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REFORM OF THE COURT OF MILITARY APPEALS

OFFICE OF THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE
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MEMORANDUM

SUBJECT: Reform of the Court of Military Appeals

This staff paper has been prepared to assist the Secretary of Defense in deciding whether any legislative proposals for reform of the Court of Military Appeals should be submitted to Congress. The Court of Military Appeals is the court of last resort in a large criminal justice system administered by the armed forces for over two million persons serving on active duty. Because of its critical role in this system and its recognized impact on military discipline and national security, it is essential that the appellate process within the military justice system be of unquestioned excellence.

The paper assesses the need for reform with respect to the Court of Military Appeals and the advantages and disadvantages of various proposals for reform. Some of the proposals for reform have been advanced at various times over the past 20 years; some have been devised during the extensive consideration of the need for reform by the staff in the Office of General Counsel. This is a staff paper written for the purpose of shaping the issues and providing the necessary background for decision-making. It does not represent any official point of view of the Department of Defense.

Before any recommendations are made regarding reform of the Court of Military Appeals, the issues discussed in this paper will be subjected to careful and thorough review. Accordingly, we are circulating this paper in draft form to solicit the views of the bench and bar, the committees of the Congress with responsibility for military justice, other government agencies and offices that have an interest in justice systems, veterans organizations, civil rights-civil liberties organizations, legal services organizations and interested members of the public. The Court of Military Appeals is unique in some respects because its decisions affect only the armed forces and members of the military services. We believe, however, that wide circulation for comment will be of benefit to the Department of Defense in shaping any legislative proposals and to the Congress in considering these proposals.

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REFORM OF THE COURT OF MILITARY APPEALS

The Court of Military Appeals is the court of last resort in a large criminal justice system administered by the armed forces for over two million persons serving on active duty. The Court is composed of three civilian judges appointed by the President to 15-year terms with the advice and consent of the Senate. The Court's decisions can have an important impact on military discipline and readiness essential to the national security. For that reason, the Department of Defense has an interest in assuring that this aspect of appellate review within the military justice system is, on balance, the best available. This paper assesses the need for legislative reform with respect to the Court of Military Appeals, sets out the advantages to be sought and the disadvantages to be avoided in effecting any reform, and evaluates 13 proposals for reform. To provide the necessary background, the appendices describe the current organization and operation of the Court of Military Appeals; the historical background of appellate review in the military justice system; the present system of review of military cases by civilian courts through collateral attack; and the current statutes affecting the Court of Military Appeals that would have to be amended if proposals for reform were adopted. This analysis provides the basis for decisions whether to make legislative proposals to the Congress and, if so, what proposals to make.

I. The Need for Reform

The Court of Military Appeals was created in 1951 as a result of a major legislative reform of the military justice system. It was, at that time, both a compromise and an experiment. Circumstances have changed dramatically over the nearly 30 years since the Court was created and experience with this capstone court, insulated from the rest of the federal appellate system and from the Supreme Court, has gradually revealed several fundamental flaws in the system. The need for reform arises out of these changed circumstances and perceived flaws.

A. The Military Justice System Has Outgrown the Compromise Effected in 1951

The military justice system onto which Congress engrafted the Court of Military Appeals in 1951 was very different than the system in place today.[1/] Prior to 1951 civilian judicial review of decisions by courts-martial was virtually nonexistent and regulations governing trial procedure were practically immune from challenge in a judicial forum. Depending on the severity of the sentence and regulations of the ared force concerned, appellate review was accomplished by one or more of the following: the commander who ordered

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1/ An historical description of the military appellate system prior to establishment of the Court of Military Appeals is set forth in Appendix B *infra* at text accompanying notes 1-52.

the court-martial, advisory boards within the Departments, the Secretaries of the Departments, or the President. At the trial level, the composition of courts-martial was substantially similar to the system in effect since the Revolutionary War. The court-martial consisted of a panel of military officers, with the senior officer acting as president. In most cases, the presiding officer was not a lawyer and there was no provision for lawyers to act as counsel for either the government or the accused.

The changes effected by the Uniform Code of Military Justice, which became effective in 1951, were sweeping.[2/] The new Code provided for a "law officer" to preside over all general courts-martial, which are the courts with the power to impose the most severe punishments, and for counsel in such courts to be lawyers. The Code also contained numerous changes in procedure including, with respect to general courts-martial, mandatory requirements for a preliminary investigation, pretrial legal advice to the commander, and post-trial legal review prior to action on the case by the commander. The Code provided for comprehensive legal review after the commander's action. If the case affected a general or flag officer or involved an approved sentence that extended to death, a punitive discharge, or

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2/ The legislative history of the Uniform Code of Military Justice is outlined in Appendix B *infra* at text accompanying notes 53-115.

confinement for one year or more, the record of trial was reviewed automatically by the Boards of Review composed of senior judge advocates within each Department. In all other cases, the Code required legal review by a judge advocate. The most dramatic change brought about by the Code was creation of the Court of Military Appeals, a tribunal composed of three civilian judges with power to review cases within the jurisdiction of the Boards of Review.

The Court of Military Appeals was created, in part, to ensure that the changes in trial and review procedure contained in the Code became institutionalized in the military justice system. Its role was to act as a civilian watchdog with respect to the actions taken by the Departments to carry out the intent of Congress to modernize and upgrade the quality of military justice. Its certiorari jurisdiction to take cases on petition of the accused was designed to give it a wide-ranging view of the actions of trial courts. Its power to review cases submitted by the Judge Advocates General was intended to provide a channel for the armed forces to obtain review in the Court.

The Court of Military Appeals was also a compromise between those who favored and those who opposed civilian review of military cases. At one end of the spectrum were those who favored bringing military cases into the existing federal appellate system by permitting review in any court

of appeals with jurisdiction over the place where the accused was being held. At the other end of the spectrum were those who insisted that no civilian involvement in military justice could be tolerated. The drafters of the Uniform Code of Military Justice moved toward a compromise. They proposed a Judicial Council composed of not less than three civilian members. The appointment power was vested in the Secretaries of the Military Departments, who could remove the members from the Council at will. Congress refined this compromise by designating the tribunal as the Court of Military Appeals and by providing for appointment of three judges by the President, with confirmation by the Senate. Each seat on the court carried a fifteen year term, with vacancies for each seat to be filled for the balance of the term. The judges were provided with secure tenure during their terms, with the possibility of removal by the President only for neglect of duty, malfeasance, or disability.

This compromise offered something for everyone. For those who were adamant about civilian review, it offered a three-judge court composed entirely of civilians who would have wide powers of review within the military justice system. It offered the civilian model of review by certiorari on petition of the accused and it provided the government with an unrestricted opportunity for review at the request of the Judge Advocate General. For those who were adamantly opposed

to civilian review, it offered a capstone court entirely within the Department of Defense with no direct access to the federal courts of appeal or to the Supreme Court. It also offered a court with limited tenure so that there was the possibility of replacing judges who proved unsuited to the task of applying military principles within a judicial system.

Enactment of the Uniform Code of Military Justice and establishment of the Court of Military Appeals did not immediately transform the court-martial process into a judicial system. When the Code became effective in 1951, the status and powers of the law officers who presided at trials were quite uncertain and there was no provision for legally qualified counsel or a law officer in special courts-martial, which are "lower" courts of limited sentencing power.[3/] The commander played the dominant role in the court-martial process. The role that would be played by the Court of Military Appeals was not clear.

In the twenty-nine years since the Code was enacted, much has changed.[4/] The law officer now carries the title of judge and presides at all general courts-martial and

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3/ The special court-martial is limited to imposing a punitive discharge, six months confinement, forfeiture of two-thirds pay per month for six months, reduction to the lowest enlisted grade, and certain lesser punishments.

4/ The major developments in review of courts-martial are set forth in Appendix B *infra* at text accompanying notes 116-223.

at virtually all special courts-martial. Lawyers represent the parties in all general courts-martial and in nearly all special courts-martial. The rules of evidence and procedure in courts-martial not only compare favorably with those applicable in civilian practice, but in many cases provide the military accused with greater rights than a civilian counterpart.[5/] Except in matters unique to military practice, military courts look to the civilian courts for guidance on matters of procedure and constitutional law. The Court of Military Appeals regularly engages in statutory interpretation of the Uniform Code of Miltitary Justice. In addition, the Court reviews and sometimes invalidates provisions of the Manual for Courts-Martial and other regulations and provides rules of practice and procedure through the exercise of supervisory power.

Civilian judicial review is no longer an experimental idea. It is the accepted mode in the military justice system.

The change in circumstances since 1951 has been so substantial that it calls into question the viability of the compromise that produced the Court of Military Appeals. The

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5/ Additional changes are under study within the Department of Defense. A year-long study aimed at substituting the federal rules of evidence for the special rules of evidence for courts-martial set out in the Manual for Courts-Martial is nearing completion. When adopted, this change will make practice before courts-martial the equivalent of practice before federal criminal courts insofar as the rules of evidence are concerned.

factors that seemed to require a capstone court with no access for either the government or the accused to the federal appellate system are no longer of critical importance. The military trial system has developed to a point where it is equivalent in quality and in many respects superior in efficiency to the criminal trial system in other federal courts. A substantial body of law has been created by the specialized Court of Military Appeals that gives guidance as to how military considerations can be taken into account in deciding fundamental constitutional and statutory construction questions affecting military members. The strong institutional resistance within the Department of Defense to civilian review has been eroded by the similarity in operation between the Court of Military Appeals and other federal appellate courts. Because the military justice system has outgrown the compromise reached in 1951, it is important to look critically at the system to discover whether the fairness and quality of military justice can be improved in ways that serve both military members and the Military Departments.

