98TH CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPORT No. 98-549

# MILITARY JUSTICE ACT OF 1983

NOVEMBER 15, 1983.—Ordered to be printed

Mr. ASPIN, from the committee on Armed Services, submitted the following

# REPORT

[To accompany S. 974]

The Committee on Armed Services, to which was referred the bill (S. 974) to amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the quality and efficiency of the Military Justice system, to revise the laws concerning review of courts-martial, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike out all after the encacting clause and insert in lieu thereof the following:

SHORT TITLE; REFERENCES TO THE UNIFORM CODE OF MILITARY JUSTICE

SECTION 1. (a) This Act may be cited as the "Military Justice Act of 1983".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

INCLUSION OF LAW SPECIALISTS OF THE COAST GUARD WITHIN DEFINITION OF JUDGE ADVOCATE

SEC. 2. (a) Clause 13 of section 801 (article 1(13)) is amended to read as follows:

"(13) 'Judge advocate' means—

"(A) an officer of the Judge Advocate General's Corps of the Army or the Navy;

"(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or

"(C) an officer of the Coast Guard who is designated as a law specialist.".

(b) The first sentence of section 806(a) (article 6(a)) is amended by striking out "and Air Force and law specialists of the" and inserting in lieu thereof "Air Force, and".

26-959 O

(c) Section 815(e) (article 15(e)) is amended by striking out "of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Coast Guard or" and inserting in lieu thereof "or a lawyer of the".

(d) Section 827 (article 27) is amended—

(1) in subsection (b)(1), by striking out "of the Army, Navy, Air Force, or Marine Corps or a law specialist of the Coast Guard,"; and

(2) in subsection (c)(3), by striking out ", or a law specialist,".

(e) Section 842(a) (article 42(a)) is amended by striking out ", law specialist," both places it appears in the third sentence.

(f) Section 936(a) (article 136(a)) is amended—

(1) in clause (1), by striking out "of the Army, Navy, Air Force, and Marine Corps"; and

(2) by striking out clause (2) and redesignating clauses (3) through (7) as clauses (2) through (6), respectively.

MATTERS RELATING TO THE MILITARY JUDGE, COUNSEL, AND MEMBERS OF THE COURT-MARTIAL

SEC. 3. (a) Section 816(1)(B) (article 16(1)(B)) is amended by inserting "orally on the record or" before "in writing".

(b) Section 825 (article 25) is amended by adding at the end thereof the following new subsection:

"(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.".

(c)(1) Section 826 (article 26) is amended—

(A) by striking out subsection (a) and inserting in lieu thereof the following: "(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed."; and

(B) in the first sentence of subsection (c), by striking out "by the convening authority, and, unless" and inserting in lieu thereof "in accordance with regulations prescribed under subsection (a). Unless".

(2) Section 827(a) (article 27(a)) is amended—

(A) by striking out "For each" and all that follows through "appropriate." and inserting in lieu thereof the following: "(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial."; and

(B) by designating the sentence beginning "No person who has acted as investigating officer" as paragraph (2) and by striking out "assistant defense counsel" in such sentence and inserting in lieu thereof "assistant or associate defense counsel".

(d) Section 829(a) (article 29(a)) is amended by striking out "except for" and all that follows through the period and inserting in lieu thereof the following: "unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.".

(e)(1) Section 838(b)(6) (article 38(b)(6)) is amended by striking out "a convening authority" and inserting in lieu thereof "the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel".

(2) Paragraph (7) of section 838(b) (article 38(b)(7)) is amended by inserting after the first sentence the following new sentence: "Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member.".

(3) Section 838(c) (article 38(c)) is amended to read as follows:

"(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

"(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

"(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

"(3) may take other action authorized by this chapter.".

(f) Section 842(a) (article 42(a)) is amended by striking out "assistant defense counsel" in the first and third sentences and inserting in lieu thereof "assistant or associate defense counsel".

PRETRIAL ADVICE AND REFERRAL OF CHARGES

SEC. 4. (a)(1) The first sentence of section 834(a) is amended by striking out "or legal officer".

(2) The second sentence of such section is amended to read as follows: "The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

"(1) the specification alleges an offense under this chapter;

"(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

"(3) a court-martial would have jurisdiction over the accused and the offense.".

(b) Section 834 (article 34) is further amended by redesignating subsection (b) as subsection (c) and inserting after subsection (a) the following new subsection (b):

"(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate—

"(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

"(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.".

RIGHT TO APPEAL AND RELATED MATTERS

SEC. 5. (a)(1) Section 860 (article 60) is amended to read as follows:

**"§ 860. Art. 60. Action by the convening authority**

"(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.

"(b)(1) Within thirty days after the sentence of a general court-martial or of a special court-martial which has adjudged a bad-conduct discharge has been announced, the accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. In the case of all other special courts-martial, the accused may make such a submission to the convening authority within twenty days after the sentence is announced. In the case of all summary courts-martial the accused may make such a submission to the convening authority within seven days after the sentence is announced. If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the period—

"(A) in the case of a general court-martial or a special court-martial which has adjudged a bad-conduct discharge, for not more than an additional 20 days; and

"(B) in the case of all other courts-martial, for not more than an additional 10 days.

"(2) In a summary court-martial case the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).

"(3) In no event shall the accused in any general or special court-martial case have less than a seven-day period after the day on which a copy of the authenticated record of trial has been given to him within which to make a submission

under paragraph (1). The convening authority or other person taking action on the case, for good cause, may extend this period for up to an additional ten days.

"(4) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

"(c)(1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

"(2) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) and, if applicable, under subsection (d), or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.

"(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—

"(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

"(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

"(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who shall have five days from the date of receipt in which to submit any matter in response. The convening authority or other person taking action under this section, for good cause, may extend that period for up to an additional 20 days. Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

"(e)(1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

"(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

"(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

"(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

"(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

"(3) A rehearing may be ordered by the convening authority or other person taking action under this section if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"860. 60. Action by the convening authority.".

(b)(1) Section 861 (article 61) is amended to read as follows:

**"§ 861. Art. 61. Waiver or withdrawal of appeal**

"(a) In each case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)), except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by defense counsel and must be filed within 10 days after the action under section 860(c) of this title (article 60(c)) is served on the accused or on defense counsel. The convening authority or other person taking such action, for good cause, may extend the period for such filing by not more than thirty days.

"(b) Except in a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may withdraw an appeal at any time.

"(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 866 or 869(a) of this title (article 66 or 69(a)).".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"861. 61. Waiver or withdrawal of appeal.".

(c)(1) Section 862 (article 62) is amended to read as follows:

**"§ 862. Art. 62. Appeal by the United States**

"(a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.

"(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within seventy-two hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

"(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

"(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

"(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"862. 62. Appeal by the United States.".

(d) Section 863 (article 63) is amended—

(1) by striking out subsection (a); and

(2) in subsection (b)—

(A) by striking out "(b)";

(B) by inserting "under this chapter" after "Each rehearing"; and

(C) by inserting at the end thereof the following: "If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.".

(e) Section 871 (article 71) is amended—

(1) by striking out subsection (a) and inserting in lieu thereof the following:

"(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.";

(2) in subsection (b), by striking out the first and second sentences and inserting in lieu thereof the following: "If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit."; and

(3) by striking out subsections (c) and (d) and inserting in lieu thereof the following:

"(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review and—

"(A) the time for the accused to file a petition for review by the Court of Military Appeals has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

"(B) such a petition is rejected by the Court of Military Appeals; or

"(C) review is completed in accordance with the judgment of the Court of Military Appeals and—

"(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

"(ii) such a petition is rejected by the Supreme Court; or

"(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

"(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

"(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.".

