Just as recently as last week I saw a case hit my desk which was the Secretary of the Army, 10th Circuit, and although it was not a military justice they reiterated the basic guideline which we've forgotten; the guideline of the fundamental necessity for obedience and the consequent necessity for imposition of discipline.

They render permissible within the military that which would be constitutionally impermissible outside. We're in a balance on that point; balance, in my view, of a wave of good organization.

Have we who designed and we who now operate the military justice system supported that commander in achieving his mission, a mission of achieving a ready and disciplined force? I must answer; No, no.

Indeed, we've excoriated the commander. We've labeled him a bete noir, as the evil force which stands in the way of achieving justice because he's the one who does awful things under the rubrick of command influence.

When I was writing this, being somewhat puckish, I almost envisioned a television commercial in which that would be some new product to guard against command influence. It probably would come in a spray.

Mr. HONIGMAN. It would be an invisible shield.

Col. BRAHMS. Ah, yes. Ah, yes.

I am obviously making fun, but it's quite serious; and I believe it.

We've isolated the commander. The process is one in which he simply starts a lawyers' end run. It's like pieces in a closet, remote from those who are most influenced by it, be they the fellow members of the accused or be it the man who is responsible for maintaining justice.

What we have done is we have set up a ritual as only we lawyers or our fellows, the good doctors, can do; and thus we have become shamen. We don't let anyone else practice in this arena, God forbid, because they're not trained or cut into this one this one group.

We've made the system arcane and we've created a mythology about it that is now so entrenched that the commander gives complete deferrence to the lawyer. "Obviously you, as a shaman, know a great deal more than I," and "do what you will with it," forgetting that this is a system of discipline.

More of the same is on the horizon. The proposals before you for study would perpetuate the trend of the past 15 years, a trend away from a system of discipline toward a system of military law which mirrors its encounter.

Take a look at what's before you: guaranteed terms of offices for military judges; sentencing only by military judges in capital cases; power of suspension for military judges; Article III status; increased special court jurisdiction. All but the last reduce the role of the nonlawyer and his ability within the military justice system to have authority and influence.

I suggest the most pernicious and puzzling of these issues is the proposal to make them an Article III court, this ostensibly toward the end of greater prestige of that court, and to thereby attract better candidates for judgeships on that court.

That puckish sense of humor that I spoke about before prompts me to note the implicit premise in the latter rationale. No further comment is necessary.

I oppose the restructuring of the COMA as an Article III court. We have begun the detailing of the reasons in the paper which we have handed out. I think it stands on its own bottom.

I commend to your attention particular the Section III that sets forth the reason why we should be concerned about change in the status of the court. In sum, the Court of Military Appeals, both by its decisions and public pronouncements of the members, has shown an historical disregard for the statutorial jurisdictional limits established for it by the Congress.

The recent cases of *Dobzynski* vs. *Green* and *Jones* vs. *The Commander of Naval Air Forces, U. S. Atlantic Fleet* are the capstone on the historical process which connects with the 1966 in the *United States* vs. *Frisenholz* that saw the court annoint itself with the Mantel of Palladin safeguarding the constitutional rights of military people. No area of military rights is beyond their ken.

To grant COMA Article III status would remove the modest restraints now present upon their extrajurisdictional adventure. Specific term is that limit and that's what makes them, at least in part, culpable. Article III status would remove that.

They would have a free hand to continue to expand their jurisdiction under the rubrick of supervisory powers. Take a look at the *Jones* case and you'll see exactly what I mean.

With their perceived added status of an Article III court, lifetime tenure and lifetime salary, what is to preclude an expansion-minded court from establishing rules of ethics for all judge advocates; not only rules of ethics,

but to set up a procedure to enforce those all the way down to my command level.

And not just enforce those for the persons who are practicing in the courts martial because theoretically everyone is served by a Judge Advocate General who practice before courts martial so their behavior would come under the scrutiny of the superpower cohort.

You think I joke. Watch.

That notwithstanding, of course, that by codal provision the judge advocates of the various services are the ones who have been given the authority by the Congress to certify, decertify and implicitly to deal with the entire area.

I must say, having never been a JAG in that area, there's room for improvement; but I do think that the JAGs are working to improve. Is that not correct?

Mr. HONIGMAN. Yes, sir.

Col. BRAHMS. But there's more.

How about the administrative clemency and parole process which now is separate and distinct from the court martial review done by COMA and by the appellate courts? What's to keep COMA from using the rationale, the general principal, that they are the final arbiter and that they could review the actions of this administrative court on the grounds that the action of the administrative court is arbitrary and capricious, and they would do this under this aegis?

They saw no problem reviewing administrative discharges. They saw no problem reviewing NJP. Well, why not something even closer, such as the clemency rule?

In that same vein, the Board for Correction of Records has the authority, indeed a mandate to review courts martial cases notwithstanding the fact that they have already gone the full judicial review and to review the case from start to finish; those cases which have been reviewed by trial courts and those which have not been.

What's to preclude COMA from stepping in in that area as well?

Mr. HONIGMAN. Colonel, if you suggest that COMA could derive or purport to derive this authority from the All Writs Act, what's to stop them from doing now in their current Article I status and how does the possibility that the judges will not be reappointed 15 years hence prevent the damage from being done at this time?

Col. BRAHMS. It's only by the grace of God that they haven't gotten into those areas now. They certainly have since 1956 moved in that direction. They've done so with some caution, however.

They've done so with caution, I suggest, because at least in a limited sence they are an Article I court of lesser standing and the politics of the thing are what makes it require caution.

There's a lot of jawboning and the opportunity to criticize and to attempt to convince them because they are, at least theoretically, vulnerable and they have been somewhat restrained in going beyond where we see them in *Jones*.

Mr. HONIGMAN. And you would view that restraint as derived from the possibility that as their terms of office expire they may not be reappointed, and would view that distinction between the Article I and the Article III courts as a sufficient protection.

Col. BRAHMS. I think that I'd like to see more and we may have more under the new provision which allows certiorari. That remains to be seen, how effective that would be and what the Supreme Court will do in terms of granting cert' and whether they will act to limit the jurisdiction only to that contemplated by the Congress.

I think that provision of cert' is less useful in an Article III court but, again, we'll have to give them their deferrence.

Again, we're talking about an amorphous situation.

Mr. HONIGMAN. Thank you.

Col. BRAHMS. Let me continue if I may.

We have found some interest in the administration illumination process. We're dealing with the *Ruiz* case which had fallout of unbelievable product in that the Article III courts followed *Ruiz* notwithstanding the *Armstrong* decision that overturned the thrust of the *Ruiz* case; and we're still in the process of trying to tidy up what the *Ruiz* case meant to our administrative discharge process in the very crucial area of drug abuse.

With an Article III status, with the addition of prestige, with the addition of clout that COMA believes they would have, I think we will get even more involved in the illumination process; and *Jones* and *Dibzynski* give you the feeling that that's the direction it will take.

Of course, such an Article III court if, indeed, they got into the kind of barriers that I'm suggesting would cause COMA to burgeon, obviously, with additional work. We need more judges. We need more support personnel and we could have, instead, a three-member court, a larger court.

Indeed, there's some suggestion in the ABA standards that an Article III court ought to have, as a minimum, five judges. So the whole Article III process might lead really to a larger court and a more adventurous court.

Mr. HONIGMAN. Colonel, if you don't mind, let me interrupt once again.

Col. BRAHMS. Sure.

Mr. HONIGMAN. There have been several witnesses before us who have testified that they believe that COMA, as it is currently constituted under Article I, should be composed of five judges.

Do you have a view as to whether the court, as an Article I court, should be expanded to five?

Col. BRAHMS. Well, I'm certainly hopeful that the new changes will reduce the need for additional new judges and a number of accused will decide that they do not want full review.

Mr. HONIGMAN. But leaving aside questions of efficiency, do you believe that an expansion to five judges would be helpful to reduce the doctrinal shifts that result when a single judge gets replaced by another judge?

Col. BRAHMS. That certainly is helpful to get a breadth of view; and my position is for broader court review.

Mr. HONIGMAN. So you would agree that it makes sense to expand the court to five as an Article I court.

Col. BRAHMS. Four that were careful would be good, I think; a breadth review of three would be better in terms of philosophy and in terms of background.

In that regard, I note with interest the background of the new judge—and this is an article in the newspaper—that perhaps there are some problems with it. Obviously, a very bright and capable young fellow is this Walter Cox.

While on active duty he did A, B, C, D and the last line is, "He was also involved in several military trials." Point made.

I say I would like to see someone who has more of an understanding of the hurly-burly of the real world out there; and while, in the civilian world, sometimes appellate court judges ahead, many of them if not most work their way up and know what's it's like to be on the trial bench, know the real world, and bring the positive and negative experiences as in put into their decisions.

Mr. HONIGMAN. But, of course, in our system we have a civilian court of military appeals and you can't really work your way up past a certain point in the ranks, so to speak, and then graduate to the highest appellate court.

Col. BRAHMS. Well, we certainly could. I suppose we could get people with more military experience who had, indeed, a lot of trial experience; or even just trial experience as some judges have had in the civilian community.

That's a problem probably beyond all of us.

In closing, I believe COMA needs to be rather summarily put in its place; a rather modest place envisioned when it was created by the Congress in 1950. To proceed to the proposal to make it an Article III court would condone its past adventuring beyond its jurisdiction and encourage it to do in the future.

I suggest that that's to the detriment of the military discipline system which, at best, is gravely ill. I urge that you recommend that COMA remain an Article I court.

Mr. HONIGMAN. One other questions occurs to me on the question that you were discussing just a moment ago.

It has been suggested that it might be appropriate for senior officers on active service to be appointed in flag or general officer rank to sit on the Court of Military Appeals. Do you have an opinion on that issue?

Col. BRAHMS. I think that would be fine. I think I would probably prefer retirement, recognizing the underlying purpose of having the civilian court. That would probably sit better than to provide the same level of expertise.

Remembering now that we're now beginning to run into a problem as a result of the practical draft that is on longer in place. In the 50s you scratch an adult male in his 30s or 40s and they have been in service; many of them more than once as a result of the multiple wars.

Today, those people who are in the age bracket that are likely to be appointed to COMA are getting younger and are more vigorous justices. It often is the case that they do not have any military experience.

Col. RABY. Sir, you address Article III and COMA at great length and I notice the bottom line of your position is basically contained in this detailed paper that you've turned in to us,—

Col. BRAHMS. That's correct.

Col. RABY. —which if you have no objection I'd like to make part of the record.

Col. BRAHMS. Please do that; and, as I say, I apologize that it's not in complete *Law Review* form; and I can beat on my *Law Review* types it will be before you go to final deliberation.

Col. RABY. Unless you want to specifically address some of the other questions, we can have each of the members of the Commission ask you specific questions about the other area of inquiry at this time, if you wish.

Col. BRAHMS. That would be fine.

Col. RABY. Captain Byrne.

Capt. BYRNE. Colonel, for the record, my name is Captain Byrne.

When you were talking about Article III versus Article I status for the Court of Military Appeals and whether or not the court would tend to be more activist if it had Article III status than it presently is, would lifetime tenure—which I understand is an aspect of Article III—influence your judgment in that regard?

Col. BRAHMS. Yes; and, of course, that comes with the territory as defined in Article III courts. You have to have lifetime tenure.

Yes, it does pose a problem.

Capt. BYRNE. Colonel, we've had other testimony from some witnesses that has indicated that the career as a member of the judiciary or as a member of the Court of Military Review may not be the most solid in any of the military services; although I stand corrected on that. Certainly we've had testimony as regards the Navy and Marine Corps in that regard.

Now, as we all know it's a hierarchical system in the military and you recommended that retired officers be considered for appointment to the Court of Military Appeals.

Since we are recommending legislative changes there and the civilian aspect can be looked at, let's say that we were to consider as an alternative there, at least three out of five—of the Court of Military Appeals went to five—members who could be general and flag officers, say for a period of five years, after which point they would retire.

Do you see any benefit to the problems you've enumerated by having individuals who have worked in the system, seen the problems in the system and are members of that society serving on the Court of Military Appeals?

Col. BRAHMS. No; and I have fears of that general flag officer as well knowing the selection process, particularly in the navy, where military justice has not been viewed as the most prestigious area of practice and, whether intentionally or not—and I certainly don't mean to suggest it—a study of the selectees to the flag officer grades of the Navy would reveal that those most successful are those who have not had a lot of military law.

I would think it would be not very helpful for someone who spent most of his life in administrative law or international law or any of the other more prestigious areas. There should be a minimum standard of practice if you're going to use folks who are in the business of doing active duty.

Capt. BYRNE. Let's pursue that a little further.

Col. BRAHMS. Let me back up a little.

Capt. BYRNE. Sure.

Col. BRAHMS. I think that everybody who sits on the Court of Military Review ought to have a series of prerequisites as a condition of sitting and that that should become a prestigious job; that they will have done a certain period of time as a trial defense counsel, have done appellate work, have been a military judge at the special court level and at the general court level, and only after they've punched those tickets would they be considered and it would be viewed as prestigious.

Capt. BYRNE. Well, what if you had some form of requirements like that for appointment to the Court of Military Appeals?

Col. BRAHMS. I would feel comfortable with using senior officers.

Capt. BYRNE. Do you think that that would have any remedial effect upon the problems which you've enumerated today?

Col. BRAHMS. Yes. I do.

Capt. BYRNE. I have nothing further.

Col. RABY. Steve?

Mr. HONIGMAN. Why don't I pass until my colleagues have asked some questions.

Col. RABY. Chris?

Mr. STERRITT. My name is Christopher Sterritt. I'm from the Court of Military Appeals. I'm also from New England. So we have one thing in common.

(Laughter.)

I'm not going to ask you about the comments with respect to the Court of Military Appeals, but I would like to question you about your preparatory statements concerning discipline and justice.

In particular, you speak about military discipline and readiness being in competition with your constitutional rights. What do you mean by that?

Col. BRAHMS. As Justice Berger has said so many times, if you're going to have an effective criminal system it's got to be swift and sure. Military justice is neither.

It may improve in terms of the appellate process as a result of the changes. We all hope so. But it is an abomination for an individual who has committed an offense to be tried four months later, to have the local review process completed another four months later, and to have the appellate review process be completed a year and a half after that.

Everybody's forgotten why they did this. The point is not made.

Mr. STERRITT. And what's the alternative?

Col. BRAHMS. What is the alternative? Well, I have an alternative because I really don't want to broach before this Commission since it's not within their jurisdiction. It is to do away with the whole damn system.

Mr. STERRITT. Would the American people join the Army in that type of situation?

Col. BRAHMS. Oh, they certainly would because all common law crimes would be tried by civilian courts in expeditionary environments where we would have extraterritorial jurisdiction.

The commander would be given sufficient power to handle minor disciplinary offenses at nonjudicial punishments to include a period of confinement.

Mr. STERRITT. What would happen to the felonies, again?

Col. BRAHMS. The felonies would be tried in civilian court. We would give Justice Douglas his due.

Mr. STERRITT. That was the system prior to the Civil War, wasn't it?

Col. BRAHMS. Well, I wasn't there prior to the Civil War so I can't comment.

(Laughter.)

It may well have been. It may well have been.

Mr. STERRITT. Who would try a case of desertion under fire?

Col. BRAHMS. Civilian court. We might like to, in a system like that, have, you know, a rucksack; a court martial type system of expeditionary court. But it would be quite difficult.

For example, in the Vietnam situation because of the inability of the local courts, the foreign courts, to try appellate type offenses impacting on the King's peace in Vietnam or the fact that we had a treaty that precluded that there might be a need for military courts.

Obviously, I haven't worked this out in any detail. That's something that's been percolating about in my mind.

Mr. STERRITT. We've also had the field marshall court, you're aware of, prior to 1910 in which a similar thing occurred.

Col. BRAHMS. Have you taken a look at that abominable court summary court guide? Now, I know the guy that wrote that. He was my former partner. We bitched at each other for two years.

He kept telling me, "I'm not doing anything new. I am simply putting into writing for the first time what the law is. It's too harsh. It doesn't protect anybody. It's just harsh."

So we won't use the summary courts, just go to the special courts to the detriment of the system.

Mr. STERRITT. I'd like to get into the discussion of your concept discipline according to your remarks so we can get a proper appreciation.

What is discipline to you? Is it coercion?

Col. BRAHMS. Certainly not.

Discipline, of course, is a force that is willing to respond to the commander's orders.

Mr. STERRITT. And how is that willingness produced?

Col. BRAHMS. That willingness is produced principally through a commitment to the institution—be it the United States, be it the Marine Corps—and more particularly to the small unit;—

Mr. STERRITT. And if that fails?

Col. BRAHMS. —and it is supported by the adjunct of a system of military justice, military law which responds quickly to those who do it in a very highly visible fashion. It doesn't have to be harsh.

It simply has to respond and be quick.

Mr. STERRITT. In the absence of a loyalty to the institution, a cohesiveness within your unit, and relying solely on what I could call—as apparently you would—the coercionary aspect of discipline, can men be led in battle and fight under that type of inspiration?

It's been tried before.

Col. BRAHMS. Let me give you an example. It's not a battle example, but it's an example which is constantly nettlesome to the commander.

The young man or woman who's completing a period of obligated service, got about a month, a short time period, is on the last two days carefully filling in the calendar. He says, "Go to hell. You can't do anything."

Not major battles, but I'm talking about going on patrol. I'm talking about nettlesome continuous problems of disobedience.

The commander, on one hand, wants to get rid of this person. He can do it by virtue of the fact that pretty soon they will walk out the door. But he also wants to make the point, us it for a didactic purpose, in criminal law.

The point that's made is that you can't do it. It's to damn hard to respond effectively and quickly in that kind of a situation.

Or the individual who is awaiting trial and is constantly getting into trouble. Perhaps under the revised guidelines of pretrial confinement we may be able to handle that a little better; but under the pre-August 1st guidelines it was a hardship.

"Look, I'm already awaiting the court martial. What the hell do I care?"; and minor misbehavior, simply the minor disciplinary function was often removed. The commander would call and say, "Why can't I lock that guy up?"

"Well, you can restrict him." "Wait a minute. To restrict him and to do it correctly requires three of four people to kind of keep an eye on him, and I've got to take three or four of my good ones to keep an eye on him.

"Why can't I lock him up?" My answer is, "Well, the appeal's pending."

Mr. STERRITT. I think you've stated it very clearly, the side of the commander; and your position condemning or looking with disfavor on the various procedural requirements we have in the Article 15, the summary or the special or general, whatever.

Why do you think all these procedural protections were developed over the years?

Col. BRAHMS. Well, let me tell you. I'm not so naive, although it might appear so today, or some kind of crazed right wing Turk looking for heads to lop of with my scimitar. On the contrary.

Mr. HONIGMAN. Just a Harvard man.

Col. BRAHMS. Absolutely; and those lessons have not been forgotten.

Mr. HONIGMAN. In the interests of disclosure, I should tell you I'm a Yale man.

Col. BRAHMS. Well, I thought very highly of you.

(Laughter.)

Take a look at something like the *Care/Green* Thing inquiry. What an abomination. It just is preposterous. It's a waste of time.

It doesn't improve the quality and the protection of rights. It's a Tweedle-Dum, Tweedle-Dee such as is born in the mind of persnickety lawyers.

We've taken this bloody system over and served our own ends, and I'm as guilty as anyone of this; and we are creating a system which is marvelous for lawyers in terms of providing jobs, in terms of feathering our nests; and we've put the lawyer in the position, as I have been many times when out in the field, of being an adversary looking in.

"No, you really don't want to try this case. I've got too much to do. You really don't want to try this case because I want to keep my record of wins from looking bad."

That wasn't what was created by the Congress in 1950. It was a system designed to remedy some problems that had taken place in World War II; to balance the protection of important fundamental constitutional rights and to give the commander a system which would be responsive, and which would involve the community.

We lost a great deal in 1969 when we got the laymen out of the military justice, a great deal. The commanders, who are now general officers, knew that system and served as trial counsel and defense counsel and summary court officers and members of courts.

They knew that system. They knew its limitations. They knew how to make it work to the ends of order and discipline; and I don't suggest I'm saying to manipulate it to their own purpose, but to make it work.