B. The Military Justice System Should Not Be Shut Off From Direct Review in the United States Supreme Court

One of the most fundamental flaws of the current military justice system is that the appellate process is shut off almost

completely from the Supreme Court.[6/] It is well-established that constitutional guarantees extend to military members.[7/] There is substantial room for interpretation, however, as to the extent of constitutional guarantees under circumstances peculiar to military operations and related to the national security. The Court of Military Appeals decides basic constitutional questions in large numbers of cases without the discipline and uniformity imposed by Supreme Court review.[8/] Under this system, the Court of Military Appeals is free to interpret Supreme Court opinions in ways that either go substantially beyond or substantially restrict what the Supreme Court intended without any recourse for the government and with only very limited recourse for the accused. At present, court-martial convictions are reviewed in the federal courts only through collateral proceedings such as petitions for habeas corpus filed in the federal district court in whose

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6/ Review of courts-martial in the federal courts under the current system is described in Appendix C *infra*.

7/ *E.g.*, United States v. Jacoby, 11 C.M.A. 428, 29 C.M.R. 244 (1960) *discussed in* Appendix B *infra* at text accompanying notes 146-48; *cf*. Levy v. Parker, 417 U.S. 733 (1974), *discussed in* Appendix C *infra* at text accompanying notes 111-121.

8/ There is a theoretical possibility that the government could obtain review in the Supreme Court through various writs such as mandamus or prohibition, but these possibilities have not been tested to date.

jurisdiction the military accused is confined.[9/] There is no statutory authority for decisions of the Court of Military Appeals adverse to the government to be reviewed in the federal courts.[10/]

For the accused, the absence of direct review by the federal courts leads to "a judicial trek that has been criticized as inefficient, costly, time-consuming, and redundant."[11/] If, for example, the accused in a general court-martial receives a sentence that includes a punitive discharge, there is legal review by a judge advocate in the field, automatic appeal to a Court of Military Review, and the opportunity to petition for review by the Court of Military Appeals. The accused then is faced with a complex array of options for mounting collateral attack in which the opportunity for obtaining review and the scope of review can differ considerably depending on the court in which review is sought and the nature of the remedy sought. The doctrine of exhaustion of remedies may require the accused to pursue further actions in the military system prior to obtaining review in

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9/ The jurisdictional bases for collateral attack are discussed in Appendix C *infra* at text accompanying notes 30-55.

10/ Appendix B *infra* at text accompanying notes 29-30.

11/ H. Moyer, JUSTICE AND THE MILITARY 1182 (1972).

a federal district court. Even if relief is obtained at the district court level, there is the likelihood of further review by a court of appeals. The situation is complicated by the procedural aspects of federal court review.[12/] Moreover, the substantive treatment of the case may vary not only among the courts of appeal but also within particular circuits.[13/]

For the government, on the other hand, there are no complex choices to be made. If there is a determination adverse to the government in the Court of Military Appeals, there is no other tribunal to which the government can appeal. This leaves the government at a very substantial disadvantage in trying to shape a rational, consistent body of law. The law is developed entirely by the Court of Military Appeals without direct guidance from the Supreme Court. The absence of direct review in an Article III court is of particular concern because of the nature of the issues decided adversely to the government by the Court of Military Appeals. The court has ruled against the government on cases considered by the Military Departments to be of direct importance to the maintenance of order and discipline in the armed forces, including issues involving search and

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12/ Appendix C *infra* at text accompanying notes 56-74.

13/ *Id*. at text accompanying notes 75-129.

seizure,[14/] interrogation and self-incrimination,[15/] subject matter jurisdiction,[16/] and the processing of cases.[17/] These key issues involve legal principles often considered by the Supreme Court in civilian contexts. In cases where the Court of Military Appeals declines to follow Supreme Court precedent, the government has no recourse. In cases where the Court of Military Appeals follows civilian precents despite unique military considerations, the government also has no recourse. It appears to some observers that the pendulum of Court of Military Appeals decisions swings back and forth between these two poles because there is no discipline imposed by higher court review.

14/ E.g., United States v. Roberts, 2 M.J. 31 (C.M.A. 1976) (substantially limiting the power of a commander to conduct a barracks inspection for contraband).

15/ E.g., United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974) (despite civilian constitutional rule that fifth amendment privilege against self-incrimination does not preclude involuntary taking of bodily fluids, the court held that the self-incrimination privilege in Article 31 of the Uniform Code of Military Justice prohibits the involuntary taking of urine samples if the test results are to be used against the soldier).

16/ E.g., United States v. Williams, 2 M.J. 26 (C.M.A. 1976) (off-post possession of drugs not service-connected for purposes of establishing court-martial jurisdiction).

17/ E.g., United States v. Henderson, 1 M.J. 521 (C.M.A. (1976) (rejecting government position that 132-day delay between confinement and trial for murder was justified by seriousness of offense and complexity of case due to involvement of foreign nationals and overseas situs of trial; murder conviction reversed based on court's holding that delay of more than 90 days creates a presumed denial of the right to a speedy trial.)

There is another substantial problem with this system. Without federal appellate review, the Court of Military Appeals is the final arbiter of its own powers. When the Court takes a conservative view of its powers, this aspect of the system does not create conflict. When, however, the Court expands its powers into areas where there is substantial disagreement that Congress ever intended it to be, its power over the government as final arbiter of these questions creates a tension that adversely affects all operations of the military justice system. Over the past five years the Court has sought steadily to expand its powers. It has, for example, resorted to extraordinary writs to reach parts of the military justice system specifically excluded from its jurisdiction by statute. That result ultimately may be judged right or wrong, but the instability in the military justice system that it produces is unmistakable. There is available the alternative of seeking legislation to correct substantive errors in interpreting the intent of the Congress or to correct results that the Congress finds inappropriate, but that is an unacceptable way to administer a justice system.

There is no other aspect of the federal justice system where a similar capstone court was set up to substitute for review in the Supreme Court. The decisions of all other

federal specialized courts may be reviewed by the Supreme Court.[18/] The decisions of military courts are not in a realm that is beyond the competence or natural focus of the Supreme Court. They are much like other specialized federal courts in that they deal with a subject matter that is in some aspects technical and arcane, but in other respects requires consideration of broad constitutional or statutory issues. The benefits of the uniformity imposed by Supreme Court review are no less important to the military justice system than in the other specialized federal courts.

C. The Court of Military Appeals Has Suffered from Disruptive Turnover in Judges and Abrupt Changes in Doctrine

The Court's first years were characterized by stability in membership, but recent years have been marked by considerable turnover.[19/] During the past ten years, eight different judges have held the Court's three seats. Within a four

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18/ Cases in the Court of Claims may be reviewed by the Supreme Court by writ of certiorari or by certification of any question of law by the Court of Claims. 28 U.S.C. § 1255 (1976). Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari. 28 U.S.C. § 1256 (1976). The decisions of the Tax Court are subject to review in the United States Courts of Appeal and the judgments of the Courts of Appeal in such cases are subject to review by the Supreme Court by writs of certiorari. 26 U.S.C. § 7482 (1976).

19/ A chart listing past appointees and the terms of service is contained in Appendix A *infra*.

year period, there were seven judges who sat at various times in nine different combinations. Only two of the vacancies during the past decade resulted from illness or death, suggesting that there are fundamental problems with the court that are causing this turnover. A present member of the Court is being considered for appointment to a federal district court judgeship. If his resignation occurs, it will be the second time within the past six years that a member of this appellate court has departed to accept an appointment to the federal trial bench. This movement from an appellate court to trial courts also suggests unusual problems.

Whether the turnover has resulted from the limited terms of service, absence of an adequate retirement system, or the limited jurisdiction of the court is a matter of considerable dispute. There is little disagreement, however, as to the adverse impact of such turnover. A major consequence has been to introduce substantial instability and unpredictability into the military justice system.[20/] As

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20/ A graphic description of the effect of the personnel turbulence on doctrine is set forth in Miller, Three is Not Enough, The Army Lawyer, Sept. 1976, at 11. Miller studied the court's treatment of a single issue, failure of the trial judge to instruct properly on sentencing, over a six year period. He concluded that there had been a considerable shift in treatment of the standard for review of this

[Footnote continued]

the court's membership has suffered rapid turnover, the state of the law has become more uncertain. A prime example is found in the state of the law with respect to search and seizure.[21/] With a variety of judges sitting on the court, and with opinions that have not commanded concurrence among the other two members, considerable confusion has arisen with respect to the extent of a military commander's power to

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20/ [continued]

single issue as a result of shifts in membership on the court:

> In a period of six years, the same error has been treated as: (1) violation of military due process requiring reversal; (2) one that requires a test for prejudice; (3) one that requires a test for the risk of prejudice; and (4) again a violation of military due process requiring a reversal.

Id. at 13. What struck Miller as significant was not so much the fact that there had been changes and reversals in doctrine, but that these shifts had taken place largely without detailed citation to or discussion of prior cases on the same point. Miller also noted:

> Because the Court of Military Appeals is a federal court, one might be tempted to liken its three judges to the three judge panels of some U.S. Circuit Courts of Appeal and argue that the concept of three judges is well recognized. This argument is somewhat specious, since the entire circuit court is large and the decisions of other panels have a stabilizing effect. Additionally, important questions may be decided en banc. Those courts have both the tenure and status to encourage longevity.

Id. at 14.

21/ See Appendix B infra at text accompanying notes 200-202.

conduct an administrative inspection of troops without probable cause. To a certain extent, change in doctrine is inherent in any judicial system as new issues arise and the fabric of the law changes with the times. The rapid changes in personnel on the Court of Military Appeals, however, have accelerated and accentuated the adverse aspects of this process.