(f) Subsection (a) of section 857 (article 57(a)) is amended to read as follows:

"(a) No forfeiture may extend to any pay or allowances accrued before the date on which the sentence is approved by the person acting under section 860(c) of this title (article 60(c)).".

(g) Section 876a (article 76a) is amended—

(1) by striking out "864 or 865 of this title (article 64 or 65) by the officer exercising general court-martial jurisdiction" and inserting in lieu thereof "860 of this title (article 60)"; and

(2) by striking out "by the officer exercising general court-martial jurisdiction" in the second sentence and inserting in lieu thereof "under section 860 of this title (article 60)".

(h)(1) The table of subchapters at the beginning of chapter 47 is amended by striking out the item relating to subchapter IX and inserting in lieu thereof the following:

"IX. Post-trial Procedure and Review of Courts-Martial ..... 859 59".

(2) The subchapter heading at the beginning of subchapter IX is amended to read as follows:

"SUBCHAPTER IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL".

RECORD OF TRIAL

SEC. 6. (a) Section 801 (article 1) is amended by adding at the end thereof the following new clause:

"(14) 'Record', when used in connection with the proceedings of a court-martial, means—

"(A) an official written transcript, written summary, or other writing relating to the proceedings; or

"(B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.".

(b) Subsections (d) and (f) of section 849 (article 49) are each amended by inserting after "read in evidence" the following: "or, in the case of audiotape, videotape, or similar material, may be played in evidence".

(c) Section 854 (article 54) is amended—

(1) in subsection (a), by striking out the last sentence;

(2) in subsection (b), by striking out "shall contain the matter and";

(3) by redesignating subsection (c) as subsection (d); and

(4) by inserting after subsection (b) the following new subsection:

"(c)(1) A complete record of the proceedings and testimony shall be prepared—

"(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and

"(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge.

"(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.".

(d)(1) Section 865 (article 65) is amended to read as follows:

**"§ 865. Art. 65. Disposition of records**

"(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.

"(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"865. 65. Disposition of records.".

REVIEW OF COURTS-MARTIAL AND RELATED MATTERS

SEC. 7. (a)(1) Section 864 (article 64) is amended to read as follows:

**"§ 864. Art. 64. Review by a judge advocate**

"(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:

"(1) Conclusions as to whether—

"(A) the court had jurisdiction over the accused and the offense;

"(B) the charge and specification stated an offense; and

"(C) the sentence was within the limits prescribed as a matter of law.

"(2) A response to each allegation of error made in writing by the accused.

"(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

"(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial ju-

risdiction over the accused at the time the court was convened (or to that person's successor in command) if—

"(1) the judge advocate who reviewed the case recommends corrective action;

"(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or

"(3) such action is otherwise required by regulations of the Secretary concerned.

"(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—

"(A) disapprove or approve the findings or sentence, in whole or in part;

"(B) remit, commute, or suspend the sentence in whole or in part;

"(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

"(D) dismiss the charges.

"(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

"(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the Judge Advocate General for review under section 869(b) of this title (article 69(b)).".

(2) The item relating to such section (article) in the table of sections at the beginning of subchapter IX is amended to read as follows:

"864. 64. Review by a judge advocate.".

(b) Section 866(a) (article 66(a)) is amended by inserting after the second sentence the following new sentence: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules.".

(c) Section 866(b) (article 66(b)) is amended to read as follows:

"(b) The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial—

"(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

"(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).".

(d) Section 867(b)(1) (article 67(b)(1)) is amended by striking out "affects a general or flag officer or".

(e)(1) The text of section 869 (article 69) is amended to read as follows:

"(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review under section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).

"(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

"(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the

Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.".

(2) The two-year period specified under the second sentence of section 869(b) (article 69(b)) of title 10, United States Code, as amended by paragraph (1), does not apply to any application filed in the office of the appropriate Judge Advocate General (as defined in section 801(1) of such title) on or before October 1, 1983. The application in such a case shall be considered in the same manner and with the same effect as if such two-year period had not been enacted.

INCLUSION OF CONTROLLED SUBSTANCES IN PUNITIVE ARTICLES

SEC. 8. (a) Subchapter X is amended by inserting after section 912 (article 112) the following new section (article):

**"§ 912a. Art. 112a. Wrongful use, possession, etc., of controlled substances**

"(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

"(b) The substances referred to in subsection (a) are the following:

"(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.

"(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

"(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).".

(b) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 912 (article 112) the following new item:

"912a. 112a. Wrongful use, possession, etc., of controlled substances.".

THE CODE COMMITTEE

SEC. 9. (a) Section 867(g) (article 67(g)) is amended—

(1) by striking out "The Court of Military Appeals" and all that follows through "and report" and inserting in lieu thereof "(1) A committee consisting of the judges of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense shall meet at least annually. The committee shall make an annual comprehensive survey of the operation of this chapter. After each such survey, the committee shall report";

(2) by adding at the end thereof the following:

"(2) Each member of the committee appointed by the Secretary of Defense shall be a recognized authority in military justice or criminal law. Each such member shall be be appointed for a term of three years.

"(3) The Federal Advisory Committee Act (5 U.S.C. App. I) shall not apply to the committee.".

(b)(1) The Secretary of Defense shall 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.

26-959 O - 83 - 2

(2) The commission shall consist of nine members, at least three of whom shall be persons from private life who are recognized authorities in military justice or criminal law.

(3) The commission shall prepare a comprehensive report in support of its recommendations on the matters set forth in paragraph (1). The commission shall include in such report its findings and comments on the following matters:

(A) 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.

(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.

(C) 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.

(D) 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.

(4) The commission shall transmit its report to the Committees on Armed Services of the Senate and the House of Representatives and to the committee established under section 867(g) (article 67(g)) of title 10, United States Code, not later than the first day of the ninth calendar month that begins after the date of the enactment of this Act. Not later than the first day of the third calendar month that begins after receipt of such report, the committee established under section 867(g) (article 67(g)) of such title shall submit such comments on the report as it considers appropriate to the Committees on Armed Services of the Senate and the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation.

(5) The Secretary of Defense shall ensure that the commission is provided with appropriate and adequate office space, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(6) The Secretary shall ensure that the commission has reasonable access to information relevant to the study.

SUPREME COURT REVIEW

SEC. 10. (a)(1) Chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new section:

**"§ 1259. Court of Military Appeals; certiorari**

"Decisions of the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases:

"(1) Cases reviewed by the Court of Military Appeals under section 867(b)(1) of title 10.

"(2) Cases certified to the Court of Military Appeals by the Judge Advocate General under section 867(b)(2) of title 10.

"(3) Cases in which the Court of Military Appeals granted a petition for review under section 867(b)(3) of title 10.

"(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Military Appeals granted relief.".

(2) The table of sections at the beginning of chapter 81 of such title is amended by adding at the end thereof the following new item:

"1259. Court of Military Appeals; certiorari.".

(b) Section 2101 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.".

(c)(1) Section 866(e) (article 66(e)) is amended by striking out "or the Court of Military Appeals" and inserting in lieu thereof "the Court of Military Appeals, or the Supreme Court".

(2) Section 867 (article 67) is amended by adding at the end thereof the following new subsection:

"(h)(1) Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petition for review.

"(2) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.".

(3)(A) Section 870(b) (article 70(b)) is amended by adding at the end thereof the following new sentence: "Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.".

(B) Subsections (c) and (d) of such section are amended to read as follows:

"(c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—

"(1) when requested by the accused;

"(2) when the United States is represented by counsel; or

"(3) when the Judge Advocate General has sent the case to the Court of Military Appeals.

"(d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme Court by civilian counsel if provided by him.".