Today's generation of commanders doesn't know that. Oftentime, the involvement of the nonlawyer enuring to the benefit of the accused because they understood. As a defense counsel, I was awful happy to have members up there who were included in that, particularly ones who knew what it was like to be enlisted personnel and who knew the pressures, knew the problems.

In my experience, they were fair.

Mr. STERRITT. I just have two more questions.

Colonel, do you believe that control of the military disciplinary mechanism, whether it be nonjudicial punishment or judicial punishment, a court martial, should lie ultimately in the hands of civilians; and, the second part of that, in the hands of lawyers?

I think you'e answered the second one already.

Col. BRAHMS. There has to be a dichotomy, I think, between the common law distributed in military justice and discipline.

In the latter case, I have no objection to the system being modified somewhat similar to what we have now remember, of course, that if that goes on to appeal we do have some civilians in our hierarchy, quite a few, who regularly remind us of their powers.

We're not alone out there without civilian leadership and we should never be alone without civilian leadership.

Mr. STERRITT. You talked earlier—this is my final question—about having people on the court with experience in military trials and, I expect, in military operations themselves to give flavor to the decision that they make, the proper framework.

What about the role of appellate counsel in providing this information? As I read the history of the Code, in 1951 it was intended that counsel provide this information to the civiian court.

Col. BRAHMS. Certainly. There certainly is a role; but I suppose that if I were to be magically transported to China and be appearing before an appellate court, whatever I might way, no matter how eloquently, it would fall on deaf ears.

One has to be able to understand the language or it doesn't work.

Mr. STERRITT. Thank you very much.

Col. RABY. Ken?

Prof. RIPPLE. Mr. Chairman, I don't have any questions of the witness, but I do have a statement to make with respect to his formal statement to correct certain inaccuracies there.

The witness mentions three members of the Commission in his statement by name indicating that a subordinate of his had contact with us during the preparation of the statement. I'm the only one of the three here.

I can't comment for the other two, Colonel Mitchell and Professor Saltzburg, but I can for myself. I think the characterization of his quest for information on this as 'the impossible dream' is glib, but it's not very accurate.

I think there are two basic inaccuracies. The first is on page 1 of his statement when he attributes to me the statement that I said I had done very little research on this topic. The other appears at page 9 of the statement where he indicates that I opined, at the last line, that "If the CMA were made an Article III court a higher quality of aspirant could be anticipated."

I'd like to correct both of those at this time.

I did receive a call from a captain in the United States Marine Corps who identified himself as an Assistant Staff Judge Advocate to the witness and requested help in preparing this statement. My first reaction, frankly, was to hang up. Commission members don't write statements for the witnesses.

But out of an abundance of courtesy and having been once an 03 who had to write statements for 06s, I told him I would try to outline the considerations which were, I thought, germane to the inquiry and which I thought would be of interest to the members of the Commission.

Although the captain attempted, throughout our conversation, to cross examine me with respect to my position on each of those, I repeatedly stated that my own views were not yet formed; that I was open to persuasion by others members of the Commission, by the wit-

nesses before the Commission, and indeed by this witness.

In short, I'm afraid that the caller misinterpreted my openness to views, as well as my courtesy to him despite what I felt was an imposition, given my responsibilities on the Commission and his responsibilities, as a statement of my views.

In that respect he was dead wrong and in that respect this statement is dead wrong.

Col. BRAHMS. The statement will be corrected. I will be pleased to do that.

I would like the statement returned. I will have it resubmitted at an appropriate time.

I apologize.

Col. RABY. Okay, Colonel.

I do not have too many questions. In fact, I just have a couple.

One of these questions that I have is we've had numerous senior commanders testify before this Commission from all branches of the service and they've expressed varying views, but one theme we've heard from more than a couple of them is that in regard to good order of discipline in the armed forces that remains a paramount necessity for combat readiness. You expressed the needs for that, yourself.

In achieving good order and discipline, these commanders have indicated that in regard to the degree of harshness in a sentence that a court martial adjudicates that that's not, in their view, necessarily the cornerstone of discipline.

Rather more meaningful to the preservation of good order and discipline in a unit is a continued meaningful participation by commanders and line officers in the system. In other words, they want something in which they can continue to participate because they believe this insures continued viability of the system in the eyes of the command and in the eyes of the enlisted force.

I guess, worded another way, commanders, not Judge Advocates, will be giving the life and death orders in the combat environment and they believe soldiers need to see the commanders involved directly in the dispensing of military justice as a means of fortifying or shoring up their command authority later on in these crucial situations.

What are you views regarding that theory?

Col. BRAHMS. I couldn't say it better. Again, I fully agree with the question of harshness. The involvement is important.

This has been reported currently in the *Marine Corps Gazette,* the most recent issue, addressing that very problem, trying to find a way to get nonlawyers to participate in the military justice process. It's very important.

Col. RABY. I noted with interest your remarks concerning the possibility of a system where civilians were involved in the adjudication of certain offenses and the military would have a more limited jurisdiction. I can't help but recall when I was Staff Judge Advocate down at Fort Stuart some years ago I was required to attend a meeting at Atlanta, Georgia that was chaired by the Honorable Sam Nunn.

It involved a group of law enforcement officials from all over the State of Georgia, the coastal area, and they were highly concerned with drug and narcotics trafficking.

What I got at that meeting, I was besieged by these individuals with complaints about the Court of Military Appeals, the decisions which has limited the military's jurisdiction at that time over off-post offenses. We've since reversed that trend, but I know you're aware of the time period that I'm speaking about.

In any event, one of the things that they indicated was that the cost of law enforcement where we had this limited jurisdiction was making it very difficult for them, especially in small counties and towns adjacent to large military bases; and that they were just unable to fill that societal responsibility.

I just wonder if the cost of the politics of the situation would make it very detrimental to the maintenance of good order and discipline if we gave away this jurisdiction only to find that the states and federal government, the Article III courts of the federal system, were unable to pick up the load.

Col. BRAHMS. That's a real problem. However, we did survive the *O'Callahan* decision, and the local jurisdictions and the federal system is prosecuting those cases which are beyond our reach.

While it's not a perfect world, they certainly are doing the job.

Col. RABY. At the moment, I'm sure this is true, there's no real way of determining what the costs would be to the states—

Col. BRAHMS. Certainly.

Col. RABY. —and to the Justice Department if this type of proposal went forward.

Col. BRAHMS. Very high.

Col. RABY. If you had it in your power to change any particular rule or law in the military justice system or to affect any court system or the nonjudicial punishment system, other than you've mentioned already, is there any particular areas you believe should be addressed?

Col. BRAHMS. I think there are major changes in nonjudicial punishment that should be made. The commander should have, as was proposed in 1983, a capability of confining an individual, probably somewhere in the neighborhood of a month; and that we should establish a nonjudicial punishment system which allows no refusal at some level, perhaps in the peer system.

This has been abandoned and not yet submitted, as yet, to the Congress. I think that's the most important area of concern. That's the one that every commander deals with and it rightly affects their power, their ability to restore discipline.

Col. RABY. Most of the senior commanders who have appeared before us have testified very favorably about the current system and indicate that it is working well.

Did you believe that the current system really is supporting their needs right now, or do you really believe that it is a major detraction for good order and discipline?

Col. BRAHMS. I think it is a problem; and, of course, we are free to disagree.

Col. RABY. Of course.

Col. BRAHMS. I know what my commander would say.

Particularly, we ought not to be talking senior commanders, but those who are in the pits; at the level of the company commander. They're the ones who see it day in and day out and are closest to it. They're the ones that have more frustration; and generals tend to mellow.

Col. RABY. Generals and admirals also tend to have a wider range of responsibility that includes community relations and direct responsibility to Congress, and things, that company commanders and battalion commanders are free of, too. So we have those.

I appreciate the views that you've stated. I want to thank you, on behalf of the Commission, for coming today and participating, and presenting some very unique and thought provoking views to us.

Col. BRAHMS. I hope it will be of help. We will correct that statement.

Thank you.

Col. RABY. Thank you, gentlemen.

We stand adjourned.

(Whereupon, the Commission meeting was adjourned.)

Col. RABY. The Commission will come to order this morning. We have with us Commander Barry representing the Coast Guard.

What we would like you to do Commander, is for the record give us a little bit of your military background and then you know the issues before the Commission. If you're prepared to give us your conclusions and views on each of these issues. When you're finished the individual panel members will ask any follow up questions that it has. Is that agreeable to you?

Comdr. BARRY. It certainly is.

Col. RABY. Please proceed.

TESTIMONY OF: COMMANDER KEVIN J. BARRY, U.S. COAST GUARD, BEFORE THE MILITARY JUSTICE ACT OF 1983 COMMISSION AT WASHINGTON, D.C. ON 11 AUGUST 1984

Comdr. BARRY. My military background, I joined the Coast Guard in 1965, graduated from Officer Candidate School in June of '66. I spent a year as a junior officer and an operations officer on a Coast Guard cutter, a 180 foot buoy tender. I was then assigned to Officer Candidate School as an instructor, instructed in Coast Guard History, Roles and Missions, Military Justice, Navigation for four years.

My next tour was Operations Officer on a High Endurance—cutter, Ocean Station patrol, primarily. I did that for a year. Subsequent to that I was assigned to post-graduate education in law. I attended Marshall Wythe School of Law, William and Mary, for three years. I was assigned at the conclusion of that as an assistant District Legal Officer in the 8th Coast Guard District in New Orleans. I spent three years in that tour. I was then assigned as District Legal Officer which is equivalent to an SJA in the other services, to a GCM convening authority, in the Second District in St. Louis and did three years in that tour, '78 to '81. Following that I spent a year as a Branch Chief, Marine Environmental Protection Response in the 2nd District in St. Louis.

Then I was tapped for the general court martial judge job in the Coast Guard which nominally is known as the East Coast Military Judge. There is also a West Coast Military Judge billet which has not been filled for some years. That job is normally in Washington, although it's flexible. I served a two year tour as Military Judge out of St. Louis. I was in that job from September '82 until 1 August of '84. I've just completed that tour and I'm now assigned as a Branch Chief in Planning and Budgeting in St. Louis in the Marine Safety Division.

So mostly staff work with some operations early on.

Perhaps if I might give a brief overview of military justice as it acts in the Coast Guard. We are, of course the smallest service with the lightest case load. From the statistics from '78 to '81, in that four year period we averaged 2.5 general courts each year and 58 special courts. In the last two years, '82 and '83, we've averaged 9.5 general courts and 73 special courts.

As I mentioned, there is currently one full time General Court Martial Judge. There are also about a dozen part time special court judges. These offices are for the most part district legal officers in the 12 districts, and they perform duties on a part time basis as special court judge. Always of course in a district other than the one that they act as the SJA.

During the period, the 23 months I had the job, I did 23 general courts and 10 special courts. The remaining special courts were done by the part time judges.

It probably seems like very low numbers in comparison to other services. We have, I think probably some peculiar problems. I was able to docket only one case in any given week normally because of the travel involved, from St. Louis to as far away as Kodiak, Alaska. It's very difficult to docket two cases back to back. Our cases generally run longer, I suspect, than cases in the other services. Average time for ten of the general courts was three days or less, they averaged slightly more than two days. The other five general courts averaged just less than 10 days at trial.

The special courts I did averaged almost three days each at trial. You tack on travel at the end of it and it pretty much consumes a week.

I think probably another reason for the length of the trials is the fact that our counsel are, in essence, part time counsel. They perform duties as assistant district legal officers for the most part and do a variety of administrative legal matters. And when a court raises its head, they kind of shelve the administrative stuff and go to work on the court. They tend to work very hard on the courts and they are very aggressive in their advocacy with lots of issues raised that need to be decided. Courts take a long time.

That's kind of an overview. If it's appropriate I'll move to a few comments on issues that you have before you.

The first one is fixed tour length, or tenure. I'd have to say on balance I favor the concept of some sort of fixed tour length although I suspect that whatever legislation would be it should be flexible enough to allow for the various services to operate within some general guidelines. I think that in our service tenure probably would apply only to the general court martial judge or judges if there are to be more, which I think would be a good idea. I gather from my perception that the evil to be avoided is either the appearance, or the reality, of the military judge being pressured in any way. It struck me that it's probably beyond the scope of the legislation that you are considering, but perhaps one of the ways to do that is to fix the subsequent tour at the time the judge is appointed.

Col. RABY. Excuse me. You made your recommendation to apply to GCM judges. As I understand your system, your chief judge of CMR in fact has for 10 years been civilianized. Isn't that right?

Comdr. BARRY. Yes, that's My understanding. All the other judges of the CMR are part time judges who are division chiefs of various divisions in the Office of the Chief Counsel.

If several numbers were given I would favor a shorter rather than longer tour length, at least as it applies to the Coast Guard. It seems to me a two year tour length would be ideal. Three would be the maximum.

The way the Coast Guard system operates, the amount of travel combined with the stress of the job, particularly being the only general court martial judge, takes its toll. I would not recommend anything longer than three years. That's why I said anything would have to be tailored, be able to be tailored to the individual services.

Along with tenure, of course you also have—I don't know, it may be beyond the scope—who supervises military judges? They'd have to be independent and yet there is a necessity for a system where the judge can get some feedback. Obviously it shouldn't come from the convening authority or SJA. There has to be some system for that. That might be part of the whole concept if you're looking at establishing a fixed tour length. That may not be a problem in the other services. I saw it as kind of a problem in the Coast Guard.

I see the question of the potential for, or actual reassignment of the military judge in the Coast Guard due to adverse feelings, as not a realistic problem in anything but the most unusual circumstances. I do not see the question of the irresponsible judge to be a realistic problem in the Coast Guard. I have never seen one of those. My experience is that all of our people involved in military justice, perhaps with the most miniscule of exceptions, are very dedicated, of very high integrity, know what they are put there to do and wish to do it. I can expand on that issue further if you desire.

With regard to the issue of sentencing, I believe that probably the judge is more expert in sentencing than members, at least in the Coast Guard. In my experience the average general court martial panel is one 05 or 06, perhaps two, and the rest are junior officers. Of the total panel, and normally the panel is five, occasionally I've had six or seven, of the total panel I will have one officer who has had prior court martial experience. Normally he sat as a member some years ago in a special court martial. I think that lack of experience weighs in the favor of the defendant or the accused's extenuation of or mitigation case, and the sentences tend to be significantly more lenient from members than I think they would be from a judge. I think the judge does a better job. Notwithstanding that, I do not think that the judge should be given sole sentencing authority. I would favor giving the accused the option of electing a panel or a military judge for sentencing in addition to his current election of a panel or military judge for findings. But if you give the judge sentencing you have further civilianized our system and reduced what makes us unique and keeps us free of some of the constitutional constraints

that apply in the civilian sector. I think that has been eroded somewhat.

On balance I think the convening authorities prefer to have the option of members and I think that's a substantial right to the accused to have the option to have member sentence. It's one of the things that makes us unique.

I'm not a great legal scholar or constitutional lawyer, but I see a potential problem if we follow too much the idea that because a civilian judge has it we should have it.

With regard to the concept of the judge being able to suspend, however, I'm going to take the other side of the coin. I think that the military judge who is sentencing ought to have the ability to suspend portions of a sentence. I've had occasions when my sentence would have been different had I been able to suspend a portion because I cannot count on the convening authority following my recommendation, in fact I can anticipate they won't, and my judgment on the matter is pretty expert. I have to make sure that I deem a sentence appropriate. I think there are occasions where not only the ability to suspend but the ability to condition a suspension is essential in the formation of a proper sentence for that case. That particularly goes in the case of, say for example, chemically dependent personnel, alcoholics, or drug abusers, who are not merely abusers but who are in fact chemically dependent. The alcoholic is a classic case. All of his crimes are related to ingestion of alcohol. If that individual comes before the court having been clean and dry and in a treatment program for six or eight months before the court, the ability to condition a sentence on a continued maintenance of that status would, I think, assist in the goals of the command and the individual. Often these people are super sailors when they're not hitting the bottle. The inability to condition sentence on that is a sentencing problem I think for the judge, so I favor that.

On the issue of one year confinement for special court martial, my initial response was—as long as you keep it to misdemeanors, I don't think it makes any difference. The more I think about it the less sure I am that the system needs to be changed. If in fact increasing that closer to the felony status is going to impose more procedural requirements on the convening authority and on the command, I would think better to leave it well enough alone. If the crime is serious,—and in my experience in the Coast Guard, whenever the crime is serious an Article 32 would be performed, and many of them that are don't get to a general court,—if the crime is serious the command generally is going to go ahead and do the procedural requirement.

I don't see a significant benefit. I'm kind of neutral on it. If it can be done without hindering what already exists I would have no objection to that. It might in fact have the result of—cases that today would go to a general that might go to a special.

I think you had one more issue that had to do with the Court of Military Appeals, an Article 3 court. With your permission I'm going to pass on that. I don't know much about that from where I've been for the last couple of years. And I think that was all the issues that I was asked to comment on.

Col. RABY. Thank you, Commander Barry.

At this time, Bill as Commander Barry is from your service, would you like to either lead off or finish?

Capt. STEINBACH. I'd just as soon finish.

Col. RABY. All right. Chris.

Mr. STERRITT. My name is Chris Sterritt. I'm from the Court of Military Appeals.

You spoke of, with respect to member sentencing, and you commented on the uniqueness of the military system as it now exists. Is there a reason today in your mind for that uniqueness to continue?

Comdr. BARRY. I think so, yes. I think that our system has to be responsive to the Coast Guard General Court Martial Convening Authority in St. Louis whose troops are few and widely scattered, and at the same time it has to be responsive to the needs of the convening authority who's sitting on the border of North Korea with the weapons loaded. He has that ability under the current system where he can hand pick the panel,—A limited number of people, three or five,—and with some dispatch to convene a court martial. I think that is a significnat benefit of our system. I don't know, I have no combat experience so I don't know exactly what a Commander in a situation like that would say. But it strikes me that to move toward further civilianization might require a six man panel. It might require random selection of court members. I don't think either of those would be desirable.

Mr. STERRITT. It's true now that it's the accused who determines whether it's a panel or a judge.

Comdr. BARRY. Yes Sir.

Capt. STEINBACH. I missed the phraseology of that question.

Mr. STERRITT. The last thing I said was it's true now that the accused determines whether it's members or judge alone.

Comdr. BARRY. Not absolutely. He has a right to request judge only. The judge is not required to grant that request although he'd have to have a good reason under current law not to. Essentially you're correct, but there is that one caveat that the judge finally controls whether or not he will be allowed to go judge alone. His right is to members, unless the judge concurs that he won't have a member trial.

Mr. STERRITT. Isn't that after a trial started?

Comdr. BARRY. This would be accomplished at some time before the basic court which is that point at which the members, having been successfull in passing challenges, are assembled. Up to then he has the right to request trial before the military judge alone. Normally that request would be made very early in the Article 39(a) session, at which point the judge explains all of his rights with regard to the forum. Normally if he is going to request Judge only that's the appropriate time.

Mr. STERRITT. Turning again to member sentencing, are we in effect presenting the service person with an opportunity to gamble an appropriate sentence by a professional, the judge, vis-a-vis a lenient sentence or more severe sentence by untrained professionals, laymen, the lay members of the court? Are we presenting him a gamble?

Comdr. BARRY. I don't know that I would use that term. I think he has a choice and that's going to be an informed choice that he makes based on the advice of his counsel. In the Coast Guard every defendant, every accused has qualified counsel. I think gambled is perhaps the wrong connotation. It's a choice. Obviously the results of the choice will not be known for some time in the future, and whether or not the other would be better will never be known.

Mr. STERRITT. Do you see problems resulting, command problems or conflicts with the trial judge if he's given suspension power?

Comdr. BARRY. The chance certainly exists. My feeling is that the convening authorities jealously guard those perrogatives that they have, and suspension is one of them. If that were given also to the military judge, they may find something not to their liking. I suspect what would be the result would be somewhat harsher sentences with portions suspended. Since the convening authority would retain the right to revoke for cause, as well as to suspend on his own, I think there may be an initial response of opposition, but I think on balance if there is proper promulgation with suitable guidance and guidelines, I don't think that the convening authorities or the commanders would be too unhappy. Initially it might be a change that they might not like.