It has become unnecessarily difficult for lawyers to advise their clients clearly on the state of the law and for the Judge Advocate schools to teach military law as a coherent discipline. For judge advocates representing the government, undue instability in the law is of serious consequence when attempting to advise military commanders on powers essential to the maintenance of discipline, such as the authority for searches or inspections. For judge advocates representing the accused, instability makes it difficult to advise service members on the alternative choices in trial strategy. Such instability has a further adverse affect in that it undermines respect for the law within the armed forces. To the extent that judge advocates are unable to advise their clients clearly, the impression is created that the military justice system is arbitrary and capricious. In a system where respect for the law is of paramount importance, it is imperative that such a development be avoided.

The three broad categories of factors discussed above -- changed circumstances over the years, the unusual lack of access to the Supreme Court for final review, and the turbulence in court personnel and doctrine -- have created a substantial need for reform. Even with such an acknowledged need, however, reform of courts must proceed carefully. Long-term solutions are required. Change must serve a wide range of interests within the justice system. The balance between the prosecution and the defense must not be weighted on one side or the other. Analysis of the need is only the first step. Careful examination of alternatives for improvement must follow.

II. Factors To Be Weighed in Considering Proposals for Reform

Consideration of proposals for reform of the Court of Military Appeals must involve a balancing process in which the advantages sought to be achieved are weighed against the disadvantages sought to be avoided. This part sets out the principal factors affecting the decision-making process. It is limited to substantive advantages and disadvantages for the military justice system and those federal civilian courts that may be affected. It does not include political judgments about the possibility of obtaining the concurrence in the legislation necessary to implement any of the proposals.

A. Advantages To Be Sought in Reforming the System

It is useful to isolate 13 factors that would be considered advantages to be sought in any reform of the Court of Military Appeals. Many of these factors are intertwined and changes that tend to produce one will also tend to produce others. Not all of these factors carry the same weight. Some are central to an effective appellate system; others are ancillary advantages. They are set out separately below to facilitate discussion and analysis of the proposals set out in Part III. This section does not attempt a thorough discussion of each factor. Analysis of these qualities in a judicial system occupies a substantial niche in the professional literature. This presentation simply identifies

these factors and states their relevance to the Court of Military Appeals.

1. Stability.

The current Court of Military Appeals has only three judges. The effect of turnover in judicial personnel is magnified in a small court. If military cases were heard by a larger court, this adverse effect would be greatly diminished. The broad range of talent, interests, and background on a larger court would bring increased stability to the military judicial system. The paralyzing affect that vacancies or disability have on a small three-judge court could be eliminated.

2. Predictability.

There have been, in the past, distinct swings in judicial approach to military cases as the judges of the Court of Military Appeals changed. A three-judge court often finds itself with one conservative, one liberal and one judge in-between. That situation gives undue weight to the views of one judge during the tenure of one set of three judges, and makes possible a substantial change in direction when the philosphical anchor of one side or another is changed at the end of a judge's term of office. This has an unsettling effect on the lawyers who must operate within the system and detracts from the perception of fairness held by military service members who are within the military justice

system. Lack of predictability may increase caseloads because lawyers are unable to advise their clients that the law is settled.[22/]

There is a corollary lack of predictability in review of military cases on collateral attack. The procedural aspects of federal court review are not settled and treatment of cases varies among circuits and within circuits.[23/]

3. Uniformity.

Building a coherent body of case law that provides a philosophical underpinning for the military justice system is difficult under a system in which one third of the judges on the court may be changed every five years or sooner. Lack of uniformity affects military planning and implementation of the court's decisions. A larger court, particularly one with an expert capability from handling large numbers of military cases, but balanced with judges having expert capability in other fields, would increase uniformity.

4. Avoidance of undue specialization.

Over-specialization creates a narrowness of viewpoint that does not contribute to the quality of justice. Over-specialization also makes more likely the dominance of one

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22/ In the view of some experts this factor has a lesser effect on caseload in a criminal system where cost is not a factor than in civil systems where the cost of appeals is sometimes a major consideration. Some experts find that the predictability associated with the Court of Military Appeals compares favorably with some federal district courts.

23/ Collateral attack is discussed in Appendix C.

interest or one philosophical approach to cases. Isolation magnifies the effects of over-specialization. A specialized court that is part of a larger court system will benefit from cross-assignments of judges and other means of broadening the range of issues considered each year by each judge. Special expert capability with respect to military matters can be made available without succumbing to specialized interests.

5. Adequate appellate review for the government.

The military justice system provides for appeals by the government to the Court of Military Appeals, but not beyond. A decision by the Court of Military Appeals that is adverse to the accused can be litigated further by collateral attack in the federal courts. The government cannot litigate further. Important principles of constitutional law affecting the government's interest in national defense can be finally decided by only two of these judges with no opportunity for a fresh view in any other court in the land and no opportunity for review in the Supreme Court. Appellate review is adequate to protect the government's interests only if Supreme Court review is available.

6. Adequate appellate review for the accused.

Under the current system, the only avenue into federal court for persons tried under the military justice system is through a collateral proceeding such as an action seeking a

writ of habeas corpus in a federal district court. Without direct review, access to Article III courts by the military accused is rendered extremely difficult as a result of the complex jurisdictional and procedural aspects of collateral attack and the uncertainties surrounding the appropriate scope of substantive review. Moreover, although the number of collateral proceedings at present peacetime force levels is not overly burdensome for the federal courts, such proceedings could present a serious problem in the event of mobilization.

7. Effective utilization of the Supreme Court.

Any system that opens up review by the Supreme Court must make effective use of the Court's time. The ideal system would require the Supreme Court to deal only with the rare case in which unsettled and important questions of law were raised. This generally would require channeling cases through a federal circuit Court of Appeals which would act as a filter. Courts outside the federal system are unlikely to be an effective filter. Any more direct channel of review in the Supreme Court creates more pressure for the Court to supervise an entire judicial system because it would be the only arbiter of military legal matters outside the military justice system and the specialized courts set up to deal only with that system. If military appeals are channeled through a federal circuit court, the pressure on the Supreme Court to decide cases because the system needs

supervision would be absorbed at the circuit court level, permitting more efficient use of the Supreme Court to decide only cases raising critical issues of statutory and constitutional interpretation. It would also be desirable to reduce the pressure for Supreme Court review by reducing conflicts among the circuits as to the procedural aspects of collateral attack as well as the underlying substantive principles of military law.

8. Efficiency.

The current appellate process in the military justice system is prolonged and complex. In most general court-martial cases, there is review in the field by a senior legal officer, mandatory review by a Court of Military Review, discretionary review in the Court of Military Appeals, and the possibility of collateral attack in a federal district court, appeal to a Court of Appeals, and finally certiorari to the Supreme Court. Simplification of the appellate process would eliminate unnecessary repetitive review.

9. Better judges.

The stature of an Article III court attracts candidates for judicial office of the highest caliber. Proposals for reform should seek to ensure high caliber of judges for military appellate cases. Any given group of judges on the Court of Military Appeals contains dedicated and highly intelligent judges, but over the long run, the stature of an

Article III court will attract better judges. The breadth of the candidate population will be greater, ensuring a wider variety of talents, interests, and backgrounds in the judges.

10. Increased stature for military justice.

The increased stature of an Article III court as compared to an Article I court would reflect favorably on the military justice system. There is a perception that the military has opted out of the federal judicial system for reasons of protection against the intrusion of constitutional principles into military discipline. The Court of Military Appeals insulates the military justice system from scrutiny by the federal courts and there is no direct appeal from its decisions on constitutional matters. No insulation is necessary. The military justice system scrupulously preserves constitutional rights, in some respects more effectively than the civilian justice system. Its actions would fare well in the Circuit Courts of Appeals and that fact would increase the stature of the military justice system among both military members and civilians.

11. Economy.

The fiscal year 1977 budget for the Court of Military Appeals was $1,239,000. With only three judges, that is a cost of $413,000 per judge. The fiscal year 1980 budget request for the Court of Military Appeals is $2,033,000, a cost of $677,667 per judge. By way of comparison, the fiscal

year 1978 budget for the federal Courts of Appeals has been estimated at $31,424,996 to support 88 judges, at a per judge cost of $357,102 -- significantly lower than the Court of Military Appeals.[24/] Another way of looking at costs is expenditure per case. If current levels are maintained, the Court of Military Appeals will dispose of 1,876 filings, which includes decisions to deny petitions for review. This is a cost of $1,084 per disposition. The federal courts of appeal are expected to dispose of 17,700 cases. This is a cost of about $2,000 per disposition. A further comparision can be made in terms of dispositions between the Court of Military Appeals and state courts of last resort:

JURISDICTION	AUTHORIZED PERSONNEL	CURRENT BUDGET*	TOTAL DISPOSITIONS	COST PER DISPOSITION
Alabama Sup Ct	60	$1,523	369	$4,127
Calif. Sup Ct	77	$3,261	3712	$ 879
Florida Sup Ct	60	$1,670	1454	$1,149
Nevada Sup Ct	36	$ 868	634	$1,396
NY Ct of Appeals	112	$3,530	3070	$1,150
Ohio Sup Ct	62	$1,763	1310	$1,346
Okla. Sup Ct	53	$1,309	771	$1,698
US Ct of Mil Appeals	49	$2,033	1876	$1,084

[* dollars in thousands]

24/ The Administrative Office of the United States Courts has not estimated the budgetary cost of the courts of appeals for fiscal year 1980.