CORRECTION OF RECORDS; DISCHARGE REVIEW

SEC. 11. (a) Section 1552 of title 10, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—

"(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

"(2) action on the sentence of a court-martial for purposes of clemency.".

(b) Section 1553 of such title is amended by adding at the end of subsection (a) the following new sentence: "With respect to a discharge or dismissal adjudged by a court-martial case tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.".

EFFECTIVE DATE; CONFORMING AMENDMENT

SEC. 12. (a)(1) The amendments made by this Act shall take effect on the first day of the eighth calendar month that begins after the date of enactment of this Act, except that the amendments made by sections 9, 11 and 13 shall be effective on the date of the enactment of this Act. The amendments made by section 11 shall only apply with respect to cases filed after the date of enactment of this Act with the boards established under sections 1552 and 1553 of title 10, United States Code.

(2) The amendments made by section 3(c) and 3(e) do not affect the designation or detail of a military judge or military counsel to a court-martial before the effective date of such amendments.

(3) The amendments made by section 4 shall not apply to any case in which charges were referred to trial before the effective date of such amendments, and

proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

(4) The amendments made by sections 5, 6, and 7 shall not apply to any case in which the findings and sentence were adjudged by a court-martial before the effective date of such amendments. The proceedings in any such case shall be held in the same manner and with the same effect as if such amendments had not been enacted.

(5) The amendments made by section 8 shall not apply to any offense committed before the effective date of such amendments. Nothing in this provision shall be construed to invalidate the prosecution of any offense committed before the effective date of such amendments.

(b) Section 7(b)(1) of the Military Justice Amendments of 1981 (95 Stat. 1089; 10 U.S.C. 706 note) is amended to read as follows:

"(b)(1) The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after January 20, 1982—

"(A) under section 864 or 865 (article 64 or 65) of title 10, United States Code, by the officer exercising general court-martial jurisdiction under the provisions of such section as it existed on the day before the effective date of the Military Justice Act of 1983; or

"(B) under section 860 (article 60) of title 10, United States Code, by the officer empowered to act on the sentence on or after the effective date of the Military Justice Act of 1983.".

TECHNICAL AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE

SEC. 13. (a)(1) Clauses (11) and (12) of subsection (a) of section 802 (article 802) are amended—

(A) by striking out "the following:"; and

(B) by inserting "the Commonwealth of" before "Puerto Rico".

(2) Subsection (b) of such section (article) is amended by striking out "of this section".

(b)(1) The heading of section 815 (article 15) is amended to read as follows:

**"§ 815. Art. 15. Commanding officer's non-judicial punishment".**

(2) Subsection (b) of such section (article) is amended—

(A) by striking out "of this section"; and

(B) by striking out "subsection (b)(2)(A)" in clause (2)(H)(i) and inserting in lieu thereof "clause (A)".

(c) Section 825(c)(2) (article 25(c)(2)) is amended by striking out "the word".

(d) Section 867(a)(3) (article 867(a)(3)) is amended by inserting "Circuit" after "District of Columbia".

## EXPLANATION OF THE AMENDMENT

The amendment makes technical changes to the bill as passed in the Senate.

## BACKGROUND AND DISCUSSION

Thirty-five years ago, there was serious concern in the post World War II Congress, and the country, over the administration of military justice.

This concern arose because the process was designed and developed for a relatively small career military, and not the citizen sailors, soldiers, and airmen who were drafted or joined the military during World War II and the years following. Among the concerns were:

Each service had its own system under the revised Articles of War or the Articles for the Government of the Navy and separate and distinct sets of rules for operating thereunder.

All appellate review of courts-martial was conducted within the services.

Courts-martial were often conducted entirely by non-lawyers (Indeed, there was no requirement in law that the Judge Advocates General be qualified lawyers).

Perhaps the most troublesome matter before the Congress in examining the Uniform Code of Military Justice legislation proposals in 1949 was the issue of command control—and rightly so.

With extensive Congressional hearings and debate, and with the eventual enactment of the Uniform Code of Military Justice in 1950, these basic issues, and others, were carefully addressed in the law. The decisions of the appellate military courts under the Uniform Code of Military Justice over the past 30 years show careful monitoring of these issues. The system today is administered, operated, and monitored by qualified military attorneys at all levels. This includes a well-qualified military judiciary, and a highly regarded Court of Military Appeals, composed of civilian judges, which has carried out in a highly commendable fashion the original charter granted by the Congress in 1950.

The committee feels that the system is working well as a general matter, but there are certain inefficiencies which need prompt attention. The amendment would streamline the pretrial and post-trial review process while not depriving military members of any of their fundamental rights. Indeed, the committee is convinced that those rights are enhanced by this bill, particularly with inclusion of the provision of the amendment which would open an opportunity for direct appeal to the Supreme Court of the United States. For additional background and general information, attention is invited to the excellent report by the other House on S. 974 (S. Report 98–53, April 5, 1983).

## Hearings and Testimony

On November 9, 1983, the Subcommittee on Military Personnel and Compensation held hearings on S. 974 and by voice vote approved the bill with an amendment in the nature of a substitute incorporating numerous technical amendments.

The following witnesses appeared before the subcommittee to offer testimony or statements, all in favor of the legislation:

Hon. William H. Taft IV, General Counsel, Department of Defense.

Maj. Gen. Hugh J. Clausen, Judge Advocate General of the Army.

Rear Adm. Thomas E. Flynn, Deputy Judge Advocate General of the Navy.

Maj. Gen. Thomas B. Bruton, Judge Advocate General of the Air Force.

Brig. Gen. W. J. Donovan, Jr., Director, Judge Advocate Division, U.S. Marine Corps.

Capt. William Steinback, Chief of Military Justice, U.S. Coast Guard.

Hon. Robinson O. Everett, Chief Judge, U.S. Court of Military Appeals.

Mr. Steven S. Hogiman, the Association of the Bar of the City of New York.

Mr. Eugene Fidell, American Civil Liberties Union.

## SUMMARY OF MAJOR PROVISIONS

*Referral of charges.* Current law requires the convening authority, normally a layman, to assess the legality of prospective *general courts-martial.* This burdens line commanders with the need to make complex legal judgments, even though in current practice the staff judge advocate advises the convening authority on the matter.

The committee amendment would require these judgments to be made by the staff judge advocate to relieve the commanders of an unnecessary task while fully protecting the rights of the accused.

Note that this provision applies only to the general courts-martial, the highest type of military court, and not to special or summary court-martial.

*Designation of court-martial personnel.* The person who has the power to convene courts-martial also must appoint the members of the court. Under current case law, there is some doubt as to whether the convening authority may delegate the authority to excuse court members prior to trial. Moreover, the convening authority is required personally to detail and approve substitutions of the military judge and counsel, even though the practical responsibility for the assignment of such personnel is exercised through legal channels. Difficulties are caused by the need to seek the personal approval for a substitution (necessitated by illness or similar factors) when busy convening authorities are unavailable because they are involved in military exercises or other important command responsibilities. The current system can produce significant delays in courts-martial, with the attendant waste of time by witnesses, judges, counsel, members, and other court personnel. In a combat environment, these problems would be exacerbated, while the need to excuse members, particularly for last minute exigencies, is likely to be even greater.

The committee amendment would permit the convening authority to delegate the power to excuse members, and authorize the military judge to excuse members for good cause after the court-martial has been assembled. Also, the amendment would eliminate the requirement that the convening authority personally detail counsel and judges; instead, they would be detailed under rules or regulations governing the assignment of legal personnel.