In that regard, about the only safeguard on that that I would think might be worthwhile is if the convening authority were to revoke a suspension there should be a record similar to what we have for revocation of a BCD.—Just to avoid any appearance that it might result from the dissatisfaction with the suspension by the military judge.

Mr. STERRITT. Finally, with respect to tenure. Assuming this commission recommends a tour length along the lines that you've spoken to would a provision leaving to the Secretary of the service concerned to designate the period be satisfactory to you? In other words he'd determine the tour length?

Comdr. BARRY. It would seem to allow the flexibility so that each service would be able to do what it needs to do. I think that would be sufficient.

Mr. STERRITT. Thank you. No further questions.

Col. RABY. Ken?

Mr. RIPPLE. For the record, my name is Ken Ripple. I'm a Professor of Law at the University of Notre Dame.

Commander, I'd like to just explore a little bit further the last point which my colleague Mr. Sterritt talked about, the fixed tour length for the military judge.

I gather that a statutory provision which required the Secretary of the service to fix a particular tour length for a military judge would be acceptable to you. What kind of procedures would you foresee one would have to go through before one could shorten that tour involuntarily, without the consent of the military judge in such a statutory situation?

Comdr. BARRY. I believe the guidelines you gave would be removal for misconduct, incompetence, physical disability—if it were to be involuntary. I'm just thinking, we have a procedure in our manual for decertification of a military judge or a counsel and it is one of the most involved and time consuming procedures that I could envision. I would certainly think that any procedure would have to be one that could be done with reasonable dispatch, but I would require at least a hearing and a right to counsel, I think for the military judge.

One of the most difficult areas is that a military judge has to make the decision on his own to get counsel and advice. I think in that circumstance it would be mandated.

Mr. RIPPLE. Why would it involve the question of right to counsel in your view?

Comdr. BARRY. I'm talking about misconduct or incompetence. Perhaps not for physical disability. And again my remarks from the Coast Guard's perspective are pretty much limited to the general court martial full time judges. It seems to me that the military judge puts a lot on the line when he takes that job. I didn't think that before I took it. I do think it now. Challenges to the military judge from whatever source are challenges to his professional—, to his competency, to his career, and future promotion.

Removal for cause of a military judge should have more safeguards than the removal of a commanding officer of a ship for cause which is at the discretion of the commander.

Mr. RIPPLE. Who would you envision as, who would be the correct decision-maker on something like that? Who should make the decision as to whether the removal would in fact take place?

Comdr. BARRY. I had not thought of that question before, Professor.

Mr. RIPPLE. If I might help focus you on the concern in asking this question to other members, other witnesses, and the most immediate answer we got was the Judge Advocate General of the service involved, and I presume that case would be the General Counsel of the Coast Guard. At least one witness, however, has testified, that command pressure within the legal corps is just as probable if not more probable than command pressure outside of the legal corps. But that gives the military judge absolutely no real independence. Indeed it's the JAG people who would probably want him out if he wasn't doing what they wanted. That there ought to be someone else.

That raises the question, then who? Not only in terms of the actuality of abuse but the appearance of abuse to the integrity of the system.

Comdr. BARRY. I think the concern is one very definitely worthy of serious consideration. In the Coast Guard the Judge Advocate General is in fact the General Counsel of the Department of Transportation who is pretty much independent of the Coast Guard law specialist cadre. I would think that it would be perhaps the appropriate level for the Coast Guard. In fact I believe my designation as a general court martial judge by the Chief Counsel is—acting with delegated authority, and the General Counsel is the one who has the statutory authority. In the other services I really am probably not competent to answer the question.

Mr. RIPPLE. At least we'd be able to make—I think it's one we'll have to wrestle with in our own thinking on the situation.

Moving on if I may to other areas you covered. You spoke quite eloquently with respect to the right of the military accused to have the option of member sentencing, and I wonder if I could explore just for a moment the question of whether or not he ought to have that right. Granted, he does have that right and traditionally has, but ought he to have it?

I suppose my main concern here is that sentencing and modern penology has certainly been recognized as one of the most difficult things a judge does. I have yet to meet a judge who said it was an easy job. I've met those who say it's an awful job, it's a heart rending job. But yet we say the military accused has the right not to have a professional person do it but to have a very uninitiated group do it. Is that really a right worth preserving I suppose is my question? Or are his interests in this very delicate process as well as society's right in the delicate process so important that it needs he needs to be committed to a professional person?

Comdr. BARRY. I don't think I have the background to answer the question on exactly what the basis of that right is or how important it is. I see it as important for both the commanders and for the accused, and I guess I would have to say I don't see it as a totally non-professional judgment. What it is, rather is the judgment of a board of officers (or with enlisted—if requested). The services have from their inception made their most important decisions by a board of officers and that of course includes decisions involving an accused at trial. Perhaps we have not given our officers quite as much experience or training as we have given our judges, and that certainly is true, but I don't think they come to the job with no credentials. I think their experience in the service, in dealing with the service personnel, gives them a depth and maturity that certainly is lacking in a random selection jury. Now these officers are selected based on their experience, maturity and judgment. I think they are professional enough. They could certainly be more professional, and perhaps in some officers there's a difference. If they sit for a period of time they're going to come up to spead very quickly. Our people are always "ad hocs." I think it's an important right for both command and for the accused. I can't give you a legal basis for it, but that's my gut.

Mr. RIPPLE. Thank you Commander. Reviewing my notes I think that is all the questions I have. Thank you very much. Thank you, Mr. Chairman.

Mr. HONIGMAN. Commander, my name is Steven Honigman and I'm in the private practice of law.

Commander, you gave us some statistics regarding numbers of general and special court martials in the Coast Guard, and I wonder if you have any statistics which reflect the percentage of those courts martial which were tried before members as opposed to those tried by the military judge alone.

Comdr. BARRY. I do not have service-wide statistics. I'm sure they're available in our headquarters and could be provided.

Mr. HONIGMAN. If you could speak from your own experience it would be helpful.

Comdr. BARRY. My experience, I believe I calculated it was something in excess of 60 percent, closer to 70, tried by members.

Mr. HONIGMAN. If I could turn to the question or return to the question of sentencing by the members as opposed to sentencing by the military judge alone, I felt that in your testimony you suggested a good option which sounded as though the accused whose guilt was found by a judge could then elect to have sentencing imposed by members. Is that correct?

Comdr. BARRY. That was not the way I was thinking of it when I said it. I was thinking of the situation where an accused desires to have a member panel, elects to have a member panel for the findings, then would have the election to be sentenced by the judge sitting alone.

Mr. HONIGMAN. A fourth option.

Comdr. BARRY. As written in your question, the election would go either way. You could have findings by the judge and sentencing by the members. I would not be in favor of that. The reason is there's a lot heard on findings which affects sentencing. If the people who are the finders of fact, are not the sentencer, then the only one who can (sentence) is the one who heard all that which is the judge. So I would be opposed to that option. I would be in favor of giving him the option, if he has gone with members for findings, to elect to go judge only at the sentencing phase, but not the other way around. You'd litigate the entire trial twice.

Mr. HONIGMAN. I think that's probably the case.

You suggested that going through a system in which the military judge would impose the sentence in every case might lead to random selection of members, and I wonder if you could tell us why one would lead to the other.

Comdr. BARRY. I don't know that it would lead directly. My fear is the more we turn away from what we have traditionally had—and particularly now when the Supreme Court is going to be in a position of looking at military cases directly,—we may find that forced upon us. If we take away what has made our system unique, namely the right of the accused to have sentencing and findings by a panel of members, and we give that to the judge, we have made ourselves very much like the civilian system, and maybe the panel becomes nothing more than a jury. And if the panel is nothing more than a jury, maybe they are subject to the law under the constitution that applies to juries. We do not have juries, we have panels of officers, or panels of officers and enlisted and it's a court martial panel, not a jury. And there's a distinct, I think, a distinct difference in the concept.

If we take away the distinction we may open ourselves down the road to control by civilian jurisdictions which would be to the detriment of the utility of the system, particularly in combat situations, where there are other concerns. That's my fear.

Mr. HONIGMAN. Let me pick up on what you just said about particularly the "in combat" situations. Do you think the UCMJ as it is now constituted, is workable in a war time situation? And if not, are there any changes that you would recommend to make it workable in a war time situation?

Comdr. BARRY. I think that question is one which probably ought to be addressed after we've had some experience with the new manual and the new act. It just came into effect 1 August with a significant number of changes in trial procedure which I am relatively familiar with, but I've never tried a case under the new manual. I don't think I could answer that question at this time. I think it should be looked at by people who have some experience in wartime situations after we've had a little time to use the new system.

Mr. HONIGMAN. When you discussed your own experiences of a military judge imposing sentences, you suggested that there were occasions upon which your sentence would have been different if you had the opportunity to suspend all or some portion of that sentence. Am I correct in assuming that your sentence would have included additional elements of punishment, albeit suspended, if that tool were available to you?

Comdr. BARRY. Either in quality or quantity, yes Sir.

Mr. HONIGMAN. And in other words, were the accused to misbehave and the suspended elements be invoked, the ultimate sentence would have been less lenient than the sentence that you judged because you could not suspend a portion of it?

Comdr. BARRY. Yes Sir.

Mr. HONIGMAN. Turning to the question of confinement.

Comdr. BARRY. Can I clarify that? Less lenient. There is a zone, I think, of appropriateness and what I'm talking about now is having to hit one end of the zone whereas the option would be to get closer to the other end of the zone.

Mr. HONIGMAN. Turning to the question of increasing the confinement power of a special court martial, what sort of procedure or increased procedural requirements do you think would flow or could flow from increasing the confinement power? I believe you said you're not sure you support the increase because it was possible that there would be an additional series of tests to perform.

Comdr. BARRY. Some of the questions in the questionnaire circulated had to do with the possibility of requiring a verbatim record if the sentence to confinement exceeded six months, similar to what we now have in the case of bad conduct discharges, or requiring that perhaps there be five members rather than three, requiring perhaps an Article 32 investigation or not allowing increased punishment unless there was a 32. The special court martial is a misdemeanor court available to do reasonably easy,—that's the wrong word,—but lacking in a great many procedural requirements. I think we should leave it alone. I think that's a very good court, it's a good system. In the Coast Guard,—I understand there was one case different this year,—but traditionally they are always tried with a military judge, always tried with qualified counsel and—we already have given and ensured that there be substantial procedural protections for the accused. I don't think that the accused suffers anything, and any special court martial—increasing the punishment—if it's going to change the current procedures by increasing them, I think it would not be worth it.

Mr. HONIGMAN. We had a witness yesterday who painted an extremely bleak picture of the condition of military justice today and he said something along the lines of, and I'm just paraphrasing, that military justice has suffered grievous wounds in the past 15 years and he believes those wounds may prove fatal. I wonder if you could give us your view about the current condition of military justice and tell us if you would agree with that picture.

Comdr. BARRY. I'm not sure I understand which direction he's coming from with that statement, but I think in either case, I don't think I can agree with that. I have been in the system, well I guess I did my first court martial as an assistant trial counsel before I was a lawyer back in about '67 and I was a court member back in that period, and I've been in the system now for about eight years, or nine. I have been trial and defense counsel, I've been special court, part time judge, and I've been a GCM judge. I will tell you that if I ever got in trouble I'd rather have a Coast Guard court martial than almost any civilian jurisdiction I have ever encountered.

I have no question but that our system from the accused's perspective is so fair and so filled with procedural safeguards, and he has so many, or she has so many rights, from counsel through a verbatim record without charge. I have to disagree. I think the military justice system is operating.

Mr. HONIGMAN. Let me say that this person that testified spoke from the perspective of an administrator with the system, not an accused. He is an 06 who occupies the position of a Staff Judge Advocate. So I wonder if you could address yourself from that perspective as well.

Comdr. BARRY. I know a Coast Goard officer who might fit that description. I don't think it was he, but I think it's an aberration. I think the court martials,—If you look on the military justice system,—now I'm particularly addressing special and general courts—as a tool for the convening authority to accomplish administrative goals, then I think that that statement probably is true. If, however, it is not an administrative tool of the commander but a criminal justice system, then that statement becomes utter nonsense.

I see the system as a criminal justice system which, in the end, may provide the convening authority a tool or may not, but when he turns it over and refers that case to that court martial, his control over that case is ended until he gets an authenticated record back. That is my view of it with a few minor exceptions with regard to deferring confinement and that sort of thing.

In the interim, the case is now in the justice system. And that's not one of his tools. And should he feel he should be able to control it, then he would have a view such as what you've read.

Mr. HONIGMAN. Let me ask you a final question. A number of witnesses have suggested that it would be appropriate to increase the size of the Court of Military Appeals from three judges to five judges, and I wonder if you could give us your views on that question.

Comdr. BARRY. I'm not an expert court watcher. It would seem to me that such a move might tend to ensure a little more stability on the court. Four or five years ago we went through an awful time, I thought, with trying to figure out such things as what is the law of Searches—we're still trying to figure out multiplicity. All they did is threw it down on the judge—and it's kind of like a hand grenade, whatever you do you're wrong. If two more judges on the court would provide more stability I'd be in favor of it, and it may well. With Judge Cook leaving and Judge Fletcher being ill, it might be nice.

Mr. HONIGMAN. Thank you very much Commander.

Capt. BYRNE. Commander Barry, my name is Captain Byrne.

I understand from your testimony that you don't favor sentencing by military judge only but that you do favor the military judge acting in suspending a sentence awarded.

Comdr. BARRY. If he awards the sentence.

Capt. BYRNE. Okay, that's what I wanted to clarify. So if the accused requested a member's court and the members sentenced, you would not favor the military judge being able to suspend the sentence the members awarded?

Comdr. BARRY. No Sir, I would not. I see the role of the military judge in that circumstance, were he to have that power I think it would be viewed by the convening authority as tampering with the legitimate results of the panel. I'm not saying that it would necessarily be that but the appearance would be that I think.

Capt. BYRNE. It would be a bifercated sentence in other words and you don't favor that result?

Comdr. BARRY. The military judge gets an admittedly limited view of the accused during the trial. A unique view, but a limited view. If the military judge sentences, I think he should have the option to give effect to that view that he gets by awarding a sentence that would include suspension. I do not believe that the limited view that the military judge gets, however is as good a view as the Commander or the convening authority would have of that accused with regard to suspension of sentence and the needs of the command. And where it's member sentencing, I would leave what the members did alone. Let the convening authority deal with it.

Capt. BYRNE. Then you would favor somewhat altering right now the option, the election that the accused has because if he elected military judge only, he has the possibility of getting part of his sentence suspended, but

if he elects members he would not at least at the trial level have the opportunity of having any of the sentence suspended.

Comdr. BARRY. I had not thought of it in those terms, Captain, and that certainly would be cause to carefully consider my previous remarks. I don't know that I would change it but I would want to assess the possible impact of that on the system. Two resolutions of course,—give the judge the authority or give the members the same authority the judge has, that they could award a suspended sentence. That wasn't one of the proposals. I don't think at this point that I have thought that through enough to have a view which would be, if either, which would be more appropriate. Sorry, I just hadn't thought about that one. It's a good issue, though.

Capt. BYRNE. Thank you.

Col. RABY. Commander, in response to a question that Mr. Sterritt raised regarding your views as to whether there still was a need for a separate system of military justice, you indicated your belief that there was, but you pointed out you had never had any combat experience. Do you believe that senior military commanders who have spent many years of military service both in combat and non-combat, are well qualified to express their views regarding the current essential needs of such a system of military justice?

Comdr. BARRY. Oh yes Sir. That's not a question for a judge, that's really a question for a commander.

Col. RABY. In reference to a question from Mr. Ripple regarding the removal for cause of military judges, I understand your testimony to be especially in regard to tenure that military judges should enjoy more job duty assignment or employment status protection than commanders. Basically you recognized the need for a commander to be quickly and dispassionately relieved for cause with minimum questions of—arbitrary and capricious action, but a judge you believe should have more due process rights.

What concerns me is if we created or recommended the creation of and Congress created a statutory system of tenure, would we find that the military judge had been vested with some substantial employment rights and not merely—due process protections are involved, but for full panopoly of—versus cafeteria workers and other things requiring extremely complex hearings, verbatim records, in other words, many trials in order to remove a judge and maybe complex appellate processes would be cranked in. Could the system really stand that?

Comdr. BARRY. No Sir. I do not favor such a system. This may be an area in which I am not competent to speak very well. It is my gut that the military judge should not be subject to relief with the same ease with which a CO is, partly because of the appearance of command influence that would go with that sort of a relief. There should be some cause shown on the record that—

Col. RABY. There should be some proceedings, there should be an opportunity to hear his part of the story and there should be some basis of cause, but you're not talking about full blown trials or hearings with complex appellate procedures.

Comdr. BARRY. Even a military judge is subject to transfer, but I do think the system requires there be something more than might be the case normally. Exactly what that is, just something. A minimum hearing, I think.

Col. RABY. To ensure fundamental fairness in the relief?

Comdr. BARRY. Yes.

Col. RABY. In regard to your recommendations on military judge sentencing, you do not favor this and you pointed out one of the bases for your views was this was a further civilianization of the system. You pointed out as we start down this road that all the sentences would get more civilianized, that we're losing more of the rationale for exempting us from certain constitutional, perhaps other statutory and due process constraints, and that we may find the whole system changed. But then I was a little surprised, based on this rationale only, that when you talked about favoring military judge sentence suspension, you did not mention the possibility of any major civilianization in this area. One thing that really concerns me is that in the civilian and federal systems where we have judge sentencing, we find that the judges inherently have a great deal of authority in—the conditions of sentence suspension so you have an elaborate probation—and this has in necessity caused the creation of an independent probation office. It's neither for prosecution or defense but working for the court to produce the elaborate information needed to give the judge all of the background so that he can impose a sentence. It is time consuming, but it also is a vehicle of probation officers for checking and ensuring that the individual is meeting the probation requirements. And of course we find that there are very complex administrative due process issues. And when you can vacate these types of probations, and I wonder if we go with the military judge sentencing, are we not following in the same track perhaps, or subjecting ourselves to the potential of falling into the same trap as we would if we went with military judge sentencing under your scenario?

True, it might not be the right word but a risk or a situation maybe is better, which changes the situation.

Comdr. BARRY. Perhaps there is a possibility of that. I see it able to be distinguished on the point of the sole sentencing by the military judge changing—versus the option to elect judge sentencing as not changing—the system. I see the suspension authority issue, rather that if

he were to *elect* to request trial by judge only, and if the judge sentences, then the judge would be able to suspend. I do not see that as changing any of the fundamental points. So to that extent I think they're distinguishable.

To the extent, however, that you suggest the conditions of suspension would impose burdens, post trial, which would have to be borne by the convening authority, that's probably a difficulty and may make the recommendation not feasible in the big picture. Certainly the military judge does not have continuing jurisdiction. He has jurisdiction only because he gets it from the convening authority. It's a different system than a civilian judge. That may in itself be enough to say that the military judge should not be able to suspend.

My recommendation comes from two years of sitting as a sentencing body and in almost every case wishing I had the authority to do more than merely recommend. So maybe from my gut, maybe it's from my gut and maybe it isn't in the big picture workable because of the problems that would be associated subsequent—or these other problems where there may be an impact on whether or not there's civilianization.

Col. RABY. Do you think the system could readily accept the resource requirement, the delay in the system of a full blown civilian probation operation?

Comdr. BARRY. No Sir. I don't see that that's required or desired.

Col. RABY. Certainly not desired. Required, once we start is what bothers me, it's what caused my question. Thank you very much.

Mr. HONIGMAN. I'd like to follow up on Colonel Raby's concerns about the probation department. Can you tell us the conditions that you would have imposed had you had the power to suspend sentences during your experience as a military judge? I think one of them you suggested was participation in an alcoholic rehabilitation program.

Comdr. BARRY. Continued maintenance of the status. Obviously—no UCMJ violations. Principally I saw it as a continued maintenance. I handled several cases where there was a significant period of time from the incident to the time of trial, in excess of six months, during which time the individual had been continually in a treatment program which was successful, in the testimony of the doctor that was running the program. It was usually a program under the auspices of one of the services. And the testimony was that certain types of punishment would in fact inhibit his continued good performance, and where he has been performing at at 4.0 level in that interim period. That's the kind of case I'm looking at, where there is no serious crime involved.