If current rates are maintained, the Court of Military Appeals will issue 79 signed or per curiam opinions, at a cost of $25,721 per opinion. Some experts point out that the relatively high cost of Court of Military Appeals operations is a function of the better quality of justice dispensed with respect to petitions for review. These

[Footnote continued]

This comparison is quite general because of the different mix of opinions and summary dispositions included in the figure for total dispositions. The percentage of discretionary appeals is very high for the Court of Military Appeals (about 90 percent); making the cost per disposition substantially lower than it would be for a court that issued many more opinions.

The staff structure of the Court of Military Appeals is costly. The average civil service grade of the employees is GS-9.93 and the average staff salary is $25,444. In part, the cost reflects the review procedure used by the court. Each case and petition for review is examined by the court's central legal staff prior to submission to the three judges and their law clerks. In part, the cost is due to personnel practices of the Court. The central staff attorneys and the attorneys on the staffs of the individual judges are permanent civil service employees. Proponents of the current system

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24/ [continued]

petitions may receive more thorough review at a higher level at the Court of Military Appeals than at federal Courts of Appeals. Under current practice, petitions are first reviewed by a staff member. There are four court employees working full time on petitions and they each handle about 50 petitions a month. Petitions are then circulated for review by all three judges. The Chief Judge of the Court of Military Appeals asserts that denial of a petition takes just as much time as a litigated case except for oral argument time and writing of an opinion.

contend that it produces a staff that is knowledgeable in military affairs and capable of assisting the court in its specialized function. Critics contend that the staff process involves unnecessary layering, produces entrenched views in the merits of legal issues, and reflects decisions made thirty years ago that no longer accord with the needs of the court or the military justice system. A system that relies upon use of law clerks that assist the judges on a one or two year basis, such as is used on nearly all federal courts, is far more economical and provides for fresh viewpoints.

12. Separation of executive and judicial powers.

The Court of Military Appeals has administrative as well as judicial functions. It is required by statute, 10 U.S.C. § 867(g), to meet annually with the Judge Advocates General to make a comprehensive survey of the operation of the military justice system and to report to the Armed Services Committees of Congress, the Secretary of Defense, the Secretaries of the Military Departments and the Secretary of the Department of Transportation on the number and status of pending cases and recommendations relating to uniformity of policies as to sentences, amendments to the Uniform Code of Military Justice and other matters considered appropriate. In practice, the Code Committee takes up a wide variety of matters, including publication of decisions by the Court of Military Appeals and the Courts of Military Review, develop-

ment of research materials for military justice practitioners, consideration of amendments to the Uniform Code of Military Justice and the Manual for Courts-Martial, and general exchange of information on developments considered or adopted by the Military Departments in the administration of military justice. Some experts believe that the Court's current role in monitoring the system is important and that the checks on the system should not be limited to court decisions. The Court has been assigned this role because it is convenient, but it could readily be performed elsewhere. The only important rule of thumb is that the function be lodged outside the Military Departments. When a court has administrative duties in implementing the justice system of which it is a part, there are inevitable conflicts of interest and appearances of conflict. There is always the implication that if changes supported by the judges are not made administratively, they will be made judicially through decisions. These conflicts diminish the stature of the court because they introduce doubt with respect to the impartiality of the judges. They could be minimized by limiting the judicial role to making reports, recommendations to Congress, and appearing before Congress.

There also may be an appearance of conflict in the administrative responsibilities of the Department of Defense with respect to the Court. The Department makes recommendations to Congress about the Court's budget and provides the

court with certain services. The Court has only one small building and a budget that provides for 49 employees. It is too small to have its own pay and retirement system, maintenance system, or other support facilities without substantial increases in cost. It is an appendage of the Department of Defense for administrative convenience and efficiency because other alternatives proved unsuitable when Congress last considered this question in 1968. Judicial functions should be separated from executive functions so that judges who decide military cases would not be trying to exert administrative influence on military systems, and the entire judicial function be separated from the Department of Defense.

13. Flexibility.

The Court of Military Appeals has fixed resources. It has three judges no matter whether its caseload is large or small. It has no flexibility to meet changing conditions. If the number of military appeals rose, due perhaps to increases in the number of persons in the Armed Forces under wartime or crisis conditions, a larger court could meet these needs more readily than a three-judge court. Similarly, if the number of military appeals decreases, due to more stability and predictability in the case law or better administrative procedures in the Defense Department, the judges originally intended to handle military cases

would not be underutilized if military appeals cases were handled in the context of a larger system.

B. Disadvantages To Be Avoided in Making Changes to the System.

The Court of Military Appeals serves some aspects of the military justice system well. It is important to preserve these aspects to the maximum extent possible in making any changes to the system. There are also urgent requirements in a military justice system that, if not being served well by the Court of Military Appeals, should not be made worse in the process of changing the system. This section sets out the principal adverse effects to be guarded against. The extent to which each proposal for change was likely to produce these adverse effects should be weighed carefully against the proposed advantages to ensure that, on balance, change produces substantial improvement in the system.

1. Adverse impact on the unique role of the military justice system in promoting good order and discipline in the Armed Forces.

The military justice system exists to promote good order and discipline in the armed forces. Order and discipline are essential to the readiness and capability of the armed forces to meet hostile military action, to respond in emergencies, to maintain an effective deterrent force, and to participate in world peace-keeping functions. The need for order and discipline exists in a civilian justice system but in a much more attenuated and less distinct

fashion. The extent to which the Court of Military Appeals gives great weight to these factors is debated by scholars and litigants, but any change in the system should not dilute the current level of deference to these needs.

A change in the current system might also weaken the individual servicemember's perception of the ability of commanders to enforce discipline. Increased participation of the federal courts in the court-martial process might be perceived within the military services as a diminution of commanders' prerogatives. Further, since civilian jurisprudence is popularly (though not always correctly) viewed as being more lenient than the military justice system, there might be less deterrence from misconduct.

2. Adverse impact on those aspects of the court-martial system that provide the military accused with greater rights than a civilian counterpart.

The military justice system provides the accused with certain rights that are broader than comparable guarantees for most civilian accused.[25/] These include the right to a detailed investigation prior to referral of a case to a general court-martial, the right to be present with counsel at such an investigation, the right to extensive pretrial discovery, broader application of the privilege against

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25/ See Moyer, Procedural Rights of a Military Accused: Advantages Over a Civilian Defendant, 22 Me. L. Rev. 105 (1970)

self-incrimination, extensive right to present witness and other material on sentencing, provision of counsel trained in military law at government expense regardless of indigency, and automatic appeal with counsel and transcript provided at government expense in all cases involving a punitive discharge or confinement for more than a year. Many of these elements of military law have grown out of the historical development of the court-martial system, particularly in terms of the relationship between military courts and the command structure. Some experts fear that civilian courts will not be sensitive to the special needs of the military accused and will attempt to impose civilian standards in all cases. Changes in the present system must be considered with a view towards insuring that dilution of the rights of the military accused does not result.

3. Less expert knowledge of military law, procedures and practices.

The judges of the Court of Military Appeals are civilians who come to the bench without any particular qualifications in military law, procedures and practices. There is no requirement or qualification of office imposed on prospective judicial candidates with respect to these factors. The judges who have served on the court for a number of years have, however, built up a store of expert knowledge. Changes in the system should preserve this capability.

4. Less supervision of the military justice system.

The Court of Military Appeals currently exercises its certiorari jurisdiction in an average of 200 cases a year. Another court with responsibilities for cases other than military cases might exercise its jurisdiction less and thus provide a lower level of supervision of the military justice system.[26/] A lower caseload, however, is not necessarily a less effective level of supervision. A civilian court might also give greater deference to the intermediate appellate courts, the Courts of Military Review, on strictly military issues. A decreased level of intervention in the system might also result in less effective supervision.

5. Slower appellate consideration of military cases.

The Court of Military Appeals has no business other than consideration of military appeals. The Chief Judge of the Court of Military Appeals, in presenting the fiscal year 1980 budget, stated that the court presently is experiencing a one year backlog in disposing of cases it has decided to

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26/ Some experts believe that the Court's activist role in visiting field installations should not be lost. This would cause less "visibility" for the court in the military justice system and might cause a decline in confidence in military members that the judiciary understand their situation and are geniunely concerned about the quality of justice.

review.[27/] Civilian courts with extensive civil and criminal dockets are, in some cases, less efficient that the Court of Military Appeals in disposing of cases. The addition of military cases to civilian dockets could cause slower consideration of military cases unless other steps, such as new judges, better staffing or required priority were compensating factors. Also any layering of appeals for military cases would slow the process from start to finish. Time is an important consideration in military cases because voluntary enlistments (or involunary inductions) are for limited periods. It is disruptive if a military case is still pending at the end of a person's military service. Some experts believe that the outside acceptable time limit would be a maximum of one year from trial to completion of appellate process. Any less expeditious processing of military appeals than is now provided by the Court of Military Appeals would be a very substantial disadvantage.

27/ At the end of fiscal year 1978, the following number of cases were pending:

Assigned opinions pending	235
Oral argument pending	22
Preargument conference pending	96
Calendar committee pending	5
Final briefs pending	36
TOTAL	394

In addition, 265 cases were pending on the petition docket and 14 cases were pending on the miscellaneous docket.

6. Increased workload for federal judges.

The Court of Military Appeals now hears and decides about 200 cases a year and disposes of a total of about 1,800 petitions and other filings a year. This workload should not be imposed on federal court judges without an adequate increase in judges and staff resources to deal with it.

7. Expansion of the federal judiciary.

An increase in the total number of judges required to deal with military cases should be avoided if possible. Three judges are adequate to deal with the current caseload. Additional judges would require additional support staff and additional expense for office space, salaries, retirement and other benefits.