*The convening authority's post-trial duties.* Under current law, the convening authority makes a legal review of the proceedings, which may involve extremely complicated appellate issues. Advice from the staff judge advocate is required after general courts-martial and after special courts-martial that adjudge punitive discharges. Court decisions have significantly encumbered the staff judge advocate's legal review. As a result, it has become a complex document that consumes substantial judge advocate resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is free of error. Moreover, review in the field—which was developed at a time when laymen tried courts-martial without judicial review—is outmoded in view of the today's sophisticated appellate process, complete with trained judges, appellate counsel, and civilian review.

The committee amendment would retain the requirement that the convening authority act on the case, but emphasizes that this role primarily involves a determination as to whether the sentence should be reduced as a matter of command prerogative (e.g., as a matter of clemency) rather than a formal appellate review. The staff judge advocate will continue to play an important role in assembling the materials to be used by the convening authority in exercising this prerogative, and the accused will have an opportunity to submit sentencing materials to the convening authority and to rebut the recommendation of the staff judge advocate.

As indicated, the committee amendment would provide express authority for such submissions and establish time limitations in article 60(b) of the Uniform Code of Military Justice. It should be noted that the opportunity to submit matters to the convening authority does not relieve the accused of the responsibility for gathering material that should be presented at trial.

Also, the amended bill ensures that the accused will have the opportunity to use the record of trial in preparing a submission to the convening authority. In that regard, it is intended that the provision of the record of trial to the accused may be accomplished by service on his counsel. The provisions of the amendment would also permit the accused to make a knowing voluntary waiver of the right to make a submission under article 60(b).

The staff judge advocate may complete a written post-trial recommendation under article 60(d) any time after receiving the record of trial, and the provision of the staff judge advocate review to the accused may be accomplished by service on the accused or his counsel.

*Appellate jurisdiction.* Under current law, every case involving a punitive discharge or confinement for one year or more is submitted to the Courts of Military Review for appellate proceedings regardless of whether the accused wishes to appeal, even when trial defense counsel, appellate defense counsel, and the accused all determine that there are no issues to submit on review. To require automatic review of all such cases represents an inefficient use of judge advocate resources, and unnecessarily delays considerastion of cases in which the appeal is of importance to the accused or the system in general. In fact, information before the committee indicates that most guilty plea cases where the accused is awarded a sentence requiring automatic consideration in a Court of Military Review are free of error and indeed, many accused are indifferent to or oppose appellate review in order to seek earliest possible separation from the service.

Current law also provides special treatment of flag and general officers by requiring appellate review regardless of the severity of the sentence.

The bill would permit the accused to waive or withdraw an appeal to the Court of Military Review. It also ends special treatment of flag and general officer cases; appellate jurisdiction of the Courts of Military Review in such cases will be the same as the jurisdiction over all other military personnel.

However, the bill retains automatic appeal in death penalty cases, and authorizes an appeal to a Court of Military Review if the

sentence includes confinement for one year or more or a punitive separation.

Moreover, even if a case is not subject to consideraton in a Court of Military Review or if an appeal is waived or withdrawn, the bill ensures a thorough legal review by requiring a judge advocate to review all cases not appealed to a Court of Military Review.

*Interlocutory appeal.* Under federal civilian law, an interlocutory ruling by the trial judge that excludes evidence or otherwise results in dismissal of charges generally is subject to review at the request of the government. This is not available in military law, and results in dismissal of charges without appellate review.

The amendement would permit interlocutory appeal by the government under standards similar to those applicable in federal civilian law.

*Review powers of the Judge Advocate General.* When the Judge Advocate General of a military department acts as an appellate authority (over cases that are not subject to consideration by a Court of Military Review), current law limits his review to issues of law; he cannot exercise the powers of a Court of Military Review in terms of review for sentence appropriateness or the authority to order a rehearing. This deprives the accused, in a case reviewed by the Judge Advocate General, of the type of appellate review that is available when more serious cases are before the Courts of Military Review.

The amendment recognizes that the powers exercised by the Courts of Military Review with regard to both findings and sentence should be available to the Judge Advocate General when acting as an appellate authrority.

*Review of decisions by the Court of Military Appeals.* As an independent tribunal, the Court of Military Appeals renders vital decisions on the constitutional rights of servicemembers and the prerogatives of commanders. It has demonstrated a willingness to strike down provisions of the Manual for Courts-Martial and departmental regulations, and to interpret provisions of the Uniform Code of Military Justice in a manner that adds to or detracts from procedural requirements or regulations. It regularly applies decisions of the Supreme Court in resolving appellate issues. At present, however, there is no authority for either party to seek Supreme Court review of decisions by the Court of Military Appeals. The accused may attempt to mount a collateral attack at his own expense, a costly and difficult venture in view of the limited grounds for collateral review; the government has no judicial recourse from adverse decisions. There is no other federal judicial body whose decisions are similarly insulated from Supreme Court review.

The amendment would authorize the parties to petition the Supreme Court to review decisions of the Court of Military Appeals through discretionary writs of certiorari. The concept of Supreme Court review has been endorsed by the House of Delegates of the American Bar Association, the Committee on Military Justice and Military Law of the Association of the Bar of the City of New York, and the American Civil Liberties Union. It was approved without dissent by the House of Representatives in the 98th Congress, but the session ended prior to formal Senate consideration. In view of

current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review. Cases in which the Court of Military Appeals declined to grant a petition for review are excluded, and the Supreme Court will have complete discretion to refuse to grant petitions for writs of certiorari. Control over government petitions will be exercised by the Solicitor General. This formulation has been endorsed by the Department of Justice as well as the Department of Defense. The committee is of the opinion that the impact on the docket of the Supreme Court would not be substantial, and that the Court of Military Appeals will remain the primary source of judicial authority under the Uniform Code of Military Justice.

In the context of considering the impact of various changes on appellate jurisdiction, the Commission established by secton 9 of the amendment should study and report on the question of whether the Court of Military Appeals should be an Article III Court.

*Drug abuse in the armed forces.* Abuse of controlled substances is one of the most significant disciplinary problems facing the armed forces. In contrast to other offenses, however, criminal use of drugs is not the subject of a specific punitive article in the Uniformed Code of Military Justice. This has led to unnecessary litigation concerning the use of regulations and the general prohibition against disciplinary offenses as the basis for drug-offense prosecutions.

The amendment would correct this deficiency by establishing a specific punitive article prescribing drug abuse offenses.

## DEPARTMENTAL VIEWS

Following are letters from the Honorable Caspar Weinberger, Secretary of Defense and Mr. Jim Burney, General Counsel, Department of Transportation, with regard to S. 974. The departments have also approved the adoption of the technical amendments included in the substitute.

THE SECRETARY OF DEFENSE,
*Washington, D.C., September 15, 1983.*

Hon. MELVIN PRICE,
*Chairman, Committee on Armed Services,*
*House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: I would like to bring to your attention a legislative matter of considerable importance to the Department of Defense, S. 974, the Military Justice Act of 1983. This legislation, which was approved by the Senate in April with strong bipartisan support, will improve the efficiency and effectiveness of the military justice system by eliminating redundant procedures and archaic paperwork requirements. It will enhance the quality of the military justice system while ensuring that rights of accused service members are protected. The bill has received broad support from the civilian bar.

I am hopeful that this legislation can receive early attention by your committee and final approval during this session of Congress. In addition to the changes contained in the proposed legislation, the Department is completing action on a revision of the Manual of Courts-Martial. Because the new Manual contains numerous

26-959 O - 83 - 3

changes requiring prompt action, it will be submitted to the President for approval this fall. Both the legislation and the revision of the Manual authorize transition periods to permit instruction of commanders and judge advocates on the new procedures. If the legislation and the Manual changes are approved this fall, we can incorporate both actions into one transition program. If the legislation is delayed until 1984, we will have to conduct two separate transition programs. This would entail duplication of expense and effort, and could generate instability in legal doctrine. A single transition period would be of great advantage to commanders, individual service members, and the taxpayers.