Mr. HONIGMAN. In that instance, well—participation in that sort of a program—it would have been the condition. You wouldn't have needed a probation department to supervise that. You could have simply required the office administering the program to notify you or the other person that would have the power to vacate the suspension as to the probation performance.

Comdr. BARRY. I would see the vacation as something that would be handled by the convening authority the same way he does now. It doesn't have to go back to the judge. In fact in our system, to go back to the judge is rare because the best you could do is, prior to authentication, to hold an Article 39a session, which means everybody flies back in and reassembles, which is very costly and probably not necessary. The convening authority is the one that I would think would be there on the spot. The guy shows up drunk, he's gone.

Mr. HONIGMAN. Or in any respect violates, I was thinking more in terms of supervising the probation performance, and I guess what I'm getting at is for the most typical condition you can think of, the providing of information about a violation of probation, wouldn't require a special office, a probation office?

Comdr. BARRY. His division officer or commanding officer would be the one that would have that information.

Mr. HONIGMAN. In essence, wouldn't it be for the case, most conditions, the probation officer which I'll put in quotation marks, really could be the probationer's senior NCO?

Comdr. BARRY. Yes. Someone senior to him in the chain of command, at the discretion of the commander or the convening authority.

Mr. HONIGMAN. Thank you, Commander.

Capt. STEINBACH. Judge Barry, in the area of tenure for military judges you started to make the comment concerning the applicability to the GCM judge only for a specified tour length in the Coast Guard. And I lost track of the thrust of your comment concerning the special court judges. Would you go over that one again? Possibly enlighten us what the effect would be in the Coast Guard if we were to prescribe such a role for special court judges.

Comdr. BARRY. The way the Coast Guard operates for special court judges is that the district legal officers who are certified, have been to the judges course and are certified as judges, are docketed for cases on an ad hoc basis. Normally just by an arrangement, that they are free in their schedule on the date the trial is scheduled. And they will do, I guess probably four or six a year special courts on the average. Some of those judges just don't get docketed very often. Some do a lot more. People who tend to like it and do it well tend to do a lot more. Other folks tend not to like it and don't do very much.

I don't see any need in the Coast Guard, and in fact it would be detrimental, I think, to require some sort of tenure for special court judges.

Capt. STEINBACH. What that becomes then is a tenure for the SJA.

Comdr. BARRY. That would be tenure for an SJA, or I guess you could break it down, the tenure as a judge, no matter what his billet, but again I see so little even possibility of any evil, I don't think the system's "broke" in the case of the special court judges.

Capt. STEINBACH. Do you think our assignment system could be responsive to your recommendation or your comment concerning specifying a followup tour if you will, the next assignment.

Comdr. BARRY. I think internally within the Coast Guard with nothing required from the statute. My recommendation to the Chief Counsel on leaving the job of the general court judge is that there be some special court judges who are carefully picked who want to do the job and who do as much as is reasonable, and that the general court martial judge be selected from that group of people who want it. And they would know when they start as a district legal officer, part time judge, that they are in training for a GCM job. I think work up the ladder for the GCM's and they'll get the people who have had a fair amount of trial work and have been observed and they're good at it.

Capt. STEINBACH. I thought I heard a comment concerning subsequent tours for the GCM judge. Were you wishing or—

Comdr. BARRY. I think if you want to make the system fail safe, if you specify a two year term or three year term, and guarantee that at the conclusion of that your billet will be for example, San Francisco District Legal Officer, then that ensures that the officer, no matter what happens during his term as judge, as a judge he won't be concerned about fitness reports or selection. His next assignment is assured, as is the option to get OPRs and make it in the next selection process. That's probably something that is not feasible but if you want it to be failsafe, that would be internally something to be done. That doesn't require or desire a statute.

Capt. STEINBACH. Is that more toward career enhancement and making the job more desirable, offsetting any potential career inhibitions if you want to call them that, rather than the pure issue of independence?

Comdr. BARRY. It would go a long way toward making the job more desirable than I perceive it is right now, yes Sir.

Capt. STEINBACH. We've had some testimony from various areas that laid out as almost a fact of life that the number of trials by members versus the number of trials by judge in a given area is highly dependent upon the advice of counsel and that the advice of counsel frequently takes into account factors such as; is the judge a hammering judge or a lenient judge. Can you comment on that either way?

Comdr. BARRY. Because we do so few cases it's difficult to get a book on the judge. I always found it difficult when I was a counsel. It's impossible to get book on the panels because they're all ad hoc. I suspect that that is the reason, as well as the items I mentioned before, that we do more member courts than judge only courts, because I suspect—and most of our accused are first time offenders, they're kids with clean records who did something bad once or got caught doing something bad once, and usually that clean record is fairly persuasive to a panel of officers who have not much experience in the court martial arena, and I think they tend to get lighter sentences from officers than they do from military judges.

Capt. STEINBACH. Commander Barry, do you have any feel for numbers in the areas of convening authority actions to reduce sentences, adjudged by the courts that you presided over—either by you as a sentencing authority or by members?

Comdr. BARRY. Only in a very few cases, and I haven't seen all the actions. Only in a very few cases am I aware that there has been some modification of the sentence by the convening authority. Normally the sentence is approved as it is awarded.

Capt. STEINBACH. What type of modifications?

Comdr. BARRY. Suspension of a discharge for instance. Or suspension of a portion of the period of confinement.

Capt. STEINBACH. And the ones that involved either of those types of suspension, do you recall if they included a recommendation from the sentencing authority?

Comdr. BARRY. In both cases they did. In both cases I was the sentencing authority.

Capt. STEINBACH. Have you seen—suspensions without such recommendations?

Comdr. BARRY. No Sir.

Capt. STEINBACH. The figures and the trends that you started out with in your remarks, I'm assuming were based on your time in service as a general court judge. Do they reflect also the same trend that you may have seen as a part time judge or as a special court judge?

Comdr. BARRY. The figures on how many courts the court Coast Guard has done came out of the Coast Guard report to the Court of Military Appeals. The figures on how long trials took were my own based on my experience over the past two years.

Capt. STEINBACH. Let me go back to the area of suspension. You highlighted the chemically dependent situation as a good ground. Do you feel there may be any other areas where the social view of the community and the views of the military system may be either slightly

out of cinc or maybe one's running ahead or behind the other that the same type of philosophy might apply to?

Comdr. BARRY. Four out of the first five general courts I did had to do with child sexual abuse. Two of those cases were non-family—where there was a lot of little kids involved. Two of the cases were in family, father-daughter situations.—in the way those cases were handled, it was an education for me. Civilians won't touch them if they're in a treatment program. They're treated similarly to the way you treat the chemically dependent. The intra-familiar incestuous relationship, the father is generally a victim of the same thing when he was a child and it repeats and it's a social phenomenon. It's a social problem.

Civilians in the jurisdictions where I tried those cases refused to handle the cases because they don't treat those cases criminally. The convening authority was not happy with that approach and tried those cases in general court martial.

The second case he took action to suspend a discharge which he did not in the first case, interestingly enough. I think I saw a change.

Capt. STEINBACH. So the suspension process here may help rehabilitation as much if not more than the alcoholic case?

Comdr. BARRY. It May. It's a large problem of education,—Just like all the services,—The social problems, the impact on the military community. And the answer to social problems is not always the criminal system, and that's the civilian learning of that, I would say.

Capt. STEINBACH. Thank you very much. I have no further questions.

Col. RABY. Thank you Commander, for appearing here today.

Comdr. BARRY. Thank you for the invitation. I was pleased to be able to respond.

Col. RABY. At this time I'll turn the chair over to the Chairman.

Col. HEMINGWAY. Why don't we take about a five minute break?

(Whereupon, a brief recess was taken.)

TESTIMONY OF: BRIGADIER GENERAL WILLIAM H.J. TIERNAN, RETIRED, DIRECTOR J.A. DIVISION, USMC, BEFORE THE MILITARY JUSTICE ACT COMMISSION OF 1983 on AUGUST 11, 1984, in WASHINGTON, D.C.

Col. HEMINGWAY. General Donovan, the Director of the United States Marine Corps Legal Division is going to introduce our next witness.

Brig. Gen. DONOVAN. Good morning ladies and gentleman. It is a pleasure to introduce Brigadier General William H.J. Tiernan, USMC Retired, Indiana Law School graduate who was commissioned 30 years ago, and in a career of line and legal service distinguished himself in a manner which included at least two deep early selections for promotion. He served, among other assignments, as Executive Assistant to the Judge Advocate General of the Navy and editor of the Navy JAG Journel; a company commander of infantry over 20 years ago; a Chief of Staff of the Marine Division at the time of selection general officer, and as Staff Judge Advocate through a variety of commands during peacetime, wartime, overseas and in the states. In a three year tour as Director, Judge Advocate Division, Headquarters of the Marine Corps, he personally was advisor to the Commandant of the Marine Corps, worked closely with the Judge Advocate General of the Navy, and demonstrated consummate familiarity with the needs of commanders, the available people and equipment to meet those needs under the current framework, and has substantial thoughts which he will share with you in an opening statement and then be available for questions and answers. Thank you.

Brig. Gen. TIERNAN. What I would like to do is start out with a few general comments to kind of let you know where I am coming from, and then I will be pleased to entertain any questions you may have with regard to the specific topics.

Permit me a historical footnote at the outset here. My memory goes back quite a ways as I recall particularly my opinions with respect to the military justice system being formed during the time frame of the late '60s I guess and the early to mid '70s. I call those the horrid years in that business. Just to give you an example of how it was in the Marine Corps, I recall being Staff Judge Advocate at Camp Pendleton, one of our largest bases, with about 41 young attorneys, Captains right out of law school, on my staff. I was a young Lieutenant Colonel and a Major as my assistant. I think that we averaged about 50 general court-martials a month, worked seven days a week and evenings, and at least 75 to 100 special court-martials during that same time.

We were fortunate enough to have a new correctional facility built just before, and the reason we got that of course was we had had a very serious riot a couple of years before, a racial-type incident. In those days the only way you got a new facility was to have a riot. Of course we had one and we got a new facility.

My point is the capacity as I recall was something like 494. We had about 550 in there, and of course it was a situation where you couldn't put one in unless you took one out.

I guess the bottom line that I am trying to get across here is that the system was going under, and it would have gone under for lack of resource had we not compromised, seriously in my opinion, our standards and

came up with administrative discharge for very serious offenders. That is the only way we survived.

Of course, the reason I am giving you this background is not only to tell you where I am coming from historically, I am well aware of the fact, the phenomenon let's say, that this particular point and time we are so much better off it's just unbelieveable. That's great. We have quality personnel. We are not having recruiting problems that we had. We are in a climate where if we have a trouble-maker, it is very easy to separate them administratively. Somebody else is waiting in line to take your place. You don't have that end strength problem. We don't have a manpower requirement. It's a great way to run a military service.

I am convinced now that we are going to have in the future another situation that we had in the past. I am convinced that we should have legislation to be able to cope with it that we didn't have in the past. Going back once again to the time we were struggling in the Vietnam situation and at the time we got into the heavy part of the war, we think we were probably at about 188,000 and then we went to 317,000 in a very short period of time. Of course, necessarily we incorporated a lot of the substandard humanity during that time frame. We had to, so we had a lot of serious crime, and we had to eat our way out and back down to 188,000 from about 1969 to 1974, sometime in that time frame. That was a very painful period.

I am not saying this is going to happen again, but I think it is a very nice position to be in to have a military justice system that is adequate to cope with the worst case that existed in that time frame and not base it on the current situation. I think if we do, we are kind of putting our heads in the sand and not preparing for the future.

I know just during my tenure here as the Director of the Judge Advocate Division I have a lot of conversation generally about will the military justice system, in its current form with its sophistications and so forth, adequately function in a combat environment. I think one of the services said don't worry about that because we've got a plan. We are going to work off of this plan, change everything, make everything expeditious. I never saw the plan. It may exist, but my point is having had the experience of working with the system in a combat environment, and even in a garrison situation people asked did it work? I said not very well. I am convinced that it did not work very well. It was cumbersome. It was logistically difficult and awfully expensive, very time consuming, and justice was not done in a vast majority of the cases that were there. Now that is where I am coming from.

My feeling developed during those years was that a special court system was not strong enough, it was not the kind of tool we really needed. Of course, recognizing the fact with respect to the jurisdictional issue, six months versus twelve months, I am aware that there was a point and time when we did not use lawyers in a special court. I was in a position during those years to see the results of the effort. I am the first to agree that our batting average is very poor. We have a much better system now. At the same time, it is obvious that that six month restriction was placed there simply because these legal safeguards were not available to our troops as they are now with the military judge, lawyers, and everything that goes with it. I am speaking Marine Corps experience. That is how we play it. So that aspect of it is different than it use to be. I am sure it has been said to you many times. In my opinion, we are in a specialized society that requires higher standards in individual conduct than the civilians. I don't want to bore you with examples, but of course it is a criminal offense to walk off your job, a criminal offense to be disrespectful to your superior, et cetera.

Given that, I feel we should have a system, a special court system, a misdemeanor system if you will, that is at least as strong as that which prevails in civil hearings. I repeat at least as strong. Of course we all know that the misdemeanor jurisdiction for the most part is twelve months.

Now with respect to the issue of sentencing by a military judge alone, I kind of view those two issues in the same context. I will be frank. I feel that one of the weaknesses in that system has been that the accused has always had too much leverage with a six month sentence restriction and an option to choose members for sentencing or a judge for sentencing. He is in a very favorable position. From there we get into negotiated pre-trial agreement process which, in my opinion, is very good. When you get into that pretrial agreement process, you have six months as a maximum, an option of going with court members for sentencing or with a judge, that doesn't leave the government much to bargain with in my opinion. Over the years I have seen so many instances where the end result of this process is something like 45 days confinement and back to duty. Of course, our corrections people will tell you that is really not enough time to rehabilitate a youngster. It takes so many days to check in, so many days to check out, another five days a month in order to get 30 days good time, so 45 days becomes perhaps 30 days or something like that. We pay a lot of lip service to rehabilitate machinery in a correctional institution, and I feel it is difficult to really get your money's worth out of that resource if you are restricted with six months at the special court-martial level.

Now with respect to the issue of sentencing by judge alone, once again, speaking very frankly, I am convinced

that this judge does not want to be known as a tough guy, and he does not want to be known as a tough guy because he doesn't want to be facing a long list of trials with members. As a result, instead of being known as a tough judge, he wants to be known as a reasonable judge. So in my opinion, inevitably he is going to start lowering his sights a little bit. I think that is unfortunate. I think it is unfair to the system and to the judge. Of course, if we did have requirements for sentencing by judge only, it would eliminate I think both of those things. It would strengthen the system considerably. I am familiar with some of the arguments against sentencing by judge alone. Services will say that they polled their commanders and their commanders felt they wanted local flavor. I couldn't personally care less about local flavor. What I am interested in primarily is uniformity and consistency. We have a great disparity, had in many instances in the Marine Corps, with respect to standard of conduct between infantry, aviation and supply units. At the supply depot they have an entirely different standard and different result. Same for every unit. In my opinion it shouldn't be that way. That is the result of the option of member sentencing. I think our chances of obtaining consistency and uniformity in terms of standards of conduct in sentencing are much higher by having a professional group of officers handle that function, our military judges.

Now I am a great believer in talking to commanders about these matters. In most instances I am convinced that in a lot of cases a commander will come up with an answer depending upon how the question is framed. I have had this experience in the Marine Corps. I would go to the commanding General and say, "General, they are doing it to you again. The lawyers are taking it away from you. They are depriving you of your prerogative under the Uniform Code," et cetera, et cetera, "how do you feel about that?" I am going to get a very strong reaction in most instances. Whereas, if I say, "General, we've got a new idea that is going to help streamline the system. It is going to make military justice more efficient. It is going to take a lot of the burden off of you and your command. How do you feel about it?"

"That sounds great."

I am kind of over-simplifying something here, but I am convinced in my experience if they are approached that way, they are very receptive, and they always have been in my experience; and with respect to these two issues, the jurisdiction of special court and sentencing by judge alone, there has been no exception.

Another argument that has been raised is the tradition aspect of the court members participating, officers participating in the process of sentencing. I just feel that such a small group percentage-wise actually have this opportunity that the value that could be achieved from an educational point of view is almost minimal when you balance against the other desirable factors, which I believe are desirable factors, of having your sentencing done by a professional. It is not a relevant argument in my opinion. Inevitably, my experience has been that the members who are selected for this particular type of duty are those that are available, expendable, and in this day and age, by definition, relatively inexperienced.

When somebody talks about the traditional aspect, I am reminded of the fact that the first cavalry survived and essentially unchanged since World War II.

With respect to the issue of military judges having authority to suspend sentence, my feelings in that regard really aren't as strong as they are in the other two issues. In my mind it is a logical thing to have. If you are going to have sentencing by judge alone, the judge logically should have the full spectrum of authority, the authority of suspension being a very vital one in the Marine community, and equally applicable in my mind to the military system. I don't have any reservations that this is going to denigrate from the authority or powers of the commander, and I don't think that would be a big problem in the Marine Corps and with the CA and SA still retaining their power of suspension. I don't have any real hang-up with the judge having that authority.

With respect to the more sophisticated issue, which is how you structure this with conditions of suspension and so on and so forth, in my mind I think we could delineate the system with certain restrictions and standards that would permit him to have as much information as the convening authority has at the time he exercises his sentencing powers, and also restricted conditional program, which the witness that preceded me mentioned, be managed by the command in terms of has he violated this by going off the wagon, here is what we do and so forth. I am talking about probation type report. It wouldn't necessarily involve generating any new huge mass of administrative machinery to administer. It just seems to me that the sensible rule would be you could specify a system that would fulfill that function, but would permit the judge to be well informed before he comes out with his sentence and permit the judge to impose some conditions to the probationary period, and to provide for another type of system which we essentially have in place now at the convening authority level which is to take care of the vacation aspect of the suspended sentence.

Going from that to the issue of guaranteed terms of office of a military judge, it is hard to argue against the fact there should be something to insure impartiality on the part of our judges. I felt we have it in the Marine Corps. We have it as a result of personnel management policies that pertain to every other officer in the Marine Corps. I am trained to think that way I guess because of

the fact, with the exception of the Coast Guard, it requires all of its lawyers to be unrestricted line officers. I guess I am opposed to carving out exceptions for lawyers. I am convinced our normal personnel assignment policy in effect guarantees a judge to have the normal tour of duty, which these days, when I left active duty, was three to five years; three years in one command, five years in one geographic area, and that, as I said, pertains across the board.

Premature transfer of a judge can be made for good reason and often to his advantage if he is selected for a school or something like that, be promoted out of rank to a judge billet and is wanted on another job. The Marine Corps is peculiar in the sense that we are small, small by comparison with the other sister services, and with a lawyer community of I guess 350 to 400, something like that. You don't have an awful lot of flexibility when someone quickly retires or becomes disabled. You have a minimal amount of time to react.

Personally I have never had the feeling that three years that I sat here as the commandant's advisor, I couldn't recall a single case that we could be accused or whatever of moving a judge because someone, a commander, was dissatisfied with his professional performance. Frankly, I recall a couple that I would have liked to but I wouldn't touch that with a ten foot pole.

I think these days our commanders in the Marine Corps are sophisticated enough with respect to their knowledge and understanding and appreciation for the legal business that that kind of fellow would never even enter their mind. I am not saying you don't have a situation where a commander will complain occasionally. But for the commander to come up on the horn or even under the table and suggest that we get rid of the judge by transferring him would be met with a stoney silence at every level of command. They just know it is just not done.

So in a personal sense I've had that feeling that we don't have a problem in that respect. I am appreciative of the imagined aspect of it at the same time. But do we need a law? I guess that is the bottom line when you get down to it. I just don't feel we do. I am not opposed to the concept. The concept is fine. A judge should not be removed prematurely from that billet without specific cause. If we have cause, that is another thing. We can act on the cause and transfer him or whatever. We have done that, but never without a very thorough and complete inquiry.