8. The system must adapt adequately to wartime conditions

All parts of the military justice system, including appellate review, must adapt to meet wartime conditions. Many of the factors affecting wartime performance have already been included in the analysis. It is important, however, to assess how these factors cOme together with respect to any given proposal for change. During wartime, the number of persons in military service is likely to expand rapidly. The number of courts-martial activity is likely to grow concomitantly. The consideration given to flexibility in Section II(A)(13) above will accommodate this

part of the wartime concern. In wartime, military factors are even more unique and important to judicial decisions than in peacetime. To the extent the system accommodates the factor described in Subsection 1 of this Section, this concern will be met. Time is also of the essence. Courts-martial cases must be processed as quickly as possible, both to maintain good order and discipline and to make the best use of every military member. Consideration is given to this factor under Subsection 5 above.

III. ASSESSMENT OF PROPOSALS FOR REFORM

There are two basic types of proposals for reform of the Court of Military Appeals. The first is to abolish the Court and shift its jurisdiction to another federal court. Variants of this type of proposal involve consideration of which court in the federal system should receive jurisdiction over military cases. The other type of proposal maintains the existing Court of Military Appeals and focuses on changes in its structure or its place in the federal system.

A. Proposals to Move to Another Federal Court

There are four federal courts to which jurisdiction over military appeals might be transferred and several variations in how the transfer might be structured.

1. Transfer to a permanent panel of the United States Court of Appeals for the District of Columbia Circuit

Under this proposal the Court of Military Appeals would be abolished and its jurisdiction would be transferred to the United States Court of Appeals for the District of Columbia. A permanent panel of five judges would be created by statute to handle cases presently within the jurisdiction of the Court of Military Appeals and five new judgeships would be added to the Court of Appeals to fill the panel and take up the new caseload.[28/]

28/ Some observers believe that these new judgeships and any similar judgeships created under alternative proposals should require military qualifications such as service at a command level or in a judge advocate position.

Although panels on the Courts of Appeal normally consist of three members, the use of a five-member panel is consistent with the American Bar Association standard of a five member tribunal for courts of last resort. Although review by the Supreme Court is opened up under the proposal, it is anticipated that the panel for military justice will continue to fulfill the role now filled by the Court of Military Appeals as the appellate court with responsibility for overall supervision of the military justice system. As such, it is more appropriately compared to a court of last resort than an intermediate court, and a five member panel would be appropriate to provide the necessary stability.

The members of the panel on military appeals would be selected by the Chief Judge of the United States Court of Appeals for the District of Columbia and would serve on the panel for terms of ten years. The judges designated for such service would retain their life tenure and membership on the Court of Appeals. At the end of the ten-year period, they could be designated for continued service on the panel or would revert to status as circuit judges without special designation.[29/] The Chief Judge could assign members of the

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29/ The degree of stability depends on selection among alternatives for the initial terms. For example, two designees could serve an initial term of five years, two for ten years, and one for fifteen years. Alternatively, two could serve for five years and three for ten years, or vice versa. In any case, these proposals would provide for stability for a minimum of five years under normal circumstances, and the

[Footnote Continued]

panel to service on other panels of the court for cases not connected with military justice as permitted by the circumstances. In times of mobilization or as otherwise required to insure the expeditous processing of military cases, the Chief Judge could create temporary three judge panels to hear military cases. Cases decided by any panel would be subject to en banc reconsideration and review in the Supreme Court by writ of certiorari.

Under this propoal, the jurisdiction and powers of the court would be similar to the jurisdiction and powers of the Court of Military Appeals. The requirement in Article 67(g) that the judges of the court and the Judge Advocates General prepare a report on the military justice system would be changed and patterned after the reporting requirement for the Judicial Conference contained in 28 U.S.C. § 331, which provides for the Chief Justice to make an annual report to Congress and also provides for the Attorney General, upon request of the Chief Justice, to report to the Conference on appropriate matters. Under this proposal the Court of Appeals would submit a report to Congress, with relevant

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29/ [continued]

possibility of redesignation could establish even greater stability. If the goal were to maximize stability, the designation for service on the panel could be for a period longer than ten years with an interval greater than five years between expiration of terms.

information provided to the Court by the Judge Advocates General.

This proposal serves all of the objectives outlined in Section II(A) above.

- Stability, predictability and uniformity would be promoted because five judges rather than three would decide military cases. This reduces the likelihood of dramatic changes in the law resulting from the switch in membership or views of a single judge. The Article III judges would have life tenure and the relatively long, slow rotation onto and off of the panel would ensure continuing expert familiarity with military cases and precedent. It is likely that judges appointed to the Court of Appeals will complete full terms on a permanent panel.

- Undue specialization is avoided by rotation of other Court of Appeals judges onto the panel, temporary service of other judges on the panel, and temporary service of the judges on the panel in other kinds of cases. The substantial number of criminal appeals in the Court of Appeals involving constitutional questions should provide helpful experience and cross-fertilization for the judges on the military appeals panel.

- There would be adequate appellate review for the government because military appeals could be reviewed en banc by the full Court of Appeals and would proceed from the Court of Appeals to the Supreme Court through writs of certorari. The accused, like the government, could seek further consideration by the full Court of Appeals en banc or seek review in the Supreme Court by writ of certiorari. Although the proposal, standing alone, would not clarify the procedural or substantive law with respect to collateral attack, appellate review within the federal judicial system should narrow greatly the

issues upon which collateral attack will be based by providing authoritative review by a federal Court of Appeals.

- The proposal should provide for effective use of the Supreme Court. The Court of Appeals would absorb most of the burden of supervising the military justice system and the additional burden on the Supreme Court would be minimized.

- The objectives of better judges and increased stature for the military justice system should be met. Assignment to the military appeals panel might be less desirable than a regular appointment to the Court of Appeals but the same high caliber candidates could be expected. The life tenure and retirement benefits of service on the federal court will make available a broader part of candidates for judgeships affecting military appeals.

- This proposal should produce minor improvements in efficiency and economy. No new layers of appeal would be added and the court's administrative operations would probably benefit from the economies of scale after merger with the Court of Appeals. In the Court of Appeals, the legal staff would be comprised primarily of law clerks who serve for one or two years, along with that part of the permanent staff required in order to meet the administrative needs of the court. This would produce economy by cutting down on the duplicative layers of staff review by permanent employees that now characterizes the Court of Military Appeals. No employees would be displaced, however. All current employees would have positions in the new system. A possible disadvantage is that the Court would not benefit from the experience in court-martial cases possessed by a permanent staff and cases might not receive the same degree of staff attention.

- The separation of executive and judicial powers would be furthered. The proposal would place responsibility for personnel matters and other administrative concerns in the federal judiciary rather than in the Department of Defense. This would eliminate

the tension that invariably results from a situation in which the Department of Defense which is the primary litigant before the court also is responsible for its budget and administration. Moreover, by structuring the annual reporting requirements along the lines of the Judicial Conference report, the proposal reduces the possibility for conflict that results from the present structure which calls for joint action by the members of the court and the Judge Advocates General, who represent the primary litigants before the court. At the same time, the reporting requirement preserves the reporting and consultation requirement that keeps the judges abreast of developments in the military justice system and provides a formal means of communication between the Judge Advocates General and the Court of Appeals.

- Flexibility should be improved greatly. If there were a great increase in the number of military appeals, this proposal provides for assignment by the Chief Judge of additional judges to the military appeals panel.

This proposal has several unique features that should minimize any of the disadvantages that are summarized in Section II(B).

- Adverse impacts on military discipline should be avoided. The creation of a special panel to hear military appeals staffed by judges who would serve ten year terms on the panel should result in adequate deference to requirements and conditions peculiar to the military.

- There should be no adverse impact on those aspects of the court-martial system that provide the military accused with greater rights than a civilian counterpart because these rights are, for the most part, provided by regulation and statute. To the extent that they are provided by judge-made law, there could be erosion in the hands of a civilian court, but this could be avoided in large part if the three judges of the Court of Military Appeals were appointed to

fill three of the seats on the new panel of the Court of Appeals.

- It should produce at least as great a reservoir of expert knowledge of military law, procedures and practices as now exist on the Court of Military Appeals and, because of better judges and less turnover, will probably provide a significant improvement in these respects. There is also the advantage that leading military cases would be reported in the Federal Reporter in addition to a specialized reporter giving them wider circulation and encouraging greater or broader intellectual participation in military justice matters. A possible disadvantage is that assignment to other duties on the court of appeals may make it difficult for the judges on the panel to make as many trips to the field to visit the military personnel as are now undertaken by the judges of the Court of Military Appeals.

- The permanent panel should provide improved ability to exercise supervision over the military justice system. There would be five judges (rather than the current three on the Court of Military Appeals) available to consider petitions and to write decisions. The services of additional judges would be available from the Court of Appeals to help with difficult cases or unexpected high levels of workload. There should be no less interest on military justice because of the location of the panel in a Court of Appeals rather than in the Defense Department. A possible disavantage is that if the judges on the court are overburdened with duties in non-military cases, there may be pressure to grant fewer petitions for review or exercise extensive supervisory powers. Another possible disadvantage relates to the amount of time that the judges and staff will devote to individual cases. To the extent that judges on the proposed panel are overburdened with other duties, military justice cases may not receive the same attention in terms of staff and judicial consideration, as now is afforded by the Court of Military Appeals. A third possible disadvantage is the availability of oral argument may be lost. The Court of Military

Appeals routinely grants time for oral argument. The Court of Appeals for the District of Columbia Circuit often does not.