The highlights of the proposed legislation are enclosed. Please let me know if further information is necesary. Your consideration of this matter is most appreciated.

Sincerely,

CASPAR WEINBERGER.

Enclosure.

## MAJOR PROVISIONS OF THE MILITARY JUSTICE ACT OF 1983

1. *Referral of charges.* Current law requires the convening authority, a layman, to assess the legality of prospective general courts-martial. The bill assigns this reponsibility to the staff judge advocate, which will fully protect the rights of the accused.

2. *Designation of court-martial personnel.* Currently, the convening authority may not delegate the authority to excuse court members prior to trial. The convening authority also is required personally to detail and approve substitutions of the military judge and counsel, even though the practical responsibility for their assignment is exercised through legal channels. Difficulties are caused by the need to seek personal approval for a substitution (necessitated by illness or similar factors) when busy convening authorities are unavailable because they are involved in military exercises or other important command functions. The bill permits delegation of the power to excuse members and authorizes the military judge to excuse members for good cause after the court-martial has been assembled. Also, the bill eliminates the requirement that the convening authority personally detail counsel and judges; instead, they will be detailed under rules governing the assignment of legal personnel.

3. *The convening authority's post-trial duties.* Under current law, the convening authority makes a legal review of the trial. Although advice from the staff judge advocate is required after trials that involve serious punishments, court decisions have significantly encumbered the staff judge advocate's legal review. It has become a complex document that consumes substantial judge advocate resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is free of error. The bill emphasizes that the convening authority's post-trial role primarily involves clemency matters rather than a formal appellate review. The staff judge advocate will continue to play an important role in assembling the materials to be used by the convening authority in exer-

cising this prerogative. The accused will have an opportunity to submit sentencing materials to the convening authority and to rebut the recommendation of the staff judge advocate.

4. *Appellate jurisdication.* Under current law, every case involving a punitive discharge or confinement for one year or more is submitted to the Courts of Military Review even when trial defense counsel, appellate defense counsel, and the accused all determine that there are no issues of law to submit on review. The bill permits the accued in a noncapital case to waive or withdraw an appeal to the Court of Military Review.

5. *Interlocutory appeal.* Under federal civilian law, an interlocutory ruling by the trial judge that excludes evidence or otherwiese results in dismissal of charges generally is subject to review at the request of the government. This is not available in military law and results in dismissal of charges without appellate review. The bill permits interlocutory appeal by the government under standards similar to those applicable in federal civilian law under 18 U.S.C. S 3731.

6. *Review powers of The Judge Advocate General.* When the Judge Advocate General acts as an appellate authority (over cases that are not considered by a Court of Military Review), current law limits this review to issues of law. The bill authorizes review for sentence appropriateness, and permits The Judge Advocate General to order rehearings. these are the same powers that are available to the Courts of Military Review.

7. *Review of decisions by the Court of Military Appeals.* As an independent tribunal, the Court of Military Appeals renders vital decisions on the constitutional rights of service members and the prerogatives of commanders. It regularly applies decisions of the Supreme Court in resolving appellate issues. At present, however, there is no authority for either party to seek Supreme Court review of decisions by the Court of Military Appeals. The accused may attempt to mount a collateral attack at his own expense, a costly and difficult venture in view of the limited grounds for collateral review; the government has no judicial recourse from adverse decisions. There is no other federal judicial body whose decisions are similarly insulated form Supreme Court review. The bill authorizes the parties to petition the Supreme Court to review decisions of the Court of Military Appeals through discretionary writs of certiorari. In view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review. Cases in which the Court of Military Appeals declined to grant a petition for rewiew are excluded, and the Supreme Court will have complete discretion to refuse to grant petitions for writs of certirari.

8. *Drug abuse in the armed forces.* Abuse of controlled substances is one of the most significant disciplinary problems facing the armed forces. In contrast to other offenses, however, criminal use of drugs is not the subject of a specific punitive article in the UCMJ. The bill corrects this deficiency by establishing a specific punitive article proscribing drug abuse offenses.

U.S. DEPARTMENT OF TRANSPORTATION,
*Washington, D.C., November 14, 1983.*

Hon. MELVIN PRICE,
*Chairman, Committee on Armed Services,*
*House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: The Department of Transportation would appreciate the Committee's consideration of the following comments on S. 974, the

"MILITARY JUSTICE ACT OF 1983."

The bill makes the following significant changes to the military justice system:

(1) The bill eliminates the requirement for the convening authority to personally detail the military judge, and trial and defense counsel. These personnel would be assigned pursuant to Secretarial regulations.

(2) It removes the requirement that the convening authority personally assess the legality of a prospective court-martial. This function would be performed by a staff judge advocate.

(3) The bill adds specific punitive articles proscribing drug abuse offenses.

(4) It permits interlocutory appeals of military judges' rulings by the Government under procedures similar to an appeal by the United States in the Federal Courts.

(5) The convening authority would no longer need to include a legal review in post-trial action. However, before acting on any general court-martial or a bad conduct discharge special court-martial, the convening authority would have to consider written recommendations of the convening authority's staff judge advocate who would review the record of trial in making the recommendations. The convening authority retains the power to modify findings and the sentence. The accused would be allowed to submit matters for the convening authority to consider before acting on the case.

(6) A written legal review prepared by a judge advocate would be required in all cases not reviewed by the Court of Military Review under Art. 66 or the Judge Advocate General under Art. 69.

(7) An accused, after conviction by court-martial, would be permitted to waive or withdraw from the otherwise mandatory appellate review process, except in a death penalty case.

(8) The bill permits review of Court of Military Appeals decisions by the U.S. Supreme Court by discretionary writs of certiorari.

(9) It restructures the Code Committee by adding two public members, and formally adds the Chief Counsel, U.S. Coast Guard, and Director, Judge Advocate Division, Headquarters, U.S. Marine Corps to the committee. The bill directs the Secretary of Defense to establish a commission to study and make recommendations on the sentencing authority of military judges and special courts-martial.

(10) In court-martial review the functions of the Board for Correction of Military Records and the Discharge Review Boards would be primarily limited to clemency actions.

The Department of Transportation strongly supports this bill.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program

to the submission of this report for the consideration of the Committee.

Sincerely,

JIM BURNLEY, *General Counsel.*

## COMMITTEE POSITION

The Committee on Armed Services on November 15, 1983, reported S. 974 favorably with an amendment in the nature of a subsitute by voice vote.

## FISCAL DATA

### FIVE-YEAR COST PROJECTION

Pursuant to Clause 7 of Rule XIII, the Committee believes the cost estimated by the Congressional Budget Office is accurate and concurs in that estimate.

### DEPARTMENT COST ESTIMATE

The committee has not received a cost estimate from the Department of Defense.

## CONGRESSIONAL BUDGET OFFICE ESTIMATE

In compliance with clause 2(1)(3)(C) of Rule XI of the Rules of the House of Representatives, the committee requested the Congressional Budget Office to submit an estimate pursuant to section 403 of the Congressional Budget Act of 1974. A draft report was submitted estimating a cost of $100,000 for fiscal year 1984 with no costs thereafter of any significance. Time did not permit a final report by the Congressional Budget Office.

## INFLATION-IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the committee attempted to determine the inflationary impact of the bill. The committee concludes that the bill in and of itself will have no significant inflationary impact.

## OVERSIGHT FINDINGS

With reference to clause 2(1)(3)(D) of Rule XI of the Rules of the House of Representatives, the committee has not received a report from the Committee on Government Operations pertaining to this subject matter.

With reference to clause 2(b)(1) of Rule X of the Rules of the House of Representatives, the committee finds and recommends that the amendment be enacted pursuant to its oversight responsibilities.