So I guess I don't like to use that trite phrase, if it's not broken, don't fix it. I think we do a pretty good job in the Marine Corps managing our judiciary in any respect. As I was saying earlier, from a historic perspective, we have come a long, long way in the last—well, since 1968 when we got the Military Justice Act and the military concept. I am thinking now in terms of experience. I think we are particularly blessed in the Marine Corps because we do have a system that provides input for our judge advocate community from our line community, and the Navy has a system and I think some of the other services do some of it, but we have done it very heavily. We have a blend in most instances now of line command experience and trial experience reflected across the board in our judiciary. We have very good people. My feeling has been with respect to these other issues, too, the responsibility of being able to exercise the authority to sentence someone to confinement for 12 months and to suspend sentence. I don't have to face the argument any longer, at least in the Marine Corps, that we don't have the experience factor to cope with that responsibility. Our judges are highly qualified and well experienced.

Just one other factor I might mention in that regard. I was on active duty during the evolution when we went from a situation where the military judge's reporting senior was the commander concern. We have gotten away from that now and the reporting senior is not the commander concerned. It is another fellow attorney, usually a senior judge, and it has been purified in that respect. So we do have in that sense independent judiciary with the normal personnel policies applying with respect to tour length. I don't know what else can be done to insure the impartiality of the judge concern.

I think that is probably enough to give you a feel for where I am coming from at least.

With respect to the question of retirement of the Court of Military Appeals, I can't profess any expertise in that regard. I've never had an opportunity to inquire into it or study it. I feel in a general sense our Court of Military Appeals right now is our supreme court in the military and should be accorded equal status with others among federal judges with respect to tenure and retirement. I don't have any problem with that, but I certainly don't profess to have the expertise to get specific about how to do it.

I think with respect to the other issue I am going to kind of waffle on, too, is the Article II court status or Article III court status for the Court of Military Appeals. My only reaction to that I guess is that it was always a problem as I saw it in the different levels of the Marine Corps to cope with civil litigation that was springing up throughout the world. I am sure the other services have the same problem. You've got one going in District Court in Honolulu, and you've got one going in Europe, and Puerto Rico. It is a difficult thing to try to coordinate this type of litigation and to get consistent results and to be able to make wise policy as a result. If we did have one court that could handle it, it my mind this would be an advantage. On the other hand, I see a

myriad of problems that could be associated with it if the court were permitted to extend its jurisdiction into the cubbyholes and crannies of our administrative processes such as promotions and administrative separation and all the other things. I am conjuring up possible problems that would wreak havoc within the entire DOD operation if they got a little too extended into it. But, as I say, it is very cursory and not very much in depth. I just did not have the opportunity to come to grips with it.

I think at that point I will shut up for a while and you can ask me some questions.

Col. HEMINGWAY. General Tiernan, in regard to the suspension of the trial judge, you said that you would favor a system which permitted a judge to have as much information as does the convening authority prior to making that decision whether to suspend a sentence or not.

Reversing that, would you continue to favor it if the judge did not have that ability to get the same information?

Brig. Gen. TIERNAN. I think I probably would prefer the other system where the judge is fully informed. In any event, I would favor the judge having suspension authority.

Col. HEMINGWAY. What about the power of the Court of Military Review to suspend a sentence?

Brig. Gen. TIERNAN. I don't feel quite the same way about that I guess because I have somewhat of a personal bias in that regard. The Court of Military Review, in my experience, is far removed in point of time and distance to the extent that to give them that authority and let them exercise it would wreak havoc on the system. I think of cases that have been two years in the mill getting to the Court of Military Review concerning someone on the West Coast that has long since gone and is in a civilian occupation doing something else. These are very subjective things. So I am prejudiced I guess for the reasons I mentioned, the time and distance factors. I don't think I favor the Court of Military Review suspension authority. To have a judge, a convening authority and supervisory authority would have that. I think that is enough.

Col. HEMINGWAY. You mentioned that—or assumed in your statement that the convening authority would continue to retain suspension power along with the judge. In your suggestion that the judge be granted this power, how do you envision the management of the probation? Is that retained by the general court-martial convening authority over the accused, or would it be exercised jointly with the judge? How would the suspension be vacated if this system were adopted?

Brig. Gen. TIERNAN. It can be done, as far as I am concerned, in a number of ways. How you work it out in terms of administrative detail and at which level is not really that critical as I see it. The system we have now which provides machinery for the convening authority to have a big pull in vacating proceeding could be expanded somewhat to include such things as the conditions of the probation imposed by the judge. The judge could have some input into it. I see a variety of systems that could be worked out I think without being too cumbersome, but I am not prepared at this point and time to give you a plan of exactly how it should be done.

Col. HEMINGWAY. In regard to tenure, one of the concerns I've heard expressed is the carving out of a separate group of lawyers in a particular function and granting them a guaranteed term of office. We have in the Department of Defense other people, too, who must operate independently, impartially, without fear of reprisal in their assigned Inspector General functions, naval investigative service, criminal investigative division, so on and so forth.

Do you see any impact on those other career fields and functions in the military if you give a guaranteed term of office to military judges?

Brig. Gen. TIERNAN. I think the issue essentially is can you distinguish justice function from other administrative functions. I was impressed by the testimony of my predecessor here. There is a distinction between being able to relieve a commander and being able to relieve a judge, and I think it is generally accepted and generally understood. There are things that are peculiar about the justice system that requires some safeguards that don't necessarily have to be reflected in the other functional areas. I think the world understands that.

Col. HEMINGWAY. Do you have any feeling about the need to enlarge the membership of the Court of Military Appeals say from three members to five members? Do you think that would expedite the appellate process or contribute to stability of precedent?

Brig. Gen. TIERNAN. I am not sure that I am really qualified to answer that in a sophisticated sense. Based again on my personal experience, I recall in years past that three judges, if you had a two on one swing in one particular point and time and the philosophy changed drastically and horrible things happened, which in my experience did happen in this period I described. Historically we were fighting to survive in the Court of Military Appeals at that point and time and seemed to be feverishly working to add additional burden on our overworked system in the form of Catlow/Russo and Burton and so on and so forth. I would have felt more comfortable in those days I guess if we had five instead of three, but frankly speaking, that is the only advantage that I see at this point and time is it would give you perhaps a better spread of judicial philosophy to have more than just three members. Three members in my experience

have tended to be somewhat polarized. I am not saying that more is better necessarily. I really don't have enough insight into how that body functions over there to be able to say it is going to speed things up. I don't know that it will, and I don't know that it won't. I think that is about the best I can do.

Mr. STERRITT. My name is Chris Sterritt. I am from the Court of Military Appeals. I have three questions. The first one is with reference to the Vietnam experience that you spoke of earlier. Could any system of justice work in the environment you were in short of summary punishment? You described the logistic problems and things. Could any system of justice work?

Brig. Gen. TIERNAN. I think a very summary system could be designed to work in that type of environment.

Mr. STERRITT. Do you think the American public would respond to that favorably and support the military?

Brig. Gen. TIERNAN. That is difficult for me to say what the American public would react to. I am speaking of course as a military man. I have a feeling based on my experience of what kind of system we need during that kind of environment. We need one that is very quick and very savage in my opinion, and we don't have it now. What we have is horribly unwieldy, and even considering my Vietnam experience, which as I said earlier I think is a garrison type of experience, beyond that you have no control whatsoever unless you get a very summary form of justice that you could exercise. I don't know if there is a perfect answer to that, but I do know what we've got in a fast moving scenario would be impossible.

Mr. STERRITT. The second question I have concerns your tenure as advisor to command in the Marine Corps. What procedure was there then to remove or transfer a judge for good cause or whatever?

Brig. Gen. TIERNAN. For cause or just—

Mr. STERRITT. Let's assume there was cause to move or transfer.

Brig. Gen. TIERNAN. Transfer of course would be when his time was up and he would go on to some other assignment. But remove for cause? I don't think we have established a procedure as such. I think it was pretty ad hoc. Of course the Judge Advocate General in the Navy is a player in this kind of game because he controls the judges, and the one instance that I can recall that this was done during my three years, a lengthy investigation was conducted and was reviewed by the Navy JAG, the staff, through the Marine Corps, the conclusion was made that he should be removed and he was.

In the three years I was in that position, that is the only case.

Mr. STERRITT. My third question concerns the suspension problem. This hasn't been mentioned I don't think before the Commission, but would you favor some type of system where the trial judge could suspend the sentence until the convening authority acts, sort of like hold off the execution sentence? As we know, right now after court-martial he goes right into jail if he gets confined and then the convening authority later acts. He can suspend a portion then, but he would have spent sometimes up to two months, or three, or sometimes less. How does the idea strike you of having the judge have a suspension power prior to the—

Brig. Gen. TIERNAN. I really don't have any problem with that.

Mr. STERRITT. I am just thinking in terms of then the convening authority in his suspension role would then have a record to work on in addition to the information; in other words, how the fellow performed during that two months.

Brig. Gen. TIERNAN. I don't think it presents any insurmountable problem as far as I could tell.

Mr. STERRITT. I have no further questions.

Mr. RIPPLE. General, I would like to ask you several questions and I would like to preface them with almost what might appear to be stating a position. It is not my position necessarily, but testimony we have heard from other witnesses. I would like to get your reaction to it. Rather than ask you a pointed question I would like to present you with a theme and let you structure your response as you care to with respect to it.

First of all, with respect to enhancing the available punishment at the special court-martial. It has been suggested that in those services which normally do use the court-martial procedure for unauthorized acts and offenses, and certainly the philosophy of the different services does differ with respect to what they consider a court-martial offense, that there would be a tendency to increase the amount of incarceration in a sentence for the UA when there was really no hope of rehabilitation. In other words, just to run the time up even though the person was in fact going to be separated from the service. And I think it is fair to say that among others the Marine Corps would do this. That what would happen is the UA that would get five or six months would now get eight or nine. The person is going to be separated from the Corps anyway, but the government is going to pay the bill for a couple more months of confinement. I would like to get your reaction to that kind of argument which is certainly one that we have to consider and hasn't been made to us in this part of our record at this point.

Brig. Gen. TIERNAN. I don't foresee that as a real problem. I don't think we are going to start jacking up UA sentences just because we have the authority and say, okay, let's use it. I don't foresee that at all. As I said earlier, I see an instance where—Of course, the driving

force behind the whole system is and has been in my view rehabilitation, getting some of these youngsters squared away and getting them back to duty. In my view you need time to do that, and under our current system, as I said earlier, I don't think we have it.

So now judge or court member will have more time to work with and say, okay, this guy says he is incorrigible, he says he wants his BCD at all cost, but we are not going to give it to him. We are going to make him through—the Army use to have what they call a retraining command or some system that says we are going to hold your nose to the grindstone and try to turn you around for your own good. If it doesn't work, it doesn't work.

I see it more in that positive sense than I do in the negative.

Mr. RIPPLE. Turning to the area of member sentencing versus military judge sentencing, you mentioned you had a concern for uniformity and consistency in sentencing, and you mentioned the fact that you had noticed in the Marine Corps had different sentencing philosophies in various communities be it the infantry or the garrison group or supply depot. One of the concerns which has been articulated in testimony here is that member sentencing might be, at times, produce over-lenient sentences; that is situations where local community is willing to wink at a particular offense. Two instances which have been mentioned have been the situation where perhaps a military group in combat might decide that a human life of a foreign national is not as important as the life of their own people. Another that has been mentioned is the life of people around a particular garrison of dubious moral reputation whose life might not be considered at the same worth.

Have you seen instances like that in sentencing? Is that a problem, and would that problem be corrected if military judges did the sentencing?

Brig. Gen. TIERNAN. It's a great question. I have had some very bitter personal experiences in that area where I thought there was, in two or three cases that I was personally involved in, a travesty of injustice in just that type of situation. One was the murder of a POW. One was the rape and assault of a Viet Cong nurse. I won't give you the third, but that gives you enough to go on. Both were acquittals which were unwarranted, unjustified.

Mr. RIPPLE. Do you feel that giving the sentencing power to a military judge would correct that situation?

Brig. Gen. TIERNAN. Absolutely.

Mr. RIPPLE. Moving on to the question of suspension of sentences, we don't usually—or our system seems to be bias against ever enhancing a sentence or enhancing the burden on the accused at anyplace on appeal. I wonder if this might be an exception? In other words, where a military judge could in fact suspend a sentence; however, where the officer exercising court-martial convening authority could in fact invalidate that suspension on the articulated ground that on the information available to him and the capabilities of the command, the situation in the command, he simply could not take responsibility for that type of rehabilitative effort. Do you think that would be workable?

Brig. Gen. TIERNAN. It seems to me that is pretty much what we have now.

Mr. RIPPLE. It would simply change the burden of persuasion I would think. In other words, instead of recommending suspension, the military judge would order it and the burden would be on the CA to reverse it.

Brig. Gen. TIERNAN. I have no problem with that. In my mind that is pretty much what we have now except, as you say, the burden is reversed. The only real heartburn in that area that I recall is in those very rare instances, and some years ago when I was really personally involved, where the judge would recommend suspension and the CA would not go along and would cause a little conflict there that wasn't really healthy. But it is a rare instance now if the convening authority won't go along with the judge's recommendation.

Mr. RIPPLE. One last question if I may with respect to tenure of the office of the military judges. You have stressed the need that there indeed might be—you might be in favor of it, but you have also stressed the need for flexibility with respect to structure and the needs of each service.

Assuming that some provision were made in law for a guaranteed term in office for military judges, but that also a provision were made in the law to assure flexibility for the service and certainly for removal for cause. In your opinion who ought to make the decision on that record to in fact remove military judge?

If I may, one of our witnesses suggest that although most of these decisions are usually left to the Judge Advocate General of the service, that the Judge Advocate General of the Service would not be the appropriate party here, in the sense as much command and career influence could be asserted on that military judge the Judge Advocate General as can be asserted by any line type, and that indeed should perhaps rest with a civilian member of the Department; perhaps the Assistant Secretary, someone like that ought to be required to sign off on the removal for cause of a military judge.

Brig. Gen. TIERNAN. That doesn't shock me at all. Of course I understand the Marine Corps/Navy situation. The legal people aren't the ones that order lawyers around. It is the command that does the ordering. The Commandant of the Marine Corps is the one that signs the orders, and that is what I was trying to express earlier. He is not going to do that unless he has a real good

reason, and the real good reason isn't because his commander says he doesn't like the way he is sentencing.

Sure, we could have that done at some other level by non-military officer holder.

Mr. RIPPLE. Thank you.

Capt. STEINBACH. Good morning. I have two very brief questions. One is just to clarify one of Professor Ripple's areas when you responded concerning two specific instances that you thought were travesties. How could the sentencing authority and the military judge have corrected those situations or equalize them, or did I misunderstand you when you said there was acquittal?

Brig. Gen. TIERNAN. I wasn't talking about sentencing. I was talking about the general concept I guess, and you are right, there wasn't sentencing involved at all. It was acquittal, so I was wrong.

Capt. STEINBACH. Have you seen situations where the sentencing itself may have had the same philosophy behind it as you described here?

Brig. Gen. TIERNAN. Yes, very definitely. In fact, that is kind of what I meant to get across.

Capt. STEINBACH. Is that mainly in the combat environment?

Brig. Gen. TIERNAN. No. It's universal.

Capt. STEINBACH. The other area I would like to touch on briefly, in your remarks you discussed the scenario of 45 day confinement period where almost the whole time is spent in and out and very little attention to the rehabilitative process. Do you have a feel for what would be an adequate time involved in the rehabilitative process?

Brig. Gen. TIERNAN. Yes. I have had that feeling over the years and that is four months. I get in conversations with correction experts and point out to me this is the program we have laid out, this is what I should go through. It is just my experience. Four months seems to be reasonable and very difficult to achieve.

Capt. STEINBACH. Is that kind of expertise available to military judges and/or potential court members? Is that a common knowledge type thing?

Brig. Gen. TIERNAN. Sure it is. That's my feeling.

Capt. STEINBACH. Is there any kind of reason that the expertise can't be used either to input to a military judge regardless of whether he is a sentencing authority or instructing and sentencing authority? Is that the kind of thing you think the government should legitimate get before a sentencing authority?

Brig. Gen. TIERNAN. I would have no problems with that. It seems to be a logical thing if you do have a standard in your service, prescribe a course of instruction so to speak during the confinement stage of the trial in a reasonable time frame. Why should not the judge and the court members be aware of it?

Capt. STEINBACH. Thank you very much.

Capt. BYRNE. I have only one question, General, and it has to do with the discussion of wartime. I believe you testified that you had three years as Director of the Judge Advocate Division, and I believe you are fairly aware of the concerns of the Commandant at least as until the time you left as Director of the JA Division, isn't that so?

Brig. Gen. TIERNAN. Very much so.

Capt. BYRNE. I am going to kind of switch a little bit the area of interest, still within the military justice system but we are talking about wartime legislation. I would like to inquire if you are aware of whether or not the Commandant and other general officers in the Marine Corps, at the time you were Director of the JA Division, had concern concerning the situation of technical representatives at time of war, and whether or not they would favor, for example, putting a technical representative who was keeping up equipment used for Marine Corps operations under military orders enforceable under the UCMJ at those time when the President declared a national emergency?

Brig. Gen. TIERNAN. I think I would be inclined to favor that provision, and that goes back to a couple of cases I am familiar with in Vietnam where we had a Supreme Court case. I have forgotten the name of it, but in that instance I guess it was a merchant seaman was tried and convicted in a military court-martial for murder, and subsequently was reversed by the Supreme Court on the basis of jurisdiction. We could not exercise jurisdiction.

I hate to base everything on the situation in Vietnam, but there was no civilian jurisdiction over there. So if you did tech rep that committed an offense in that kind of territory, we couldn't try them and nobody could unless there was some way to extend jurisdiction. I am not really certain that that could be done, but for those reasons I am kind of inclined to favor something like that.

Capt. BYRNE. I am thinking, too, in terms of I don't know how many Marine Corps operation units rely upon technical representatives in order to function effectively in time of conflict and whether or not that is a concern with the Marine Corps, but in time of national emergency these tech reps might decide to discontinue their employment and seek safer havens.

Brig. Gen. TIERNAN. That I don't really have a feel for how extensive a problem that would be in the Marine Corps. I know that our technical units in aviation of course have their tech reps with them necessarily when they are in a conflict situation, and I am sure in other areas as well. But the issue of whether we need protection to keep the civilians from bailing out when the shooting starts, I really don't have a firm grip on. I would simply say it would be a protection to prevent that, but whether necessary or not I really don't know.

Capt. BYRNE. Thank you.

Mr. HONIGMAN. Good morning, General. My name is Stephen Honigman and I am in the private practice of law. General, let me start with your comments about the Court of Military Appeals and Article III jurisdiction. I believe you testified that it would be advantageous if there were one court to handle civil litigation matters relating to the military, and that would help to achieve consistency and predictability and so on. Can you elaborate upon the elements of civil litigation that you would commit to that single court?

Brig. Gen. TIERNAN. I think I am speaking primarily in terms of personnel litigation, things I get into civil court right now that are peculiar to the military such as the promotion system, separation system. Whereas it now stands, after exhaustion of administrative remedies within the service, then it goes to civil court for relief, and it would be in my mind much easier to cope with that situation were it located in one jurisdiction rather than 50 or whatever.

Mr. HONIGMAN. Would you also include civil litigation regarding military government contracts? For example, a dispute about performance of a shipbuilding contract?

Brig. Gen. TIERNAN. I really don't feel qualified to comment on that. I really can't say.

Mr. HONIGMAN. Let me turn to the suspension authority. Assuming that we retain, we the Congress, retains an option of an accused to be sentence by member, would you favor giving suspension authority to the member in addition to giving suspension authority to military judges when the judges judge a sentence?

Brig. Gen. TIERNAN. No, I don't think I would. My reasoning there is I think the less the members have, the better we are. I think the experience factor in most instances, in my experience, is so minimal that I can't react favorably to granting the members special authority.

Mr. HONIGMAN. Isn't, to some extent, your concern about whether the members will reach an appropriate result on a sentence, isn't there an unspoken concern about the quality of the advocacy on the part of counsel in apprising a member of the concerns, circumstances, principles that should go into a sentencing decision?