- Appellate consideration by a five-judge panel in the Court of Appeals should be faster than consideration by the three-judge Court of Military Appeals, although this might not come to pass if the panel judges become heavily involved in other assignments with the Court of Appeals.

- There would be no increase workload for federal judges on the Court of Appeals because five new judgeships would be created to take up the new caseload now handled by only three judges. Indeed, this proposal would create some new resources for the Court of Appeals with the availability of new judges for assignment to some non-military appeals.

- There would be a net expansion of two judges in the federal judiciary under this proposal. The five new judgeships for the Court of Appeals would be balanced by the three judgeships abolished with the Court of Military Appeals.

- A five member panel of a relatively large Court of Appeals should increase the capability to adapt to wartime conditions.

2. Review in a proposed new intermediate appellate court.

The Department of Justice has proposed the creation of a new intermediate appellate court, the United States Court of Appeals for the Federal Circuit.[30/] The new court, composed of 15 judges, would merge the current Court of Claims and

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30/ The proposal is described in a paper entitled "A Proposal to Improve the Federal Appellate System" prepared by the Office for Improvements in the Administration of Justice, Department of Justice, July 21, 1978 (hereinafter "Justice Department Proposal"). The proposal has been introduced as S. 677, 96th Cong., 1st Sess. (1979).

Court of Customs and Patent Appeals. The jurisdiction of the proposed new court would include that of the two cited existing courts and, in addition, jurisdiction of certain appeals from the district courts. Certiorari to the Supreme Court would be available. The new court would be located principally in Washington but would sit in panels elsewhere throughout the country. If this concept is adopted, it could readily be enlarged to accommodate court-martial appeals. This could be done by adding jurisdiction over court-martial appeals and allowing the new court to deal with these appeals through its normal panel system, or by creating a designated permanent panel for military appeals as outlined above with respect to the District of Columbia Court of Appeals. Five new judgeships would be added to take care of the military appeals caseload.

If this proposal were implemented with a permanent panel the assessment of advantages and disadvantages would be the same as outlined above with respect to a permanent panel of the District of Columbia Court of Appeals with the following exceptions.

- Undue specialization would be avoided by exposure to other kinds of cases considered by this Court, but the expert capability developed in the kinds of cases handled by this Court would not be directly relevant to work on military appeals. The limitation of the subject matter of this court to government claims, patent, tax and environmental cases would preclude additional experience in criminal cases involving constitutional questions.

- The object of better judges would be promoted, but appointments to a panel on military appeals within a Court of Appeals with limited subject matter jurisdiction might be less desirable than other Court of Appeals appointments.

- There is some question whether the objective of increase stature for the military justice system would be improved if it were put into a specialized appellate system.

If this proposal were implemented with a general assignment of jurisdiction to the new Court of Appeals there would be the following additional factors to weigh:

- Stability, predictability and uniformity, although improved over the current system, would be less well served than under other options because military appeals cases could come before any panel of the court. Those panels might contain judges expert in patent, tax or claims matters and not in military law. The court as a whole would gradually gain experience in military law, particularly if three of the new judgeships were filled with the judges from the existing Court of Military Appeals, but there would not be the same advantages as would accrue from a specialized panel. There might be a considerable problem in predictability and stability if cases were routinely assigned to different panels. In a large court of appeals, there is a likelihood of lack of uniformity because different combinations of judges are given responsibility for deciding similar issues.

- This system might make somewhat less efficient use of the Supreme Court. Use of different panels may not be as effective a filter of cases for the Supreme Court, even if en banc review is available

- Efficiency might be reduced because different panels may not produce opinions on military law suffiently authoritative to have a substantial impact on the problem of collateral attack.

- The objective of obtaining better judges would be affected because the specialized value of the court may result in selection of persons with less experience on criminal law and military affairs than persons otherwise selected for a court of appeals.

- Consideration of requirements and conditions peculiar to the military might suffer under this system because of the particular subject matter orientation of most of the judges on this court, their general lack of experience with criminal law, and the chances of drawing a panel not experienced in handling military cases.

- The reservoir of expert knowledge of military law, procedures and practices might increase over time, but at the outset would be generally lower than under the current Court of Military Appeals.

- Because of lack of familiarity with military law, consideration of military cases might be slower under this system. This factor might also result in a reluctance to engage in extensive supervision of the military justice system and a more general deference to the Courts of Military Review.

3. Review in the United States Court of Appeals for the District of Columbia Circuit.

Of the eleven Circuit Courts of Appeal, the District of Columbia Circuit has characteristics that most nearly qualify it as a "national" court. Appointees to its 11 judgeships are not selected from a single group of states as are the appointees to the regional Circuit Courts. They sit in the nation's capital and in some respects already function as a national court through their review of major agency decisions. This Court has reviewed military matters

in some cases, giving some indication of the even-handedness with which civilian courts decide military issues.[31/] Under this proposal there would be three additional judgeships created to absorb the extra workload from the transferred jurisdiction but there would be no statutory requirement for a permanent panel to consider military cases.

If the three new appointees were experts in military law and if the Chief Judge of the Court of Appeals chose to assign them as a panel to hear military cases, there would be much the same balance of advantages and disadvantages as in Proposal 1 with the following differences:

- There might be fewer benefits in stability, predictability and uniformity because there would be fewer panel members. Without a permanent panel, judges would be more likely to stray off into other assignments putting more of the burden of deciding military cases on judges without long experience in the field.

- Undue specialization would disappear because the judges responsible for military cases would decide a wide range of other civil and criminal cases.

31/ Decisions by the United States Court of Appeals for the District of Columbia that were adverse to the Military Departments include Huff v. Secretary of the Navy, 575 F.2d 907 (D.C. Cir. 1978); Robinson v. Resor, 469 F.2d 944 (D.C. Dir 1972); and Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971). The Court ruled in favor of the Military Departments in several recent cases including Priest v. Secretary of the Navy, 470 F.2d 1013 (D.C. Cir. 1977); Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir. 1977); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977); and Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

- There would be additional economies in terms of permanent support personnel if no specialized panel were created. Use of three rather than five judges would also result in savings.

- There would be no expansion of the federal judiciary. The creation of three new seats on the Court of Appeals would be balanced by the abolition of the three current seats on the Court of Military Appeals.

- There might be less collective expert capability in military law and less appreciation of the special requirements of the military.

- There might be less enthusiasm for supervision of the miltiary justice system and more pressure to cut down on the number of cases accepted for review if military cases competed for the Court's resources with all other cases.

If the Chief Judge chose to assign the new judges to cases at random and the old judges to an equal part of the workload added by military appeals, then there would be the same additional disadvantages outlined with respect to Proposal 2 above except that the subject matter limitations would not be important.

4. Review in a specialized federal court.

There are three specialized courts located in Washington that may be characterized as "national" courts and hence eligible for consideration as forums to hear court-martial appeals. These courts are the Court of Claims, the Court of Customs and Patent Appeals, and the Tax Court. They already

operate as appellate tribunals and the Court of Claims has had some experience with military cases.[32/]

The Court of Claims is nominally a trial court, but it actually functions like an appellate court. Ordinarily it does not hear evidence or make the initial determination in a case. Such determinations are made by one of the 17 trial commissioners who function as trial judges. Their determinations are then considered by the Court or a panel thereof which enters dispositive orders. There are now seven judges on the Court. Last year 382 cases were decided and 1,731 cases are pending. The Department of Justice Study indicates that the Court could absorb some additional caseload.[33/]

The Court of Customs and Patent Appeals hears appeals from the U.S. Customs Court, from three entities of the Patent and Trademark Office (the Board of Appeals, the Board of Patent Interferences, and the Board of Trademark Trial and Appeals), from decisions of the U.S. International Trade Commission, and from certain findings of the Secretaries of Commerce and Agriculture.[34/] The Court has five judges, not including an inactive senior judge. Last year 199 cases

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32/ Recent cases involving the military considered by the Court of Claims include Crone v. United States, 538 F. 2d 875 (Ct. Cl. 1976); Boyd v. United States, 207 Ct. Cl. 1 (1975), cert. denied 424 U.S. 911 (1976); Brenner v. United States, 202 Ct. Cl. 678 (1973), cert denied 419 U.S. 831 (1974); Ricker v. United States, 296 F.2d 226 (Ct. Cl. 1961).

33/ Justice Department Proposal at 19.

34/ See id.

were decided. In the view of the Justice Department, this Court could absorb some additional caseload.[35/]

The Tax Court hears appeals from deficiency assessments made by the Internal Revenue Service with respect to income, self-employment, estate and gift taxes. It has 16 active judges, three retired part-time judges and eight trial judges who hear small tax cases. Last year this Court considered 12,062 cases.

This option is available, obviously, only if the Department of Justice proposal to merge these specialized courts is rejected by the Congress. This option has roughly the same disadvantages as Proposal 2 except that if limited to the Court of Claims there is substantial familiarity with military law and experience in dealing with military cases. This advantage is diluted under Proposal 2 because the judges of that combined court would come from tax, patent and custom cases.

5. Review in a regional Court of Appeals.

Still another possibility is designation of one of the regional Circuit Courts to consider court-martial appeals. The two most likely candidates are the Third (with 10 judgeships) and Fourth (with 10 judgeships), which are located in

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35/ Justice Department Proposal at 20.

Philadelphia and Richmond respectively.[36/] Their proximity to the Courts of Military Review whose decisions are to be reviewed and to the Department of Defense where the centralized system of appellate counsel is managed would be a substantial advantage over courts of appeals located in other parts of the country.