## SECTION-BY-SECTION ANALYSIS

A section-by-section analysis is contained in the Senate Report on S. 974 (Senate Report 98–53).

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

# TITLE 10, UNITED STATES CODE

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## Subtitle A—General Military Law

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## PART II—PERSONNEL

* * * * * * *

### CHAPTER 47—UNIFORM CODE OF MILITARY JUSTICE


| Sub-chap. | | Sec. | Art. |
|---|---|---|---|
| I. | General Provisions | 801 | 1 |
| II. | Apprehension and Restraint | 807 | 7 |
| III. | Non-Judicial Punishment | 815 | 15 |
| IV. | Court-Martial Jurisdiction | 816 | 16 |
| V. | Composition of Courts-Martial | 822 | 22 |
| VI. | Pre-Trial Procedure | 830 | 30 |
| VII. | Trial Procedure | 836 | 36 |
| VIII. | Sentences | 855 | 55 |
| [IX. | Review of Courts-Martial | 859 | 59] |
| *IX.* | *Post-Trial Procedure and Review of Courts-Martial* | *859* | *59* |
| X. | Punitive Articles | 877 | 77 |
| XI. | Miscellaneous Provisions | 935 | 135 |


SUBCHAPTER I—GENERAL PROVISIONS

* * * * * * *

**§ 801. Article 1. Definitions**

In this chapter:

(1) * * *

* * * * * * *

[(13) "Judge advocate" means an officer of the Judge Advocate General's Corps of the Army or the Navy or an officer of the Air Force or the Marine Corps who is designated as a judge advocate.]

*(13) "Judge advocate" means—*

*(A) an officer of the Judge Advocate General's Corps of the Army or the Navy;*

*(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or*

*(C) an officer of the Coast Guard who is designated as a law specialist.*

*(14) "Record", when used in connection with the proceedings of a court-martial, means—*

*(A) an official written transcript, written summary, or other writing relating to the proceedings; or*

*(B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.*

**§ 802. Art. 2. Persons subject to this chapter**

(a) The following persons are subject to this chapter:

(1) * * *

* * * * * * *

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside [the following:] the Canal Zone, *the Commonwealth of* Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside [the following:] the Canal Zone, *the Commonwealth of* Puerto Rico, Guam, and the Virgin Islands.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) [of this section] and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

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**§ 806. Art. 6. Judge advocates and legal officers**

(a) The assignment for duty of judge advocates of the Army, Navy, [and Air Force and law specialists of the] *Air Force, and* Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment of duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice

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SUBCHAPTER III—NON-JUDICIAL PUNISHMENT

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**§ 815. Art. 15. Commanding Officer's [nonjudical] *non-judicial* punishment**

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under simolar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) [of this section,] any commanding officer may, in addition to or in lieu of admonition or repremand, impoe one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command—

(A) restriction to certain specified limits, with or without suspension fro duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command—

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command—

(A) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) detention of not more than 14 days' pay;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above—

(i) the punishment authorized under [subsection (b)(2)(A)] *clause (A);*

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

((iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E—4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

((vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

* * * * * * *

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of—

(1) arrest in quarters for more than seven days;

(2) correctional custody for more than seven days;

(3) forfeiture of more than seven days' pay;

(4) reduction of one or more pay grades from the fourth or a higher pay grade;

(5) extra duties for more than 14 days;

(6) restriction for more than 14 days; or

(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate [of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Coast Guard or] *or a lawyer of the* Department of Transportation for consideration and advice, and

may so refer the case upon appeal from any punishment imposed under subsection (b).

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## SUBCHAPTER IV—COURT-MARTIAL JURISDICTION

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### § 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests *orally on the record or* in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

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

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## SUBCHAPTER V—COMPOSITION OF COURTS-MARTIAL

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### § 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least, one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on

account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, [the word] "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or social court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

*(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.*

**§ 826. Art. 26. Military judge of a general or special court-martial**

[(a) The authority convening a general court-martial shall, and, subject to regulations of the Secretary concerned, the authority convening a special court-martial may, detail a military judge thereto. A military judge shall preside over each open session of the court-martial to which he has been detailed.]

*(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.*

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail [by the convening authority, and, unless] *in accordance with regulations prescribed under subsection (a). Unless* the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report converning the effectiveness, fitness, or efficien-

cy of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and 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 the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

**§ 827. Art. 27. Detail of trial counsel and defense counsel**

(a) [For each general and special court-martial the authority convening the court shall deteal trial counsel and defense counsel, and su assistants as he considers appropriate] *(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.*

*(2)* No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trail counsel, or, unless e expressly requested by the accused, as defense counsel or assistant *or associate* defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate [of the Army, Navy, Air Force, or Marine Corps or a law specialist of the Coast Guard,] who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

d(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigenies. If counsel

having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate [, or a law specialist,] or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

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**§ 829. Art. 29. Asent and additional members**

(a) No member of a gneral or special courtmartial may be absent or excused after the court has been assembled for the trial of the accused [except for physical disability or as a result of a challenge on] *unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.*

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SUBCHAPTER VI—PRE-TRIAL PROCEDURE

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**§ 834. Art. 34. Advice of staff judge advocate and reference for trial**

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate [or legal officer] for consideration and advice. [The convening authority may not refer a charge to a general court-martial for trial unless he has found that the charge alleges an offense under this chapter and is warranted by evidence indicated in the report of investigation.] *The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—*

*(1) the specification alleges an offense under this chapter;*

*(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and*

*(3) a court-martial would have jurisdiction over the accused and the offense.*

*(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate—*

*(1) expressing his conclusions with respect to each matter set forth in subsection (a); and*

*(2) recommending action that the convening authority take regarding the specification.*

*If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.*

[(b)] *(c)* If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating oficer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

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## SUBCHAPTER VII—TRIAL PROCEDURE

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### § 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) * * *

* * * * * * *

(6) The accused is not entitled to be represented by more than one military counsel. However, [a convening authority,] *the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel* in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. *Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member.* To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

[(c) In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate.]

*(c) In any court-martial proceeding resulting in a conviction, the defense counsel—*

*(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);*

*(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and*

*(3) may take other action authorized by this chapter.".*

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**§ 842. Art. 42. Oaths**

(a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant *or associate* defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. the form of the oath, the itme and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant *or associate* defense counsel may be taken at any time by any judge advocate[, law specialist,] or other person certified to be qualified or competent for the duty, an dif such an oath is taken it need not again be taken at the time the judge advocate[, law specialist,] or other person certified to be qualified or competent for the duty, and if such an oath is tken it need not again be taken at the time the judge advocate,[ law specialist,] or other person is detailed to that duty.

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**§849. Art 49. Depositions**

(a)* * *

* * * * * * *

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence *or, in the case of audiotape, videotape, or similar material, may be played in evidence* before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears—

(1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which athe court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

(f) Subject to subsection (d), a deposition may be read in evidence *or, in the case of audiotape, videotape, or similar material, may be played in evidence* in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority

directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

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**§ 854. Art. 54. Record of trial**

(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under this subsection. [If the proceedings have resulted in an acquittal of all charges and specifications or, if not affecting a general or flag officer, in a sentence not including discharge and not in excess of that which may otherwise be adjudged by a special court-martial, the record shall contain such matters as may be prescribed by regulations of the President.]

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record [shall contain the matter and] shall be authenticated in the manner required by such regulations as the President may prescribe.

*(c)(1) A complete record of the proceedings and testimony shall be prepared—*

*(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and*

*(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge.*

*(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.*

[(c)]*(d)* A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

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SUBCHAPTER VIII—SENTENCES

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**%§ 857. Art. 57. Effective date of sentences**

[(a) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended or deferred, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.]