Would you have a different view if counsel were somehow of a higher quality of preparation or advocacy in that area?

Brig. Gen. TIERNAN. No. I think my feeling is for the opposite. I think our counsel is so good in that regard. I think particularly our defense counsel is very persuasive, and lacking experience factor on the part of the court membership, they are much more inclined to buy that approach than they are prosecution arguments for an appropriate sentence.

I might say, in a lot of instances our commands are equally responsible because they want to help their guy, and they are going to send somebody in there, the first sergeant, and he is going to get up and say he is a great guy. Do you want him back? Yeah, we want him back. He is super. And the guy committed a very serious offense and the prosecutor is scratching his head and moaning and groaning. So he comes out with a slap on the wrist. That is a problem as I see it.

Mr. HONIGMAN. Is that really a problem? If the evidence is that the guy has medals up and down and the first sergeant would have him back, can't you argue that the members have reached an appropriate sentence if they give due weight to that sort of testimony?

Brig. Gen. TIERNAN. My argument would be in this regard, and that would be in the experience factor. In special courts we are talking about—It is always a low experience factor when we talk about members. They are probably in their first command. They probably know very little about the service and they don't have a feel in most instances for the command much less the needs of the service.

As a result, being in their first experience they are really impressed by this scenario. The judge having sat through hundreds of these scenarios is much wiser to the weight to that type of testimony.

Mr. HONIGMAN. You mean he has heard it all before so he is likely to discount it?

Brig. Gen. TIERNAN. I wouldn't put it in those terms.

Mr. HONIGMAN. You testified that you view one of the weaknesses of the system is that the accused has too much leverage, and you said that two elements of that leverage are two of the issues we are considering, one the option to choose members or a judge in terms of who will impose the sentence, and the other is the six month ceiling on the special court.

The two suggestions you have are two changes which would disadvantage the accused in terms of his current situation. Do you think the system could work if there were a tradeoff in which the special court-martial jurisdiction were increased but the member sentencing option were retained?

Brig. Gen. TIERNAN. Would I—

Mr. HONIGMAN. Would you favor that kind of a tradeoff if a tradeoff had to be made?

Brig. Gen. TIERNAN. Yes. Anything that would strengthen the system is good.

Mr. HONIGMAN. I guess I have two more philosophical questions. You testified that you think we need a quick and savage process in wartime, and I wonder if you can describe that kind of justice system?

Brig. Gen. TIERNAN. You really leave me on the spot here. Savage may have been a poor choice.

Mr. HONIGMAN. That is why I want to give you a chance to—

Brig. Gen. TIERNAN. Stern perhaps would be a better term. To take the extreme example, you go into history and find a man was summarily shot in view of the troops and that got the message across, but that is not a good idea to do. That is one extreme, and I am sure you can go across the spectrum from there and come up with something that will provide a very real needed element, which is a deterrent to the other troops. And it is on the books, but to get a conviction, you know what is involved. It is not going to have any immediate affect on the forces on the seam.

My point is when I say stern, I mean something at that point and time that can be done that would impress upon the others in the command that this is not a good thing to do. The particularly machinery for that, I haven't really worked out in my mind.

Mr. HONIGMAN. I guess finally let me refer to some testimony we heard yesterday from a witness who in essence said that in his view the military justice system has suffered some grievous wounds in the past 15 years and those wounds may prove to be fatal.

I wonder if you can tell us whether you agree with that approach, and if you can discuss your view of the essential healthiness of the system?

Brig. Gen. TIERNAN. I think the system is very healthy. Of course, I am prejudice in that regard having worked in it almost 30 years ago. I think where we were then and where we are now. It has come a long way in a very positive evolution. I talked earlier and alluded to the sophistication of our commanders now in dealing with the system as opposed to 25 years ago. A lot of horror stories existed that I won't even bother going into. But, yes, the system is healthy. It has gone through several good evolutions and my thought is it can be improved still, and that is why I am in favor of these two issues.

With respect to its being healthy as such, it's great. I think it is working fantastically right now. I think the resources and the quality of the personnel are adequate to do a first class professional job. I am very positive about that aspect. I don't see where we have suffered any serious mortal wounds, but of course you have wounds as you go through the evolutionary process.

Mr. HONIGMAN. Thank you very much, General.

Col. RABY. Good to see you again, Sir.

One military witness testified before this Commission that he believed that maintenance and discipline must be very swift, especially while maintenance and military justice must be swift to support discipline, especially in times of war and the need to maintain combat readiness. His solution, however, was to achieve this to the ultimate degree that we should allow civilian courts to take over the punishment of all non-military offenses except maybe in the combat zone, and that we just retain the right to try all non-military offenses, and that that would thus free the commanders to work in a more effective manner without so many constitutional constraints.

What are your views regarding the need for military to maintain jurisdiction over the so-called non-military offenses, and can the military and non-military offense be neatly distinguished in all cases?

Brig. Gen. TIERNAN. I will answer your last question first and say no. I don't think you can neatly distinguish what is military and non-military.

I can't see the advantage of a situation where you send so-called common law crimes to a civilian tribunal. All the constitutional safeguards that exist in that system are very prevalent in our system. I can see where it would be much more cumbersome in many instances.

Once again, in a wartime scenario, a case in Chu Lai, how is the District Court in Hawaii going to handle that when you have to go with fire teams to get witnesses? I could go on and on, but I am very strongly opposed to that kind of a proposal. I think we should have as much jurisdiction as possible. I think I would like to see the Supreme Court reverse the O'Callahan situation.

Col. RABY. Have you in the years of your military experience ever had problems getting civilian jurisdiction interested in prosecuting military offenses, or offenses that occurred on the military installation?

Brig. Gen. TIERNAN. It was a horrendous problem during the Catlow/Russo days when we had the misconduct stigma, and trying to convince the U.S. Attorney that these criminals should be prosecuted was just like pulling teeth. They didn't want any part of it. In many, many instances the culprit concerned walked free.

Col. RABY. Have you ever seen cases where FBI or other civilian investigative jurisdictions were not overly enthusiastic about investigating offenses that occurred on a military installation that would fall within their jurisdiction normally?

Brig. Gen. TIERNAN. Absolutely. Understandably. They are overworked, too, and they think that is our business and they aren't that eager to get involved.

Col. RABY. In regard to the question of tenure, I noted at one point in your testimony you indicated when you were the Marine Corps' number one lawyer you had a couple of occasions where a judge's conduct was brought to your attention, but you did not feel it was appropriate for you to remove the judge. The one thing that caught my attention was you said you wouldn't touch that situation with a ten foot pole.

Did you feel you had enough—power is the wrong word—but did you feel that the perception that would occur had you acted to remove a judge that needed to be removed would be so severe that it hampered you in

any way from ever exercising that authority if you needed to? In other words, what I am getting at is do we need some guidelines for when we can remove judges? Are judges overly protected now perhaps?

Brig. Gen. TIERNAN. I think what we have now is adequate to handle that aspect. My alluding to a couple of instances, I think it was kind of tongue in cheek in the sense that the judge had done something that would not, in my opinion, constituted cause to remove him. He had done something that reflected poor judgment.

Col. RABY. Are you aware in your years of military experience of any occasion where a judge had been removed from office arbitrarily?

Brig. Gen. TIERNAN. No, I'm not, not arbitrarily, no.

Col. RABY. Are you—Have you ever had or aware of any military judge who has ever filed an IG complaint or written a Congressman or brought a lawsuit against any service for being arbitrarily and capriciously removed from office?

Brig. Gen. TIERNAN. Not within my knowledge within the Marine Corps.

Col. RABY. You gave a couple of examples where you disagreed with the sentences of court members. Would it be fair or not to say that there may have been occasions where a military judge rendered a sentence during your military career with which you didn't agree?

Brig. Gen. TIERNAN. I think certainly. It is a subjective thing of course.

Col. RABY. So aberrations can occur on both sides?

Brig. Gen. TIERNAN. Absolutely.

Col. RABY. Do you believe that court members can basically be trusted to follow their oaths of office regarding their responsibilities as to finding of sentence? I mean across the board basically in most cases?

Brig. Gen. TIERNAN. I would say yes, they follow their oaths of office. They are sincere in trying to do the correct thing.

Col. RABY. In response to Professor Ripple—on several occasions he has used examples where injustices that he perceived to happen during combat conditions. Do you believe that court members cannot be trusted to judge their fellow soldiers, the actions of their fellow soldiers under combat conditions? Can they be trusted or not trusted because of the uniqueness of the danger situation, that they would be too forgiving?

Brig. Gen. TIERNAN. I think I answered that question earlier. I am inclined to hold that view, yes.

Col. RABY. So do you—

Brig. Gen. TIERNAN. I cited those two cases earlier where members were acquitted.

Col. RABY. I knew those two cases, but I wanted to clarify whether you meant across the board the wide range of line officers, that you didn't feel that they could be trusted to, in a combat scenario, to judge the combat offenses of other soldiers?

Brig. Gen. TIERNAN. I agree.

Col. RABY. I take it inherent in your testimony is the fact that you do trust a military judge who may be in a combat zone, may be getting shelled or in an intensive war scenario may even have his position overrun and see his fellow lawyers, court reporters bayoneted, you would trust him?

Brig. Gen. TIERNAN. Yes, I do, in comparing the two. He is professionally trained to perform that function. I have a higher confidence level in him than I do the other.

Col. RABY. Professional training you feel will enable him to overcome the emotional situation and continue to judge and sentence in a mature manner.

Brig. Gen. TIERNAN. Let me answer that by just elaborating with a few facts concerning the two cases I referred to earlier. In both instances the PCM judge as a Marine Colonel who had seen extensive experience in combat in World War II, and there you are. That is your answer. He was aghast at the verdict. So your answer is yes. My answer is yes.

Col. RABY. Across the board, not just in combat, but across the board, do you believe lawyers are more capable of insuring the stern disciplinary system that you believe necessary than the line officer?

Brig. Gen. TIERNAN. I would have to answer that with a qualification. I would say definitely yes under our current personnel posture. We've got the experience factor, we've got the depth, and we've got highly qualified folks doing the business.

The caveat is when we first got into this in 1968 when we got the military judge we were not in this situation. We had youngsters who were fress out of law school. Because of the lack of numbers and the lack of depth in terms of grade we had to rely on them. In that instance of course I might have some reservations as opposed to our current situation where we have highly qualified and experienced folks.

Col. RABY. What is going to happen if we have this law on the books for judge alone sentencing and judge suspension powers and we go into a mobilization situation where we are calling up reservers, judge advocates, and lawyers out of law school, taking lawyers from every place because our ranks are swelled, our disciplinary rates based on the World War II scenario at least quadruple—that's probably an understatement—and we suddenly have this tremendous expansion, but the regular professional military lawyer is the exception and not the rule?

Brig. Gen. TIERNAN. I still think we would be better off than where we are now.

Col. RABY. That a young lawyer right out of law school might find himself as a judge would be better qualified to render a sentence than a line commander?

Brig. Gen. TIERNAN. I wouldn't say that. That is kind of loading the question. I would say than the type of officers who generally serve at the special court level in my experience.

Col. RABY. One thing that interested me was on the this Article III testimony of yours. I understand fully your position about—Well, if I understand it, your position would be Article III would be nice to have, but you are not really pushing it 100 percent. You don't feel as strongly about it as certain other things you've testified to, but one of the things you think would be nice would be if you had a central litigation point because of the time and cost, the complexity of bouncing all over.

I accept that, but I wonder if you took into consideration, and if you have, fine. If you have not, whether it would affect your views any, and that is under the current system where we are litigating administrative elimination action, challenges to the promotion system or otherwise, if we go into the District Court and we lose in that court, that decision's precedent technically only within that jurisdiction. We can litigate the same issue in another District Court and receive a favorable verdict, then maybe the issue ultimately can be dropped at the circuit, but we have several opportunities if we get a bad decision based on a civilian judge that doesn't fully understand the system. But if we have a central court like the Court of Military Appeals, we get one shot. If we get a bad decision, it would affect us, all the services across the board. The only jurisdiction we may have left to go to would be the Supreme Court, and with their work load we might never get there.

Would that be healthy?

Brig. Gen. TIERNAN. I think my response to that question is largely based on ignorance rather than knowledge of fact. My response to your question would be hopefully you have a level of expertise built up within this particular forum so that you wouldn't have to worry too much about a district judge making an uninformed decision based on lack of knowledge and so forth. You have a body of experts that know how the system works and how it functions that would eliminate this problem. That is the best I can do.

Col. RABY. Thank you.

Col. HEMINGWAY. Thank you very much for your time today and your long testimony.

Brig. Gen. TIERNAN. Thank you.

Col. HEMINGWAY. We will be in recess until 2:00 p.m.

(Whereupon, a lunch recess was taken.)

Col. HEMINGWAY. Our next witness is Brigadier General Edwards, former Assistant Navy Judge Advocate General.

STATEMENT OF BRIGADIER GENERAL RAYMOND W. EDWARDS, RETIRED, USMC, ASSISTANT NAVY TJAG FOR MILITARY LAW, BEFORE THE MILITARY JUSTICE ACT COMMISSION OF 1983, on AUGUST 11, 1984, in WASHINGTON, D.C.

Brig. Gen. EDWARDS. Good afternoon. I would like to thank the Commission for permitting me to testify before you. It is a great honor and privilege for me to testify and I sincerely hope that I might assist the Commission by giving my perspective accumulated from 31 years of experience with the uniform code of military justice. If you will indulge me for a few seconds, I will provide you with some of my background to assist you in evaluating my testimony. I joined the Marine Corps in March of 1953 and was commissioned in September 1953. I was given the military occupational specialty of an artillery officer and trained at the Army Artillery School at Fort Sill, Oklahoma. After this training, I was assigned to a Fleet Marine Force artillery unit in Japan where I came into contact with the original UCMJ and the original "red book" *Manual for Courts-Martial.*

As a junior officer, I tried and defended cases before special courts-martial and sat on courts-martial. I continued my career as an artillery officer having commanded three artillery organizations. In the mid 1960's, I attended law school at night and upon completion made my first tour in Vietnam as an artillery officer. I then got into the legal business just in time to see the transition caused by the Military Justice Acts of 1968 and 1969. As a lawyer I held all the usual jobs including Military Judge, Staff Judge Advocate for the 1st Marine Aircraft Wing while we were still engaged in combat in Vietnam, Staff Judge Advocate for two major installations, Appellate Court Judge at the Navy-Marine Corps Court of Military Review, and finally the Assistant Judge Advocate General of the Navy for Military Law until my retirement on the 1st of July this year.

It is from these 31 years of growing up as both a line officer and lawyer with the UCMJ as it evolved that I looked at the change of this commission. The matters under consideration are important. The recommendations of this Commission certainly will be influential in shaping military justice into the foreseeable future. As we shape military justice, we cannot lose sight of the fact that the commander is in a position where he is accountable for everything his command does or does not do whether it be an infantry battalion in combat, an air-

craft carrier in the Indian Ocean, a missile silo in Kansas, or a major installation, home to military families. As such, not only must the commander have a system to regulate the interpersonal relationships between the members of the military society that is a criminal justice system, but also a system to assist the instilling discipline in the command, so that when the command is called upon to perform its stated mission they will be trained and ready to accomplish the mission.

In short, as we examine each proposal that impacts on the military justice system, we must hold it up to the Litmus Test—"Will it assist the commander in fulfilling the mission of the command?"

Addressing the specific proposals. First, sentencing by military judge alone. I support this proposal in all cases except capital cases. Over the years we have developed a competent independent professional judiciary. The schooling given our judges, not only at the army, navy, and air force schools, but such educational institutions as the National Judicial College has given us judges who understand the theory of sentencing. The changes to the *Manual for Courts-Martial* enable the military judge to have made available to him matters concerning the personal make-up of the convicted service member. All in all, the time has come to give the sentencing to the military judge. This will give us more consistent and enlightened sentencing tailored to the accused and to the offense, taking into consideration the interests of society. This is a matter which is very important to the accused and to the command. This consistency in sentencing will assist the military justice system in maintaining the respect of the military society.

Second, the power to suspend. This proposal will not pass the Litmus Test. The power to suspend is an important tool for the commander. Contrary to the opinions of some reporters on the military society, the commander is more interested in effective utilization of manpower to assure mission effectiveness than he is in extracting a pound of flesh. The power to suspend, provides the commander with an effective tool to rehabilitate and utilize the convicted service member. The convening authority is responsible for good order and discipline. He knows a great deal about the accused and has available to him the resources necessary to evaluate and assist in the rehabilitation of likely candidates. In the military society, the military judge is not responsible for mission accomplishment, nor do the military judges have the tools available to them to monitor progress, a critical matter in the highly mobile military society. Suspension is the tool of a commander. Leave it to the man with the responsibility.

Third, extending the sentencing authority of the special court-martial to confinement at hard labor to one year. This proposal is worthy of support. First, it gives the special court-martial parity to civilian courts as a misdemeanor court with the one year sentence to confinement at hard labor. Second, many cases presently being referred to general courts-martial where realistically the sentence would be in the six to twelve month category would be referred to a special court-martial. From this would accrue benefits. The accused would be going to trial with a ceiling on his potential confinement and he would not be subject to the considerable disadvantages of a general court-martial conviction as opposed to a special court-martial conviction. To the commander there would be a considerable savings in time and manpower. We now have the procedural substantive safeguards in place in our special courts-martial system to protect the rights of the accused. On balance, this change will assist the commander.

Fourth, tenure for military judges. This is a proposal which has appeared on the scene apparently without positive rationale. Independent judiciaries have been established. Premature removal from the judiciary is not a known problem. If tenure means a normal duty assignment, then we already have tenure. If it means a career as a military judge, then we may well be short sighted.

The concept of developing a protected community within a community has disadvantages. The military judge must compete for promotions under DOPMA. If he is going to compete successfully, he will need varied assignments. We have in place a judiciary independent of command. Officers are assigned for normal tours and are not transferred early except for exigencies of the service. I fail to see how this change would assist the commander. I have no knowledge of a problem in this area which would cry out for this change. If it ain't broke, don't try to fix it. This now leads us to the last two proposals which concern on their fact the Court of Military Appeals. I am for a fair and equitable retirement system for the Court of Military Appeals. I think that it is extremely important that we attract knowledgeable, high quality persons to the Court of Military Appeals. A fair and equitable retirement system will go a long way in this recruiting effort. The form that the retirement system will take is a matter that experts in this area are better qualified to address than I am.

The last item under consideration is Article III court status for the Court of Military Appeals. This is a matter which requires great study. The issues are many. For instance, if the highest court is an Article III court, are the trial and intermediate appellate courts also Article III courts? If the Court of Military Appeals is an Article III court, what is its subject matter jurisdiction? I would ask—what is the need for Article III status? What are the advantages to accrue from Article III status? To date, no one has shown how such a change would assist the commander in carrying out his responsibilities. As-

suming that if it made the military justice system more responsive and efficient, it would assist the commander, I still have not heard how Article III status would improve the military justice system. It would appear that this proposal does not pass the Litmus Test.

Thank you once again for the opportunity to testify. I am confident that all proposed changes will be studied thoroughly and that those changes will improve the military justice system will be so recommended. An effective military justice system, responsive to the needs of the commander, is an absolute necessity if we are to have effective fighting forces. I would be glad to answer any questions.

Col. HEMINGWAY. General Edwards, if the military judge was not limited to the information that is now introduced in the mitigation and extenuation sentencing portion of the trial, if he were to have a pre-sentencing report similar to that used in federal court, would that in any way change your feeling about giving the power to suspend to trial judges?

Brig. Gen. EDWARDS. I don't believe that the pre-sentencing report as such will give him the tools that he needs to make that evaluation. As an example, the commander can ask of the sergeant is this guy worth saving, and the first sergeant pretty well knows whether he is worth saving or not. That is not going to be in the pretrial report, or pretrial information report. Even if it did give him a handle on which people should have their sentence suspended, he is going to be moving away—not transferred—but he is on to something else at that time, and he has left the commander sitting there with the bag so to speak.