This proposal involves roughly the same balance of advantages and disadvantages as in Proposal 3 with respect to a shift of jurisdiction to the District of Columbia Circuit. The additional disadvantages are:

- The Third and Fourth Circuits are not "national" courts in the same sense as the District of Columbia Circuit. The judges are appointed from one group of states within the circuit and the caseload is limited to those arising within a narrower geographic area.

- The Third and Fourth Circuits are located at some, although not great, distance from Washington where the intermediate courts of review and the government's appellate offices are located.

B. Proposals to Change the Existing Court

The second category of proposals would not abolish the current Court of Military Appeals but would make changes in

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36/ These figures include the one additional judgeship designated for the Third Circuit and three additional judgeships designated for the Fourth Circuit under the Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3(a), 92 Stat. 1629.

the Court or in its place in the system to compensate for perceived deficiencies in the current system. The assessment in this section examines only the advantages sought to be attained that are described in Section II(A). The disadvantages sought to be avoided, described in Section II(B), are not relevant here because the current system is maintained.

1. Increase the size of the Court.

The present size of the Court produces instability in doctrine. Because important decisions may be decided by a 2-1 majority, the departure or shift in position of only one judge can produce substantial changes in doctrine. An amendment to Article 67 expanding the Court's size to five or more members would increase the likelihood of greater predictability and uniformity in the Court's decisions.

This proposal does not reach the advantages of better judges, increased stature for military justice, adequate appellate review for the government and the accused, effective use of the Supreme Court, efficiency, economy, separation of executive and judicial processes, and avoidance of undue specialization.

2. Provide full terms for all appointees.

Under Article 67 of the Uniform Code of Military Justice, 10 U.S.C. § 867 (1976), if a member of the Court leaves office prior to expiration of the fifteen year term, the person appointed to fill the seat is granted tenure only

for the balance of the term. This provision not only increases turnover, but also makes qualified persons hesitant to accept a judicial appointment with such limited tenure. This would help provide better judges for the Court and make a contribution toward increased predictability and uniformity.

This proposal would detract from even turnover in the Court in some respect. Full fifteen-year appointments on an ad-hoc schedule (rather than every five years) could mean that the appointment of two or all three judges could become bunched in a short time period, creating even more difficult problems in continuity. The proposal makes no contribution toward the objective of avoidance of undue specialization, adequate appellate review for the government, economy, separation of executive and judicial powers, or flexibility.

3. Revise the retirement system.

Because the court's pension program is tied to the retirement program for career executive branch employees, it has little to offer a person with sufficient legal experience to qualify for a judgeship who has not otherwise accumulated substantial prior government service. As a result, the retirement system operates as a disincentive for service on the court. The retirement system for federal judges cannot be adapted to the Court of Military Appeals because it is built around the concept of lifetime tenure

and retirement from active service at age 65 or 70.[37/] A more useful model is supplied by the retirement system for the Tax Court, an Article I court composed of 16 members who are appointed to full fifteen-year terms.[38/] The Tax Court has its own retirement system with relatively attractive pension benefits.[39/] Members must retire at age seventy, and may retire at age 65 after 15 years of service, or at any age if not reappointed after 15 years of service or for disability. The Tax Court's retirement system is tied to Civil Service only for general purposes of administration, and not for purposes of establishing eligibility or the rate of retirement compensation.

Improvements in the retirement system would help reduce the Court's turnover, thus assisting in reaching the objectives of stability, predictability, and uniformity. It would probably also be of substantial assistance in obtaining better judges, or at least a wider pool of candidates from which to choose. This also has a helpful contribution toward the objective of increasing the stature of the military justice system.

37/ 28 U.S.C. §§ 371-376 (1976)

38/ 26 U.S.C. § 7443 (1976).

39/ 26 U.S.C. § 7447 (1976).

Revising the retirement system does not advance the objectives of avoidance of undue specialization, adequate appellate review for the government and the accused, economy, separation of executive and judicial powers, or flexibility.

4. Establish life tenure for the judges.

Article 67 could be amended to provide judges on the Court of Military Appeals with life tenure. This proposal might provide for better judges and enhance the likelihood of greater predictability and uniformity in the Court's doctrine.

On the other hand, life tenure on a court concerned solely with review of courts-martial might increase problems caused by undue specialization and could lead to stagnation in doctrine due to the absence of exposure to areas of law other than military justice. Moreover, this proposal does not achieve any gains in increased stature for military justice, effective use of the Supreme Court, adequate appellate review for the government, relief of district court dockets, greater efficiency, economy, separation of administrative and judicial functions, and flexibility to meet changing conditions.

5. Provide for review in a United States Court of Appeals.

A new section could be added to Chapter 47 of title 10, United States Code, to provide for further review of

decisions from the Court of Military Appeals by a United States Court of Appeals. This alternative would provide a means of appellate review for the government and a more direct route to the Supreme Court than is available presently for the accused.

A major disadvantage of this approach is that it could substantially increase the workload of an existing circuit court (unless the new Federal Circuit were selected). Moreover, this approach would not achieve any benefits in efficiency and economy. Instead, it would establish a system wherein three levels of appellate courts would exist between the trial court and the Supreme Court.

6. Provide for review in the Supreme Court.

A new section could be added to Chapter 81 of title 28, United States Code, to permit direct Supreme Court review of decisions from the Court of Military Appeals by writ of certiorari.[40/] This proposal would provide appellate review for the government and would enable the accused to reach the Supreme Court without requiring use of the complex avenues of collateral attack. It would not achieve benefits in

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40/ A bill, designated as S. 1353, was submitted in the 95th Congress and referred to the Senate Judiciary Committee. It provided for review of Court of Military Appeals decisions by the Supreme Court on writ of certiorari. No action was taken on the bill.

increased stature for military justice, better judges, efficiency, separation of administrative and judicial functions, avoidance of undue specialization, and flexibility to meet changing conditions. Moreover, it is unlikely that the Supreme Court would decide to review a sufficient number of cases to provide substantially greater stability, predictability, and uniformity.

7. Provide statutory regulation of collateral attack on court-martial convictions

One approach might involve enactment of a statute similar to the legislation that presently governs the standards and procedure for collateral attack in the federal courts upon state court convictions through petitions for habeas corpus.[41/] Because this approach would not cover jurisdictional bases for collateral attacks, such as mandamus, declaratory judgment, suits for back pay, the habeas corpus model would have to be modified to require similar standards and procedures for all form of collateral attack. Because the standards and procedures in such a statute must be sufficiently broad to encompass a wide variety of circumstances, the mere enactment of legislation would not necessarily produce substantial uniformity among the circuits. Therefore, consideration might be given to another proposal, that might

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41/ 28 U.S.C. § 2254 (1976).

complement the statute on standards and procedures, centralizing all appeals from original collateral attack decisions in one federal court of appeals.

8. Combine alternatives into a broader legislative package.

The foregoing alternatives could be combined to provide for a Court of Miltiary Appeals composed of five or more members with full 15-year term (or life tenure) whose decisions could be reviewed directly by the Supreme Court (or through a court of appeals). Revision of the retirement system and the collateral attack system could be added. This combination of alternatives overcomes many of the disadvantages of the individual proposals. An assessment of a combination of alternatives is set out below.

a. Stability. Full 15-year terms would improve stability, but would detract from the ability of the court to maintain balanced turnover. This problem could be minimized through combination of the full 15-year term proposal with other stabilizing concepts such as reform of the retirement system and increase in the size of the court to five members.

The proposal for life tenure would provide even greater stability, particularly if combined with the concept of a five member court and reform of the retirement system, but it has substantial disadvantages with respect to stagnation and over-specialization as discussed below.

Reform of the retirement system, combined with a five member court, would produce greater stability than the present system even if life tenure or the full 15-year term proposal were not adopted. Retirement reform alone might have a substantial salutary effect in terms of increasing the pool of qualified persons who would consider accepting a judgeship on this court and regaining judges who might otherwise leave the court because of pension plan considerations. With the exception of the life tenure proposal, however, none of these concepts provides greater stability than the proposal for use of a permanent panel on a court of appeals. Even this apparently advantageous aspect of the life tenure proposal can be matched by the court of appeals proposal by lengthening the term of assignment on the permanent panel for military appeals.

b. Predictability. Although no system can guarantee predictability, the various combinations discussed above in terms of stability are likely to have a concomitant effect on predictability of decisionmaking in the court. With the possible exception of the proposal for life tenure, none is likely to have a greater effect on predictability than the proposal for review by a permanent panel of a federal court of appeals.

c. Uniformity. As with predictability, the combined proposals discussed in terms of stability are likely to have a relatively similar effect in facilitating

development of a uniform body of case law. Use of a court that devotes its sole attention to military justice matters is likely to produce somewhat greater uniformity than use of a court where members may be assigned other duties, but it is far from certain that uniformity would be substantially greater in a reformed Court of Military Appeals than in a permanent military appeals division of a federal court of appeals.

d. Avoidance of undue specialization. Life tenure on a court concerned solely with review of courts-martial is likely to increase problems caused by specialization in a relatively narrow area of the law and could lead to stagnation in doctrine due to the absence of exposure to areas of law other than military justice. The proposals for stability that retain the concept of a 15-year term are far superior in this regard. None, however, provide the opportunities for experience in areas outside the military justice field that are offered by the alternatives that involve review in a federal court of appeals.

e. Adequate appellate review for the government. Direct review in either the Supreme Court or a court of appeals would provide adequate appellate review for the government. Either option would require the Court of Military Appeals to stay within Supreme Court decisions and would permit review in cases where the Court exceeded its limited statutory authority.

f. Adequate appellate review for the accused. As with review by the government, the proposals for direct review in either a court of appeals or the Supreme Court would provide adequate appellate review for the accused.