*(a) No forfeiture may extend to any pay or allowances accrued before the date on which the sentence is approved by the person acting under section 860(c) of this title (article 60(c)).*

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## [SUBCHAPTER IX—REVIEW OF COURTS-MARTIAL]

## *SUBCHAPTER IX—POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL*

Sec. Art.
859. 59. Error of law; lesser included offense.
[860. 60. Initial action on the record.
[861. 61. Same—General court-martial records.
[862. 62. Reconsideration and revision.]
*860. 60. Action by the convening authority.*
*861. 61. Waiver or withdrawal of appeal.*
*862. 62. Appeal by the Unityed States.*
863. 63. Rehearings.
[864. 64. Approval by the convening authority.
[865. 65. Disposition of records after review by the convening authority.]
*864. 64. Review by a judge advocate.*
*865. 65. Disposition of records.*

* * * * * * *

### [§ 860. Art. 60. Initial action on the record

[After a trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the person who convened the court, a commissioned officer commanding for the time being, a successor in command, or any officer exercising general court-martial jurisdiction.]

### *§ 860. Art. 60. Action by the convening authority*

*(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.*

*(b)(1) Within 30 days after the sentence of a general court-martial or of a special court-martial which has adjudged a bad-conduct discharge has been announced, the accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. In the case of all other special courts-martial, the accused may make such a submission to the convening authority within 20 days after the sentence is announced. In the case of all summary courts-martial the accused may make such a submission to the convening authority within seven days after the sentence is announced. If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the period—*

*(A) in the case of a general court-martial or a special court-martial which has adjudged a bad-conduct discharge, for not more than an additional 20 days; and*

*(B) in the case of all other courts-martial, for not more than an additional 10 days.*

*(2) In a summary court-martial case the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).*

*(3) In no event shall the accused in any general or special court-martial case have less than a seven-day period after the day on which a copy of the authenticated record of trial has been given to him within which to make a submission under paragraph (1). The convening authority or other person taking action on the case, for good cause, may extend this period for up to an additional 10 days.*

*(4) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.*

*(c)(1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.*

*(2) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) and, if applicable, under subsection (d), or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.*

*(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—*

*(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or*

*(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.*

*(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who shall have five days from the date of receipt in which to submit any matter in response. The convening authority or other person taking action under this section, for good cause, may extend that period for up to an additional 20 days. Failure to object in the*

*response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.*

*(e)(1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.*

*(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—*

*(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;*

*(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or*

*(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.*

*(3) A rehearing may be ordered by the convening authority or other person taking action under this section if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.*

**[§ 861. Art. 61. Same—General court-martial records**

*[The convening authority shall refer the record of each general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion thereon to the convening authority. If the final action of the court has resulted in acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to the Judge Advocate General of the armed force of which the accused is a member.]*

***§ 861. Art. 61. Waiver or withdrawal of appeal***

*(a) In each case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)), except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by defense counsel and must be filed within 10 days after the action under section 860(c) of this title (article 60(c)) is served on the accused or on defense counsel. The convening authority or other person taking such action, for good cause, may extend the period for such filing by not more than 30 days.*

*(b) Except in a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may withdraw an appeal at any time.*

*(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 866 or 869(a) of this title (article 66 or 69(a)).*

**[§ 862. Art. 62. Reconsideration and revision**

[(a) If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action.

[(b) Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned—

[(1) for reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

[(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

[(3) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.]

***§ 862. Art. 62. Appeal by the United States***

*(a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.*

*(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.*

*(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.*

*(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).*

*(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a*

*speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.*

**§ 863. Art. 63. Rehearings**

[(a) if the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing. In such a case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.]

[(b)] Each rehearing *under this chapter* shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. *If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.*

**[§ 864. Art. 64. Approval by the convening authority**

[In acting on the findings and sentence of a court-martial, the convening authority may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence is approval of the findings and sentence.]

***§ 864. Art. 64. Review by a judge advocate***

*(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:*

*(1) Conclusions as to whether—*

*(A) the court had jurisdiction over the accused and the offense;*

*(B) the charge and specification stated an offense; and*

*(C) the sentence was within the limits prescribed as a matter of law.*

*(2) A response to each allegation of error made in writing by the accused.*

*(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.*

*(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command) if—*

*(1) the judge advocate who reviewed the case recommends corrective action;*

*(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or*

*(3) such action is otherwise required by regulations of the Secretary concerned.*

*(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—*

*(A) disapprove or approve the findings or sentence, in whole or in part;*

*(B) remit, commute, or suspend the sentence in whole or in part;*

*(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or*

*(D) dismiss the charges.*

*(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.*

*(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the Judge Advocate General for review under section 869(b) of this title (article 69(b)).*

**§ 865. Art. 65. Disposition of records after review by the convening authority**

[(a) When the convening authority has taken final action in a general court-martial case, he shall send the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.

[(b) If the sentence of a special court-martial as approved by the convening authority includes a bad-conduct discharge, whether or not suspended, the record shall be sent to the officer exercising general court-martial jurisdiction over the command to be reviewed in the same manner as a record of trial by general court-martial or directly to the appropriate Judge Advocate General to be reviewed by a Court of Military Review. If the sentence as approved by an officer exercising general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall be sent to the appropriate Judge Advocate General to be reviewed by a Court of Military Review.

[(c) All other special and summary court-martial records shall be reviewed by a judge advocate of the Army, Navy, Air Force, or Marine Corps, or a law specialist or lawyer of the Coast Guard or Department of Transportation, and shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.]

***§ 865. Art. 65. Disposition of records***

*(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.*

*(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.*

**§ 86. Art. 66. Review by Court of Military Review**

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reveiwing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection. (f). *Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules.* Appellate military judges who are assigned to a Court of Military Review may be commissined officers or civilians, each of whom must be remember of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge on the appellate military judges of the Corut of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

[(b) The Judge Advocate General shall refer to a Court of Military Review the record in evcery case of trial by court-martial in which the sentence, as approved, effects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.]

*(b) The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial—*

*(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and*

*(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).*

* * * * * * *

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, [or the Court of Military Appeals] *the Court of Military Appeals, or the*

*Supreme Court,* instruct the convening authority to take action in accordance withthe decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

* * * * * * *

**§ 867. Art. 67. Review by the Court of Military Appeals**

(a)(1) There is a United States Court of Military Appeals established under article I of the constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of a State. Each judge is 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, and is eligible for reappointment. The President shall designate from time to time one of the djudges to act as chief judge. The chief judge of the court shall have precedence and preside at any session which he attends. The other jduges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The court may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court.

(2) Judges of the United States Court of Military Appeals may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or for mental or physical disability, but for no other cause.

(3) If a judge of the United States Court of Military Appeals is temporarily unable to per form his duties because of illness or other disability, the President may designate a judge of the United States Court of Appeals for the District of Columbia *Circuit* to fill the office for the period of disability.

(4) Any judge of the United States Court of Military Appeals who is receiving retired pay may become a senior judge, may occupy offices in a Federal building, may be provided, with a staff assistant whose compensation shall not exceed the rate prescribed for GS-9 in the General Schedule under section 5332 of title 5, and, with his consent, may be called upon by the chief judge of said court to perform judicial duties with said court for any period or periods specified by such chief judge. A senior judge who is performing judicial duties pursuant to this subsection shall be paid the same compensation (in lieu of retired pay) and allowances for travel and other expenses as a judge.

(b) The Court of Military Appeals shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Military Review, [affects a general or flag officer or] extends to death;
(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

* * * * * * *

(g) [The Court of Military Appeals and the Judge Advocates General shall meet annually to make a comprehensive survey of the operation of this chapter and report] *(1) A committee consisting of the judges of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense shall meet at least annually. The committee shall make an annual comprehensive survey of the operation of this chapter. After each such survey, the committee shall report* to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate.