I think it would be better to let the commander decide whether he wants the bag or not, whether he thinks that this man will make a better service member and can be rehabilitated. Quite frankly, one of the biggest problems a commander has is getting trained personnel, and if he has somebody that is trained, he would like to be able to keep him if he can if they can be an effective person in the military community.

So contrary to opinions of a lot of people, I have found over the years that the commanders are more than willing to give a person an opportunity to rehabilitate, sometimes for crimes which I have a hard time as a Staff Judge Advocate saying, are you sure we want to rehabilitate a person who has done the type of offense that he has done and bring him back in the society? I found commanders, if they have a trained person, they want permission to do this.

It gets back to the General Eisenhower statement before the hearings many, many years ago when he said, "I want the power to bring this guy back to duty because he may be the best soldier I've got in the outfit and that is what I need right now."

Col. HEMINGWAY. Your comments seem to be limited to the trial judge. Is it safe to assume you feel the same way about the Courts of Military Review having the power to suspend?

Brig. Gen. EDWARDS. Having sat on the Court of Military Review, I found that they are singularly inept to make a decision as to whether anybody should have their sentence suspended.

Col. HEMINGWAY. You mentioned in regard to the authority of a judge to sentence in all non-capital cases the need for consistency. The Air Force statistics indicate there is a very slight variance between sentence by court members and sentence by judges when the accused has elected to go to trial by judge alone, and I was wondering if in your experience you did have an inconsistency between the two sentencing functions?

Brig. Gen. EDWARDS. When I say consistency, I don't mean that if a person is an unauthorized absentee for six months, he gets X sentence and, therefore, he would be consistent. That is not what I mean by consistency. When I am talking about consistency I am saying that there is a range in there when that given offense, when you compare the accused with that offense and take in his good points or the points in aggravation, that you are going to get a range of sentence. I believe that that range would be more consistent if it is done by a military judge who has been trained how to sentence.

It has been my experience that what I call the wild pair sentence comes from members. That is either at the high side or the low side or both. Those ones that are on the outer limits of the curve come from the member court. I don't know why, but that is where they come from. I think if you bring it in to a tighter group, you have a consistency and, therefore, more confidence in the system.

Mr. SALTZBURG. General Edwards, my name is Steven Saltzburg and I teach at the University of Virginia. I want to ask a couple of questions on two subjects, on the Courts of Review first. Am I correct in assuming when you use that phrase singularly you are only referring to the power to suspend sentence?

Brig. Gen. EDWARDS. Yes, sir.

Mr. SALTZBURG. General, on the Court of Military Appeals and whether it ought to be an Article III court, or whether it ought to remain as it now is constituted under Article I, let me ask you whether you think when Congress first adopted the statute that provided for a Court of Military Appeals such as we now have, do you think that they were concerned with supporting the commander?

Brig. Gen. EDWARDS. At the time that they came up with the Article I court they were looking for civilian review. I don't necessarily think that that means they weren't supporting the commander. They just felt there

should be civilian overview of the system as a result of the things that occurred during the second World War.

Mr. SALTZBURG. Would the following statement be fair or unfair in your view? Following both World Wars, the 1st and the 2nd, and the problems that have come to Congress' attention that in providing for a Court of Military Appeals such as we now have, would it be fair to say that Congress sought to enhance the stature of military justice by providing a civilian review as the Court of Military Appeals provides for, and at the same time a body that was sensitive to the needs for military discipline and for the military to carry out its mission?

Brig. Gen. EDWARDS. I think that is a fair statement.

Mr. SALTZBURG. Is it your view that making the Court of Military Appeals an Article III court would be inconsistent with enhancing the quality and perhaps the perception of the court as an independent court, thereby promoting justice and at the same time by doing that assisting the military in carrying out its mission?

Brig. Gen. EDWARDS. First, I have a little difficulty with the other side of what you are saying which is that they are not an independent court today. I personally find them to be an extremely independent court and I don't understand that part of it. In other words, they are independent today.

What is it about Article III that is going to put a halo around them that isn't there today for them, for the Court of Claims, these types of courts?

Mr. SALTZBURG. That is a very important question. Do I understand you to support the idea of an independent Court of Military Appeals?

Brig. Gen. EDWARDS. I believe they are independent.

Mr. SALTZBURG. Should they be?

Brig. Gen. EDWARDS. I think all courts should be independent.

Mr. SALTZBURG. In your past experience on the basis of what you know about the Court of Military Appeals, can you think of any other court in the federal system in which the President has the power to possibly influence the actions of a judge to reappointment and assignment of the Chief Judgeship, any other court where the President can exercise that authority as he can with the Court of Military Appeals?

Brig. Gen. EDWARDS. I am not aware of any.

Mr. SALTZBURG. On the basis of your knowledge and experience, do you believe that in fact Presidents have selected Chief Judges when they have had the opportunity to do so on the basis of dissatisfaction with opinions coming from the Court of Military Appeals?

Brig. Gen. EDWARDS. I don't believe that that was the reason for that. The last time it occurred I think it was just politics. There was a new group in there and they appointed one of their guys.

Mr. SALTZBURG. The last question is would you agree with me there is a possibility for pressure of one sort or another to reappointment and for reassignment of the Chief Judgeship that generally doesn't exist in other courts provided it is independent?

Brig. Gen. EDWARDS. There is a potential there very easily corrected by legislation which just tells them you can't do it.

Mr. STERRITT. My name is Christopher Sterritt and I am from the Court of Military Appeals. I have a question in regard to your Litmus Test that you posited at the beginning of your testimony. What role does the confidence of the American soldier in the justice system to which he is subject to play in the Litmus Test?

Brig. Gen. EDWARDS. Well, if the system is not responsive, if the commander is not responsive so to speak, then you have a poor leadership situation. No responsible commander is going to do things which will undermine confidence in the military justice system because the military justice system is the tool by which—it is the only tool he has to regulate the interpersonal relationships within the society, or the relationships between members of society and the organization itself. So he isn't going to do anything to undermine that. Some may have on occasions done something, but they are not responsible commanders and they are no longer commanders. I think our system today has the safeguards, both procedural and substantive in them, to protect the accused from that type of thing.

Mr. STERRITT. You are starting then at the baseline of the system we have and then assessing the changes?

Brig. Gen. EDWARDS. That's right.

Mr. STERRITT. My second question, in thinking about these changes, suggested changes, what consideration do you believe should be given to the public at large's perception of military justice and confidence in the system? Does it play a major role?

Brig. Gen. EDWARDS. Once again, it can't do anything but because you are talking about perceptions, what are the things that would cause these perceptions to be better or worse?

Mr. STERRITT. For example, we adopted a change on the basis that assists a commander in accomplishing his mission, are we not opening ourselves up to criticism from the public sector on the fairness of the system? Do you see a conflict?

Brig. Gen. EDWARDS. I don't see a conflict there that you do now. As an example, if you decided to recommend that flogging be put back in again, this type of thing, I don't think that flogging can pass the Litmus Test by assisting the commander. A responsible commander doesn't need flogging.

Mr. STERRITT. Thank you.

Mr. RIPPLE. For the record my name is Kenneth Ripple, I am a Professor of Law at the University of Notre Dame. General Edwards, I would like to explore several of these areas with you briefly, and I would like to do it by trying to capsulize in each case a little bit of the testimony we have heard from other witnesses and asking you to react to that rather than give you a very pointed question, and then let you structure the answer as you care to.

First of all, with respect to the military judge alone and the sentencing process. One of the matters that we have discussed in the Commission and with other witnesses is whether or not there are situations where the local military community, through a court-martial composed of members, in effect under-sentences? We have posited to possible situations, the possibility of committing United States forces in a foreign country where the military panel appears to consider the life of a foreign not worth as much as the life of an American.

The other one that has been posited in the record is the situation of a civilian on an American military base of perhaps less than reputable virtue of whose life is also considered by a military jury as less than comparable to the worth of someone else. Have you seen such cases? Is such a possibility a real one if we indeed permit military jurers to sentence?

Brig. Gen. EDWARDS. Yes, I have, and these are what I call the wild hair cases. It is a form of jury nullification which is practiced in the courts all the time, that the defense appeals to the court, and you see sentences which I don't feel are good for the society and that type situation occurs.

Mr. RIPPLE. Could you describe for us again with respect to the issue of military judge alone, could you describe to us briefly the type of training the Naval Judge Advocate about to be assigned general court-martial military judge duties undergoes? What types of opportunities does he have to learn about the sentencing process?

Brig. Gen. EDWARDS. Everyone who is assigned to the judiciary from the Naval Service either goes to the Military Judges Course at the Army JAG School, or the Military Judges Course at the Naval Justice School in Newport, Rhode Island. In each of these courses there is consideration given to teaching the theories of sentencing, why you sentence and why you don't. There are sentencing seminars where sentences are discussed. In addition to that, periodically there will be sentencing seminars in parts of the country where the judges are brought together and experts are brought in and the judges once more get into the subject of sentencing, how you determine what is an appropriate sentence.

Mr. RIPPLE. How frequently do these seminars involve interraction with civil judges who also have the responsibility of sentencing and if that is frequent, do you consider that to be a worthwhile experience?

Brig. Gen. EDWARDS. I would say probably annually or bi-annually they are exposed to this type of sentencing institute where there are civilian judges that come to it. A certain percentage of our judges are sent to the National Judicial College at Reno, Nevada, and they are involved with the civilian community as to the reasons for sentencing.

Mr. RIPPLE. Moving on to the next subject, the power to suspend a sentence. One of the suggestions which has been made in our colloque with other witnesses has been the possibility, recognizing the prerogative of the commander and wanting to do something about preserving that, and at the same time recognizing as one of the witnesses did this morning the sometimes lack of sentencing suspension has seemed to put on military judges. Perhaps we could have a system where a military judge did have the right to suspend a sentence, but indeed the suspension was subject to ratification by the commanding officer or the convening authority in effect to reverse the current presumption. Presumption would be more on the convening authority to say I am not going to allow it than to say I am going to grant it as he currently does?

Brig. Gen. EDWARDS. I see two problems with that, the first one being the perception problem, that if the commander did not do it, it would appear that he some type of ogre, and that may not necessarily be the reason that he did it. He just may have had more knowledge of the man than the military judge did.

The second problem I have is that I think the eventual course of judicial review in that type of situation will be—it will turn into abusive discretion. Did the judge use his discretion when he suspended the sentence? Once you get into this standard, which I am sure that this would probably go to, the standard is very, very high. You put the commander in a position where he is going to have to give rationale for any time that he did not suspend a sentence. Even after he gave the rationale, because it is abusive discretion, as reasonable men differ and as reasonable men differ, the judge's decision is going to be the one that sticks.

Mr. RIPPLE. Moving on to the increasing the possible punishment of the special court-martial to one year. We have heard a good deal of conflicting testimony on this, and one argument against it was as follows: In some of the services, although not all, the special court-martial is used to punish the routine unauthorized absence offense, for the repeated unauthorized absence offense where further retention in the military is just not a feasible possibility, rehabilitation really isn't in the cards. The argument continues that the increase in punishment to twelve

months as opposed to six months will simply unnecessarily increase the bill which the American public has to pay for the brig time this person goes through before being discharged anyway. That one might as well discharge at an earlier point. Any deterrent effect on the troops can be made without paying a bill for four or five months in confinement.

I would appreciate getting your reaction to that line of argumentation.

Brig. Gen. EDWARDS. I think that the argument can be made, but I think that the other side of it is that there are a lot of offenses where the bill to be paid is probably between the six and twelve months and there is no price tag on justice. If justice cried out that the sentence be in that area, then I think by raising the forum of the special court-martial to twelve months will be able to take care of those sentences that are in there without the disadvantages so to speak of the general court-martial.

As I said in my testimony, such as branding the man with a bad conduct discharge with a general court-martial as opposed to special court-martial, and the other time you are saving the manpower and time.

Mr. RIPPLE. With respect to the so-called tenure question, assuming by tenure we mean a guaranteed tour and nothing more than that and order the military judge to Camp Pendleton for a three year tour and he stays in that job for three years, could in your judgement the Navy and Marine Corps live with an arrangement as follows: Where the statute required the service secretary to promulgate regulations requiring that before such a judge was short toured that a record of some sort be made, the reasons be stated for that removal, and that the removal be okayed by someone within the military establishment on the record. In other words, there be in fact an independent determination, that there be specified reason, and that there is good cause to remove him before he did?

Brig. Gen. EDWARDS. I think so. The first part of that I have no difficulty with. The second part of it, when you get to somebody looks at it and reviews it, I have a little difficulty with somebody.

Mr. RIPPLE. That is my next question. It has been suggested that the person ought to be the Judge Advocate General to the service. The counterthrust to that is it ought not to be the Judge Advocate General because he probably can exercise as much command influence over that military judge's career as anybody can in the military. How would you feel about, for instance, requiring that someone at the assistant secretary level would approve the short tour of a military judge?

Brig. Gen. EDWARDS. I think I could live with that.

Mr. RIPPLE. One last question if I may, Mr. Chairman. With respect to Article III, the status for the United States Court of Military Appeals, I think these are some of the arguments that are made and I wonder if I could get your reaction to them.

First of all, it would involve life tenure and, therefore, any judicial independence which normally comes with life tenure. Secondly, it would make it possible for the judges of the United States Court of Military Appeals to sit by designation on other courts, and, therefore, broaden their judicial experience. Thirdly, since they would be constitutional members it would in fact insulate them from any possible overreaching by the executive branch.

Those are three arguments one hears with respect to that. I would appreciate getting your reaction as to how you feel with respect to each.

Brig. Gen. EDWARDS. What was the first one again?

Mr. RIPPLE. Life tenure.

Brig. Gen. EDWARDS. There are many reporters that say that life tenure has a lot of disadvantages in our court system. I've heard the stories of the Federal District Judges that felt after they had been appointed they had been anointed and that creates a problem.

The second thing is in the systems which have life tenure, a person is appointed from that society to a judge in that society. In our system people that come to the Court of Military Appeals don't come from that society. If they did come from it, it was many, many years ago in their day to day law practice if you will, and their experience has been with the civilian society. One of the major problems when a new judge comes on to the Court of Military Appeals is what I call the spin-up time, until they understand what a battalion is. Judges sometimes conjure up the idea that that is three or four people, or maybe it is three or four thousand people. They have no idea of what it is.

One of the most difficult problems I also saw in my duties was as the officer in charge of the Navy-Marine Corps appellate activity, having responsibility for the counsel who practiced before the court. One of the major problems that we had is arguing the social reasons why this decision should go one way or the other; that is what is it in this military society that calls out and says you shouldn't change it, or you should change it? It is very difficult because this new person who comes in from out in the civilian society in a sense has to relearn the necessity for discipline.

When it comes time to go to war, it is too late for discipline. It is too late to train when you are on your way up the hill. It is the training they get in a peacetime environment if you will, or training camps, or out in the fields, that carries over so when the time comes for combat when you need immediate response to the orders that are given by the commander, that they do it then. In peacetime we can afford to have people debating if you will and say, gee, I don't think I should go up there because it is hard going up that hill. And we have time

enough that we can have NJP or have a court-martial, whatever it is, for refusal to carry out that order. When we get to war it is too late. We have to acquaint the new court members with why it is that we need good order and discipline in this spin-up period. Once that spin-up period is over, then it is so easy so to speak.

What I am saying is these people coming out of a different society, I have a little bit of difficulty with the life tenure on that. Maybe one of them won't spin-up.

Now the second part.

Mr. RIPPLE. The possibility of the judges in the United States Court of Military Appeals having more opportunity to interreact with the rest of the federal judiciary and having the judiciary experience increased by the opportunity to sit on other courts of appeals?

Brig. Gen. EDWARDS. I think it would be very advantageous for them. I think that would cause an inducement for some people, highly qualified people, to come in the court that maybe otherwise would not necessarily come on the court. That is a good recruiting gimic.

Mr. RIPPLE. And lastly, that they would have the protection of the rest of the judiciary, that they would be part of the third branch of the government, and in fact the rest of the third branch of the government would stand up for them in terms of judicial protection, judicial independence?

Brig. Gen. EDWARDS. I think that is fair. The question is is it working now and what is the potential for it breaking.

Mr. RIPPLE. Thank you, General.

Col. RABY. I am Colonel Raby, former Chief of Criminal Law for the Judge Advocate General, Department of the Army and currently Senior Judge, Court of Military Review.

Judge in clarity, the reason that the Court of Military Review should not be vested with suspension of sentence power that several witnesses have testified to is by the time they get the case it is so old that really they cannot apply that particular remedy in a meaningful way. Plus often the records contain a small amount of information that they can't really apply it in a knowledgeable fashion. What was your basis for concluding that the court should not have this authority?

Brig. Gen. EDWARDS. That is one of them right there. Of course, if you are a long-term personnel, I don't think that you necessarily fall under the clemency rule, whatever he may be, and that is why we have in place a system in each of the services for clemency and parole board. It is that kind of a duplication they have available to them a lot more information.

The last thing, and the thing I think you are really asking me about is what does the member of the Court of Military Review base his suspension on? The problem is that the record that they get is not good for that type of activity, and I think the cases that I have seen where court members wanted to have the ability to suspend a sentence are those cases where it would feel good to do it. It is one where they think it would feel good to do it. It is easy to do that when you are in Washington, D.C. and you are 7,000 miles away from the command where the offense occurred. You don't know what it was. And my theory has been, and I think it is the theory in sentencing and review of sentences at the appellate court level, is that you should not overrule the sense of the society where the sentence was awarded unless you have overwhelming reason why. That is what I think. Given this power, there will be a tendency to utilize it because it feels good.

Col. RABY. Several witnesses testified on this issue on two predominate type of themes that occurred underpinning that testimony, and I wonder if you fit in either of these categories or somewhere inbetween. Some people that have testified view suspension purely as a clemency; that is they consider that the question of an appropriate sentence should be determined by the sentencing body and can be determined by the sentencing body without using a suspended sentence, and only after you have arrived at an appropriate sentence should the clemency aspect be introduced, and only at that point and time is suspension the appropriate remedy.

Do you feel that it would not be appropriate to initially judge a suspended sentence?

Brig. Gen. EDWARDS. No. I think the original sentence should be an appropriate sentence, and then the suspension aspect comes on later, not necessarily just for clemency but also for the rehabilitative—the necessity for the rehabilitation if you will. This may be the only crypto technician that you have and there may be an absolute necessity that he be rehabilitated if there is any way at all.

Col. RABY. Statistically who do you believe currently are imposing confinement most of the time in general and special courts-martial they sit on, court members or military judges?

Brig. Gen. EDWARDS. I have no statistics in front of me.

Col. RABY. Do you have a feeling as to who consistently is imposing the sentences that include punitive discharge and confinement most or not, or do you think there is such a trait?

Brig. Gen. EDWARDS. The answer is obvious. In the Naval service it would have to be the military judge because the majority of the cases go military judge alone.

Col. RABY. I was thinking more in terms of percentage wise of those cases they handle, and we can find that out in a different manner.

Do you believe or do you not believe that court-martial members, line officers basically, can be trusted to fulfill their judicial responsibilities in an honest manner?

Brig. Gen. EDWARDS. Yes, I do.

Col. RABY. Do you believe basically across the board that in combat and non-combat circumstances, after they have convicted an individual, that court-martial members will act in accordance with their oath and will honestly try to render a sentence that they believe appropriate for the offense?

Brig. Gen. EDWARDS. Yes, I do. I believe they do.

Col. RABY. So you do not perceive the court-martial members, the line officers, can't be trusted to perform their responsibilities in a judicial manner, rather you question whether they have had the training to provide the best sentence for the result?

Brig. Gen. EDWARDS. That is correct. I think they have as hard a time sentencing service members as any judge has who sentences someone who comes before him. What I question is whether they have the—or whether we can afford to give them the training which is necessary to achieve consistent sentence and the knowledge to sentence for the reasons that we do sentence, the serious sentences.

Col. RABY. You would disagree with anyone that espoused a lack of integrity or a distrust for their honest efforts in fulfilling their judicial responsibilities?

Brig. Gen. EDWARDS. Yes, sir. It has been my experience that is the toughest part of the job.