*(2) Each member of the committee appointed by the Secretary of Defense shall be a recognized authority in military justice or criminal law. Each such member shall be be appointed for a term of three years.*

*(3) The Federal Advisory Committee Act (5 U.S.C. App. I) shall not apply to the committee.*

*(h)(1) Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petition for review.*

*(2) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.".*

* * * * * * *

**§ 869. Art. 69. Review in the office of the Judge Advocate General**

[Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the applellate review of which is not otherwise provided for by section 966 of this title (article 66), shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with section 866 of this title (article 66), but in that event there may be no fur-

ther review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)). Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdication over the accused or the offense, or error prejudicial to the substantial rights of the accused. When such a case is considered upon application of the accused, the application must be filed in the Office of the Judge Advocate General by the accused before—

[(1) October 1, 1983; or

[(2) the last day of the two-year period beginning on the date the sentence is approved by the convening authority or, in a special court-martial case which requires action under section 865(b) of this title (article 65(b)), the officer exercising general court-martial jurisdiction,

whichever is later, unless the accused establishes good cause for failure to file within that time.]

*(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review under section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).*

*(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.*

*(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.*

**§ 870. Art. 70. Appellate counsel**

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).

(b) Appellate Government counsel shall represent the United States before the Court of Military Review or the Court of Military Appeals when directed to do so by the Judge Advocate General. *Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.*

[(c) Appellate defense counsel shall represent the accused before the Court of Military Review or the Court of Military Appeals—

[(1) when he is requested to do so by the accused;

[(2) when the United States is represented by counsel; or

[(3) when the Judge Advocate General has sent a case to the Court of Military Appeals.

[(d) The accused has the right to be represented before the Court of Military Appeals or the Court of Military Review by civilian counsel if provided by him.]

*(c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—*

*(1) when requested by the accused;*

*(2) when the United States is represented by counsel; or*

*(3) when the Judge Advocate General has sent the case to the Court of Military Appeals.*

*(d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme Court by civilian counsel if provided by him.*

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**§ 871. Art. 71. Execution of sentence; suspension of sentence**

[(a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the Presiden. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as apporoved by him, except a deathg sentence.]

*(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.*

(b) [No sentence extending to the dismissla of a commissioned officer (other than a general or flag officer), cadet, aor midshipman may be executed until approved by the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any paret of the sentence as approved by him.] *If in the case of a commissioned officer, cadet, or midshipman, the sen-*

*tence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit.* In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

[(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals.

[(d) All other court-martial sentences, unless suspended or deferred, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence, except a death sentence.]

*(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review and—*

*(A) the time for the accused to file a petition for review by the Court of Military Appeals has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;*

*(B) such a petition is rejected by the Court of Military Appeals; or*

*(C) review is completed in accordance with the judgment of the Court of Military Appeals and—*

*(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;*

*(ii) such a petition is rejected by the Supreme Court; or*

*(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.*

*(2) If a sentence extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action on that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.*

*(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.*

* * * * * * *

**§ 876a. Art. 76a. Leave required to be taken pending review of certain court-martial convictions**

Under regulations prescribed by the Secretary concerned, an accused who has been sentenced by a court-martial may be required to take leave pending completion of aciton under this subchapter if the sentence, as approved under section [864 or 865 of this title (article 64 or 65) by the officer exercising general court-martial jurisdiction] *860 of this title (article 60),* includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct dischare. The accused may be required to begin such leave on the date on which the sentence is approved [by the officer exercising general court-marital jurisdiction] *under section 860 of this title (article 60)* or at any time after such date, and such leave may be continued until the date which action under this subchapter is completed or may be terminated at any earlier time.

SUBCHAPTER X—PUNITIVE ARTICLES

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Sec. Art.
910. 110. Improper hazarding of vessel.
911. 111. Drunken or reckless driving.
912. 112. Drunk on duty.
*912a. 112a. Wrongful use, possession, etc., of controlled substances.*

* * * * * * *

***§ 912a. Art. 112a. Wrongful use, possession, etc., of controlled substances***

*(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.*

*(b) The substances referred to in subsection (a) are the following:*

*(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.*

*(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.*

*(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).*

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## SUBCHAPTER XI—MISCELLANEOUS PROVISIONS

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### § 936. Art. 136. Authority to administer oaths and to act as notary

(a) The following persons on active duty may administer oaths for the purposes of military administration, including military justice, and have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, by persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands, and by other persons subject to this chapter outside of the United States:

(1) All judge advocates [of the Army, Navy, Air Force, and Marine Corps].

[(2) All law specialists.]

[(3)] *(2)* All summary courts-martial.

[(4)] *(3)* All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

[(5)] *(4)* All commanding officers of the Navy, Marine Corps, and Coast Guard.

[(6)] *(5)* All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.

[(7)] *(6)* All other persons designated by regulations of the armed forces or by statute.

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## CHAPTER 79—CORRECTION OF MILITARY RECORDS

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### § 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, undeer procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executie part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescried by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

* * * * * * *

*(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—*

*(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or*

*(2) action on the sentence of a court-martial for purposes of clemency.*

**§ 1553. Review of discharge or dismissal**

(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, established a board of review, consisting of five members, to review the discharge or dismissal (other that a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motio or request for review must be made within 15 years after the date of the discharge or dismissal. *With respect to a discharge or dismissal adjudged by a court-martial case tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under this subsection may extend only to a change in the discharge or dismissal or issuance of a new discharge for purposes of clemency.*

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# TITLE 28, UNITED STATES CODE

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## PART IV—JURISDICTION AND VENUE

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### CHAPTER 81—SUPREME COURT

Sec.
1251. Original jurisdiction.
1252. Direct apeals from decisions invalidating Acts of Congress.
1253. Direct appeals from decisions of three-judge courts.
1254. Courts of appeals; certiorari; appeal; certified questions.
1255. Court of Claims; certiorari; certified questions.
1256. Court of Customs and Patent Appeals; certiorari.
1257. State courts; appeal; certiorari.
1258. Supreme Court of Puerto Rico; appeal; certirorari.
*1259. Court of Military Appeals; certiorari.*

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***§ 1259. Court of Military Appeals; certiorari***

*Decisions of the United States Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases:*

*(1) Cases reviewed by the Court of Military Appeals under section 867(b)(1) of title 10.*

*(2) Cases certified to the Court of Military Appeals by the Judge Advocate General under section 867(b)(2) of title 10.*

*(3) Cases in which the Court of Military Appeals granted a petition for review under section 867(b)(3) of title 10.*

*(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Military Appeals granted relief.*

# PART V—PROCEDURE

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## CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

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**§ 2101. Supreme court; time for appeal or certiorari; docketing; stay**

(a) * * *

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(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

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SECTION 7 OF THE MILITARY JUSTICE AMENDMENTS OF 1981

EFFECTIVE DATES

SEC. 7.(a) The amendments made by this Act shall take effect at the end of the sixty-day period beginning on the date of the enactment of this Act.

[(b)(1) The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after the effective date of such amendments under section 864 or 865 (article 64 or 65) of title 10, United States code, by the officer exercising general court-martial jurisdiction.]

*(b)(1) The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after January 20, 1982—*

*(A) under section 864 or 865 (article 64 or 65) of title 10, United States Code, by the officer exercising general court-martial jurisdiction under the provisions of such section as it existed on the day before the effective date of the Military Justice Act of 1983; or*

*(B) under section 860 (article 60) of title 10, United States Code, by the officer empowered to act on the sentence on or after the effective date of the Military Justice Act of 1983.*

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