Col. RABY. We have had witnesses that have come forth that have raised these type of questions. Some have indicated they have great concern with having the court members sit adjudicating findings without also having sentence responsibility for one or two reasons. Some of those witnesses perceive that once the weight of following through and actually imposing a sentence on an individual was lifted from those court members' shoulders, that it could cause them in close cases where they felt there was a lot of mitigation to acquit because they no longer could control a sentence, or some other witnesses have expressed the opposite view and said, well, in those cases once the burden is relieved from their shoulders, we could have a clear danger that no longer being faced with that responsibility they will be more prone to convict and just allow the greater moral dilemma to pass on someone else's shoulders, and either way it may result in the accused being convicted or acquited when he should not be.

Do you see any possibility for either one of these scenarios?

Brig. Gen. EDWARDS. It certainly is possible. We have jury nullification today. That is the same thing. That is what you are talking about under a different system.

Col. RABY. Earlier in your testimony you mentioned those wild hair sentences, when you had seen them more frequently originate from court members, and you described those as those that are inordinately high and those that are inordinately low in your perception based on the offenses and the circumstances thereof. Now we can correct the inordinately high ones it seems through convening authority's actions, Staff Judge Advocate's advice and so forth. So what we are left with is the inability to correct the inordinately low sentence when we have these wild hair sentences.

Is that the basic problem as you see it, sir?

Brig. Gen. EDWARDS. Yes. I think the system will not receive the confidence and respect it should when it has this type of situation.

Col. RABY. You testified the commander is responsible for all he does or does not do, and certainly the individual we all look to. When we get these inordinately low sentences that cannot be corrected, who is the vastly affected by it, the lawyer or the justice system per se or the command and the commander or the accused?

Brig. Gen. EDWARDS. Who is the most affected? Society.

Col. RABY. So you would say that it is not then—that it is society across the board and not command discipline that is necessarily most adversely affected, or do you support the two? I want to be sure of this.

Brig. Gen. EDWARDS. Many times it depends upon the offense. For instance, larceny as opposed to disobedience of an order. If it is disobedience of order, obviously the initial suffer so to speak is the command. I believe disobedience of orders makes the whole society suffer.

If you get a wild hair sentence in a larceny type case, then it is probably society that loses first on that, the sentencing authority that believes the story I was just trying to teach him a lesson.

Col. RABY. In time of war experience factor shows that military type offenses occur with greater frequency than those that are tried at much higher rate than they are during peacetime. Is that not true?

Brig. Gen. EDWARDS. I have some statistics that I have made over the years. I don't have them with me, which indicate that a couple three years right after the completion of a war that you have a higher incident rate than what you did during wartime.

Col. RABY. Is that attributed to during war maybe things are happening so fast that we can't use the judicial system to its fullest, but after the war we are trying to have time to return back to what we would say normal operating peacetime conditions? We have had our ranks swollen and we have a bunch of people in there that—

Brig. Gen. EDWARDS. Yes. That is certainly a potential. I think we all saw that in the '73, '76 time frame, that that is a problem.

Col. RABY. Our more severe military offenses such as failure to engage and maybe spying. We haven't tried one of those in years. But failure to engage I am thinking of Vietnam; desertion to avoid hazardous duty. Those are only triggered in wartime conditions, are they not?

Brig. Gen. EDWARDS. By definition.

Col. RABY. So we have a certain amount of purely military offenses that are unique to war conditions?

Brig. Gen. EDWARDS. Yet, each one of those is a peacetime offense. You just put the aggravation onto it that you engage with the enemy or something of this nature. Each one of those, the equivalent of the offense, is the same whether it was peace or war.

Col. RABY. Switching gears and going to another topic, we were talking about Article III courts and tenure, and during the course of that you stated your position for how you felt about both of those. Then you did say you believed, however, that all courts should be independent, they should not be influenced in their judicial function by outside interference?

Brig. Gen. EDWARDS. That is true, which is not inconsistent with what I said before.

Col. RABY. One thing that concerns me in this area is of course the Court of Military Appeals' independence. Do you believe if the court becomes too independent that that would give it a blank check to write bad law? Some witnesses have so testified, or do you believe the court by its very nature would be self-policed?

Brig. Gen. EDWARDS. Bad law comes from bad cases. Whether they are independent or not, I believe they would be self-policing. I don't think they are going to go on a vendetta just to make bad law.

Col. RABY. Correct me on this hypothetical in case I am wrong, Chris. I believe that right now the Court of Military Appeals does not have final control over its own budget, and its budget approval is vested in the Department of Defense.

Mr. STERRITT. That is not quite accurate as I understand, and this is just recollection from past years. There was some controversy over the submission of the budget and what effect whoever it was submitted to, I think DOD, could do about it. As I recall, a resolution was passed in one of the houses that said DOD wasn't suppose to do anything other than pass it on. I may be wrong in that, but that is my recollection.

Mr. HONIGMAN. What happened in the Ward/Monday case?

Mr. STERRITT. Monday won.

Mr. HONIGMAN. Didn't the court construe that question as to the authority?

Mr. STERRITT. I don't know what that court decision said about that matter, but I know there was a resolution in one of the houses with respect to the issue you are talking about to the effect that DOD was to pass on the budget.

Col. RABY. Does it help the court to achieve judicial independence if the judges do in fact have control over their own budgeting, if they do have a fair and equitable retirement system independent of their participation, or the results of their participation on the bench, and if they do have at least some minimum guaranteed term of office does that assist judicial independence, or does it not make any meaning for contribution?

Brig. Gen. EDWARDS. If you are saying as elimination of any potential or influence over the court, if it is removed will they be more independent? I would have to say yes. They would have the capability of being more independent.

Col. RABY. Some witnesses have indicated that perhaps the Court of Military Appeals, because it handles unique questions, that is questions that deal directly with the preservation of military discipline, which in turn substantially impact on the combat readiness of the national security of the nation, that perhaps they should not be independent like Article III courts and should be subject to some sort of executive control because of the serious and unique type of decision with which they are dealing. Do you subscribe to that type of theory or not?

Brig. Gen. EDWARDS. If you believe that they are capable of making the decision which would have grave impact on the ability of the armed forces to fulfill their mission for the defense of the nation, then you would have to agree there had to be some form of ultimate control so to speak over them rather than removal for malfeasance or something of this nature, insanity if you will, something of this nature. My problem is I have a little bit of difficulty in finding that case where they are going to make a decision which will inhibit the ability of the armed forces in the United States to carry out their own assigned mission. Maybe you can give me a hypothetical on one of those.

Mr. STERRITT. Under the Constitution, who is empowered to make that decision as to whether the commander in chief is or is not interfered with by a court-martial system?

Brig. Gen. EDWARDS. Whether the commander in chief is what?

Mr. STERRITT. In the performance of his duties is being interfered with to a prejudicial extent by some either Court of Military Appeals or some other part of the court-martial system?

Brig. Gen. EDWARDS. As it is set up now, it is inside the executive branch. I guess the commander in chief.

Mr. STERRITT. Doesn't the Constitution say that Congress has the power to make the rules for regulation discipline in the armed forces?

Brig. Gen. EDWARDS. Yes.

Mr. STERRITT. I am trying to distinguish who would make the case in a hypothetical you made. Let's say the problem does exist. Where would that case be litigated? Where would the decision be made that that situation exists and what to do about it?

Col. RABY. That is exactly why I am asking the question because I would like to see. Various witnesses have testified to various philosophies I think how they view the court's role and how the court really stands and should stand in relationship to the military community is an independent question.

Brig. Gen. EDWARDS. It is a very valid question. The simply thing that I came up with, you have a judge that somebody feels is insane. Who removes him?

Mr. HONIGMAN. Isn't the answer to your question in the Youngstown case?

Mr. SALTZBURG. There is no answer to that question. General, with all due respect, if you could answer that one, I would go with you and we would make a million bucks. No one in the country knows the answer to that question. That is the basic question we struggle with every day.

Col. RABY. It wasn't that I expected a solution as much as I tried to find out more about your underlying philosophy, judicial philosophy in these areas and help shed light on the basis for some of the recommendations.

I will just wrap it up this way. You have testified, and I think most articulately, that when we are talking about war we have to have military personnel who have been thoroughly trained and the desire and motivation to respond immediately to lawful orders must have been thoroughly inclucated in them, because when we reach that moment of truth it is then too late; that we have to have our officer corps and our enlisted personnel thoroughly disciplined and ready for and obedience to those tasks which are given to achieve our national objective. As I understand your testimony, you have decided the military justice system and the need for it as being in direct support of the combat readiness and discipline of our armed forces. Is that not your philosophy?

Brig. Gen. EDWARDS. Yes.

Col. RABY. We have had several commanders from various services come in and testify before this Commission that they, too, viewed the military justice system as having that function. But they have indicated to us that the military justice system achieves these results, the most important result, which is why we have the separate system, not solely or primarily necessarily by the severity of the sentences, or by the uniformity of the sentences, but by the fact that commanders are involved in the system, that they are part of the system, and that the military personnel that they lead perceive that they are part of the system and see them participating in it. It is this participation which helps to give credence to their authority, and helps support them in time of crises more than the results.

Do you believe these commanders are wrong in their analysis of that role of the military justice?

Brig. Gen. EDWARDS. No. I support that.

Mr. HONIGMAN. My name is Stephen Honigman and I am in the private practice of law. A number of witnesses have testified that they see an advantage in increasing the number of members of the Court of Military Appeals from three to five judges. I wonder if you could give us your views on that question?

Brig. Gen. EDWARDS. I support that.

Mr. HONIGMAN. Can you tell us why?

Brig. Gen. EDWARDS. The Court of Military Appeals is highly susceptable to change if you will upon the appointment of one new member to the court. In the past ten or fifteen years we have seen quite a few changes in the composition of the membership of the Court of Military Appeals, and people have commented about this, that you see this big change and you get a philosophical change one way, and you get a philosophical change another way. I don't find the philosophical changes over the years nearly as troublesome as the period of time that it takes to get a new member appointed to it and to get the new member spun-up to the point where he is a working member of the court as such.

I think that if you had a five member court, that you would have less impact caused by somebody leaving the court than by somebody coming on. What I am saying is the impact isn't the person coming on. The impact is the person leaving the court, and if you have five members, they would be able to continue on and continue to get these decisions out. I would be willing to bet right now that there is a backlog over in the court which can't be resolved because there are two people who have opposite views and we need that third person so to speak to come on and break the deadlock.

So I think if we had five we would have a continum type court as opposed to what we have now which is a (inaudible.)

Mr. HONIGMAN. General, are there any particular changes that you would recommend should be made in the uniform code apart from the changes that we are considering here?

Brig. Gen. EDWARDS. I think that the role of the commander, if there is a place where he needs to have more participation, it is in the non-judicial punishment area. There are a lot of schemes as to how he could have more participation. For example, in the right to refuse

non-judicial punishment in most services except the naval service aboard ship.

There are schemes that could be used to eliminate the right to refuse, but still have the commander involved in it. As an example, I believe the Israeli system has a system has a system where if the man refuses the right to NJP, it can be kicked over laterally to another commander so that we still have the timeliness of it. Some system of this nature, a pick-up system, a kick-over system so that the man is still subjected to the non-judicial punishment which is quick, efficient, and doesn't hurt him nearly as much as he thinks it does, and we could have that system without having him subjected to the commander who he feels has it in for him so to speak. This is one area. The right to refuse I think would be picked up in the NJP area. A modest form of incarceration as opposed to restriction. Restriction is probably one of the toughest punishments there is. Restriction for long periods of time is almost a guarantee that that man will get in more trouble. The more humane thing that could have been done for him was to put him in carceration for maybe three to five days as opposed to giving him 30 days of restriction, because in those three to five days he may well have found the light to reform. But in those 30 days of restriction all he is doing is simmering inside because he can't get outside that gate, and that is why I say that maybe some of these are considered to be tougher forms of punishment are actually an easier and better form of punishment. So I would go for the commander having the ability to give modest periods of incarceration as opposed to long periods of restriction.

Mr. HONIGMAN. That is an insight I hadn't really focused upon.

Let me turn to the question of judge alone sentencing for a moment. What is the incidence in the Marine Corps of member sentencing? Does it happen often these days?

Brig. Gen. EDWARDS. Member sentencing? This is strictly from memory and I don't have the latest statistics, but I think it runs around 10 to 15 percent.

Mr. HONIGMAN. And the incidence of what you call wild hair sentences by members, is that a frequent occurrence?

Brig. Gen. EDWARDS. I don't know the frequency of it, but when it occurs it is usually because of a members court.

Mr. HONIGMAN. But would it be fair to say that the wild hair sentence might be 10 percent of the members court or more than that?

Brig. Gen. EDWARDS. I don't want to answer that because I really don't know. I don't have a feel for it. The wild hair sentence, you don't keep track of them. All you do is you know when they jump up and hit you. You review the sentence and you say how could they have awarded that sentence to that man? I have to say fortunately when you see that I think the commander has been very responsible in knocking it down.

Mr. HONIGMAN. Let's assume just for the sake of the argument that you yourself at some point in your career were faced with charges and you were put on trial. Would you have wanted to have the option of selecting member sentencing or judge alone sentencing from your perspective as an accused?

Brig. Gen. EDWARDS. I guess that depends on what the offense is. If I was there for (inaudible) I would want member sentencing so I could appeal to them. That is from my standpoint as an individual. My standpoint as an individual is, A, not to get convicted, and, B, to have as least a sentence as is humanly possible. So, sure, from that standpoint I know what I want.

Mr. HONIGMAN. You want to have at least the right to make a choice, the right to choose members or judge alone?

Brig. Gen. EDWARDS. Sure. I am not saying that is good for society, but that is good for Russ.

Mr. HONIGMAN. I guess the point I am getting at is this. Grant it that an accused would almost invariably want the option, leaving aside which option he would choose, he would want that option. Granting if we go to military judge only sentencing we are taking that option away, and that may well be perceived as a move that disadvantages an accused. It takes away an option that he would like to have.

Is this incident of disproportionate ununiformed wild hair incidences so high as to make it worthwhile taking that option away? Are you paying a larger cost than the benefits you are receiving?

Brig. Gen. EDWARDS. Inherent in your question is the assumption that it isn't better for society to have uniform sentencing, or appropriate sentencing.

Mr. HONIGMAN. I guess inherent in my question is if we have a situation with 15 percent of the trials have members that judge sentence, and the incidence of wildly askewed sentences is a small proportion of that 15 percent, are you not making a very significant change in the way the system is perceived to cure what may be one percent of the sentences that may have a problem attached to it?

Brig. Gen. EDWARDS. I don't think that you are making as significant a change, and weighing off on that is what are you going to achieve through this. It is my contention that you will receive uniform, more appropriate sentences because in the sentence today there is still askew in there and that is the judge knows that if he gives what he feels are appropriate sentences in many cases, and if the defense counsel start getting a book on him, that they may be able to beat that by going mem-

bers alone. Then the judge starts reducing his sentences. Why does he start reducing his sentences? Because it is easier to try cases without members, and so it is a form of legal maneuvering if you will to play that game. I am not so sure—I feel that society will be better off if we can have uniform appropriate sentences and eliminate anything which might run counter to that.

Mr. HONIGMAN. General, you are not the first witness to make that point. I guess there is something that troubles me about it.

You testified that the military judges receive extensive training in sentencing practices, theories, some of them attended judicial college, and they take an oath of office. Are you really suggesting that merely for the sake of convenience a military judge as a regular matter will judge sentences that he thinks are inappropriately lenient simply to assist him in moving his docket along and to attract judge only trials?

Brig. Gen. EDWARDS. I think that what occurs is that by human dynamics we create that situation, not through any malice or anything like that, but human dynamics create it. It is an unfortunate reality of life I think.

Mr. HONIGMAN. Isn't it just as likely that what is happening is a judge whose sentences are perceived as unduly harsh has been subjected to a checks and balance situation in which the members panel are telling him that they think an appropriate sentence for this kind of an event is X, and judge you have been judging X plus 30 days and maybe the judge is simply conforming sentences to the sense of the community as to what is appropriate?

Brig. Gen. EDWARDS. I think there is a potential for that just as I think there is a potential for convening authorities when they start supporting these type sentences. What they are saying is, hey, Judge, we don't need that kind of a sentence.

Mr. RABY. I am really troubled by this, too, and you hit on something. This is the second or third witness that said this, and I didn't say anything at first, but it really bothers me. You talk about human dynamics as mainly explaining this and what troubles me is I know our judges' rating system and they are rated by other judges within the system who have certain perceptions as to what appropriate sentences are. If the human dynamic may, in a significant number of cases, and I can only assume that you perceive it as a significant number of cases, or you and other witnesses from the particular branches of service would not have mentioned this, perceive that judges are sentencing low for this docket consideration, all be it based on human dynamics, what if we give them judge only sentencing and remove that human dynamic? How do we know another human dynamic won't come into effect, that in order to achieve balance with the perceived views of appropriateness of their rating circuit judge who watches their conduct much more closer, who reads their records at trial and scrutinizes their work very closely and uses those records as more of his basis for ratings. Many times they are located a hundred miles away but the dynamic will not shift and they will suddenly start giving it appropriately high sentence is if it a human dynamic. What guarantee do we have then if this system of military judging is not producing sentences that we can depend on as being appropriate? It seems like we are in a no win situation here. I am very concerned about this. I wish you to address this just a little more. Do you trust judges or don't you trust judges? What is our track record with judges?

Brig. Gen. EDWARDS. I trust judges. I think that their track record is good. I am saying that there is a potential there. Just like some of the hypotheticals and the potentials that you all have been throwing at me, I am throwing this same type back at you.

Col. RABY. If that is it, if we have been talking about this being a potential and it is in a hypothetical, then I can accept it, not because you said it now, but because there were two or three witnesses that said it. It suddenly started to come through as being more than a hypothetical, but might be coming through as a statement of fact that judges were doing this and I think it very important to clarify it.

Brig. Gen. EDWARDS. Let me clarify that because I know of no case of any judge who is known of suspected of doing this in order to keep his work down or whatever you want to call it.

Col. RABY. That clarifies it to my satisfaction.

Mr. HONIGMAN. Thank you.

Capt. BYRNE. Initially when you addressed retirement, you made an initial statement that we need to do a great study on Article III. What are the advantages, the subject matter? Will this assist the commander in carrying out his responsibilities? How will it improve the military justice system?

Also, as to retirement you made a general statement on a fair and equitable retirement system. However, some Commission members have asked you specific questions, although you initially stated that you thought more study was required, and they asked questions about reappointment, life tenure, assignments to other circuits, CMA budget, independence of the CMA, increasing CMA membership from three to five.

Now, sir, are you familiar with the questionaire we sent out to the commanders, SJA's, defense counsel, trial counsel, Court of Military Review judges and military judges on military judge only sentencing, tenure, suspension, and increasing confinement in hard labor to one year?

Brig. Gen. EDWARDS. I am familiar with its existence, but unfortunately it didn't get to me before I retired for me to take a look at it or fill it out.

Capt. BYRNE. If we had provided a questionaire such as this that gave all the options on Article III and retirement and reflected this study that you advocated in this questionaire as we did on the other four issues, would that have been helpful to witnesses that did get the questionaire, which most of them did, in formulating views on retirement and Article III issues when they appeared before the Commission?

Brig. Gen. EDWARDS. It certainly would be more helpful if you have an idea of what the questions are and have an opportunity to research and think about them. All my answers are obviously nothing but opinions of how I feel. I still say I think there are more questions than answers so far.

Capt. BYRNE. I gathered from what transpired here you have been asked more questions about Article III than any other witness to my knowledge. It would have been helpful perhaps if the Commission had done more study on it and formulated the questions based on more information on the present council. We could have addressed the pros and cons with each witness.

Brig. Gen. EDWARDS. Let me put it this way. When asked Constitutional questions I felt that why not let Mr. Ripple answer them and not me. He is the Constitutional scholar.

Capt. BYRNE. Thank you.

Capt. STEINBACH. I believe my fellow Commission members have covered in depth more areas than I could even envision initially. I want to thank you for your time and coming to share your knowledge and experience with us, sir. I don't have any questions.

Col. HEMINGWAY. Thank you very much.

(Whereupon, at 3:45 p.m., the meeting was concluded.)

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