g. Efficiency. Review of the Court of Military Appeals by a federal court of appeals would be inefficient because it would add a third layer of review between the trial court and the Supreme Court. Greater efficiency could be achieved through use of one of the proposals that would replace the Court of Military Appeals with review in a federal court of appeals. The efficiency of any alternative would be enhanced by enactment of a statute governing collateral review of courts-martial, particularly if combined with a proposal to centralize appeals of collateral proceedings in one court of appeals. The latter would be most efficient if it relied upon the same court of appeals in which a permanent panel for military appeals were located as a replacement for the Court of Military Appeals.

h. Effective utilization of the Supreme Court. The proposal for direct review in the Supreme Court is deficient because it would focus all pressure from the military justice system directly on the Supreme Court without another high level Article III court to act as a filter. The proposal for review of Court of Military Appeals decisions in a federal court of appeals resolves that problem, but it represents an

inefficient approach to management of cases in the military justice system. None of the proposals in this section would be as effective with respect for utilization of the Supreme Court as direct review in a court of appeals in place of review in the Court of Military Appeals.

i. Better judges. Life tenure, a five judge court, and retirement reform would result in a substantial improvement in attractiveness of service on the court. Full 15-year terms and retirement reform are likely to have almost as great an effect. None of these proposals, however, is likely to be as attractive as service on a federal court of appeals with the attendant prestige and opportunity for involvement in a broader range of cases.

j. Increased stature for military justice. Any of the proposals that enhance stability, predictability, uniformity, and the quality of judges will increase the stature of the military justice system. The primary consideration in comparing proposals in the degree of improvement in the stature of the system. The proposals for reform of the Court of Military Appeals are tied inextricably to the current system and have, therefore, a substantial hurdle to overcome in this respect.

k. Economy. None of the proposals are likely to result in a more economical use of staff and personnel.

1. Separation of executive and judicial powers. None of the proposals will result in the type of separation of functions that is needed to reduce actual and apparent conflicts between the Court and the Department of Defense.

IV. RECOMMENDATION TO THE SECRETARY OF DEFENSE

[The recommendation of the General Counsel will be added to the memorandum after comments have been received and the memorandum has been revised to take account of new considerations or different perceptions of advantages and disadvantages.]

APPENDICES

APPENDIX A

CURRENT ORGANIZATION AND INTERNAL OPERATIONS OF THE COURT OF MILITARY APPEALS

APPENDIX A

CURRENT ORGANIZATION AND INTERNAL OPERATIONS OF THE COURT OF MILITARY APPEALS

The Court of Military Appeals is, to some extent, unique in its organization and internal management operations. This Appendix describes the current operations of the court in order to put into context the proposals for change. Section 1 describes the judgeships and the judges who have held them since 1951; Section 2 covers the trial courts from which appeals can arise and the Court's jurisdiction over those appeals; Section 3 sets out the staff organization of the court and outlines administrative and personnel matters; Section 4 describes briefly the salary, retirement and other benefits available to judges; and Section 5 describes the Court's current workload and backlog.

1. The Judges.

The Court consists of three judges, appointed from civilian life by the President with the advice and consent of the Senate[1/] No more than two of the judges may be from the same political party. Each seat on the Court carries a fifteen year term. If a vacancy develops within a fifteen year term, the successor appointed to that seat fills only the remaining balance of the term.

1/ 10 U.S.C. § 867 (1976).

The first appointments in 1951, when the Court was established, were for terms of five, ten and fifteen years. For the fifteen year term and the position of Chief Judge, President Truman appointed Robert E. Quinn, former Governor and Lieutenant Governor of Rhode Island, who had served in the Navy's legal department during World War II. Chief Judge Quinn was reappointed to a second fifteen year term in 1966 by President Johnson. He resigned in 1975 and died shortly thereafter. The initial ten year term was filled by George W. Latimer of Utah, who had served in an infantry unit during World War II and was elected to the Utah Supreme Court after the war. The five year term was filled by Paul W. Brosman, who had been Dean of the Law School at Tulane and Chief of Military Justice for the Army Air Force during World War II. He died in office in 1955.

President Eisenhower appointed Homer Ferguson in 1956 for the term expiring in 1971. Judge Ferguson previously had served as a Circuit Judge in Wayne County Michigan, United States Senator from Michigan, and Ambassador to the Phillipines. Subsequent to his retirement from active service in 1971 Judge Ferguson became senior judge and saw frequent active service in the years 1974-76 due to considerable turnover on the court during that period.

When Judge Latimer's term expired in 1961, President Kennedy appointed Paul J. Kilday, a member of the House

Armed Services Committee, as his replacement. Judge Kilday died in office in 1968. President Johnson appointed William H. Darden, a member of the staff of the Senate Armed Services Committee to replace Judge Kilday. Judge Darden, who was designated Chief Judge by President Nixon in 1971, resigned from the Court in 1973. He was replaced in 1974 by William H. Cook, counsel to the House Armed Services Committee. Judge Cook served the unexpired balance of the term originally begun by Judge Kilday and was appointed to a full fifteen year term in 1976.

When Judge Ferguson's term expired in 1971, President Nixon appointed as his successor Robert M. Duncan, a Judge on the Supreme Court of Ohio. He was designated by President Ford to be Chief Judge in 1974 and resigned from the Court to accept a federal district court judgeship in Ohio later the same year. In 1975, President Ford appointed Albert B. Fletcher, Jr., a judge from the Eighth Judicial District of the State of Kansas, to fill the unexpired term of Chief Judge Duncan. President Ford designated Judge Fletcher to be Chief Judge.

The vacancy created when Judge Quinn left the court in 1975 was filled in 1976 by Matthew J. Perry, an attorney in private practice, who was appointed by President Ford.

The present incumbents are Chief Judge Fletcher, Judge Cook, and Judge Perry. Judge Perry's term expires on May 1,

1981. Chief Judge Fletcher's term expires on May 1, 1986. Judge Cook's term expires on May 1, 1991. Table A-1 provides a chronological list of the judges and their terms of service.

TABLE A-1

JUDGES OF THE COURT OF MILITARY APPEALS

Year	Term Expiring in 1956, 1971, 1986	1961, 1976, 1991	1966, 1981
1951	Paul W. Brosman (1951-1955)	George W. Latimer 1951-1961	Robert E. Quinn (1951-1966; 1966-1975)
1956	Homer Ferguson (1956-1971)*	Latimer	Quinn
1961	Ferguson	Paul J. Kilday (1961-1968)	Quinn
1968	Ferguson	William H. Darden (1968-1973)	Quinn
1971	Robert M. Duncan (1971-74)	Darden	Quinn
1974*	Duncan	William H. Cook (1974-present)	Quinn
1975*	Albert B. Fletcher, Jr. (1975-present)	Cook	Quinn
1976-present*	Fletcher	Cook	Matthew J. Perry (1976-present)

* Judge Ferguson, as Senior Judge, saw active service during the years 1974-1976 due to the existence of vacancies during that period.

2. Jurisdiction

A description of the jurisdiction of the Court of Military Appeals must begin with an outline of the trial system from which appeals arise, and of the intermediate appellate courts where cases are first reviewed.

a. Trial courts.

There are four types of trial courts in the military justice system.

- General courts-martial consist of at least five members and a military judge. Both government and defense counsel are lawyers. A verbatim record of the proceedings is kept. This court may adjudge the maximum punishment authorized in the case by the Manual for Courts-Martial.2/ Cases tried in a general court-martial potentially are subject to review under the statutory jurisdiction of the Court of Military Appeals.3/

- Special courts-martial empowered to adjudge a bad-conduct discharge ("BCD special courts-martial") consist of at least three members and a military judge. Both government and defense counsel are lawyers. A verbatim record of the proceedings is kept. This court may adjudge a sentence that includes a bad-conduct discharge and up to six months confinement at hard labor.4/ Cases tried in a BCD special court-martial potentially are subject to review under the statutory jurisdiction of the Court of Military Appeals.5/

- Special courts-martial not empowered to adjudge a bad-conduct discharge ("non-BCD special courts-martial") consist of three members. A military judge is detailed to most non-BCD special courts-martial. The government and the defendant are represented by lawyers in most cases. A summarized record of the proceedings is authorized. This court may

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2/ 10 U.S.C. §§ 816, 818, 826, 827 (1976) (Arts. 16, 18, 26, 27).

3/ See text accompanying notes 18-22 infra.

4/ 10 U.S.C. §§ 816, 819, 827 (1976) (Arts. 16, 19, 27).

5/ See text accompanying notes 18-22 infra.

adjudge a sentence that includes up to six months confinement, but may not adjudge a punitive discharge.6/ Cases tried in this court are not subject to review under the statutory jurisdiction of the Court of Military Appeals.7/

- Summary courts-martial consist of one officer who acts as fact-finder, represents all parties, and, in the event of a finding of guilty, adjudges a sentence. There is no requirement that the summary court officer be a lawyer or that the accused be provided with counsel. The accused may object to trial by summary court-martial, in which case he or she may be tried by a special or general court-martial.8/ A summary court-martial may adjudge a sentence that includes up to one month's confinement at hard labor. Cases tried in a summary court-martial are not subject to review under the statutory jurisdiction of the Court of Military Appeals.9/

As Table A-2 indicates, most cases in the military justice system are tried in courts not subject to review under the statutory jurisdiction of the Court of Military Appeals. In recent years, the Court has asserted the power to issue extraordinary writs with respect to special courts-martial in which the sentence imposed did not bring the case within the court's statutory jurisdiction, but this power has been exercised only in a most tentative fashion.10/

6/ 10 U.S.C. §§ 816, 819, 827 (1976) (Arts. 16, 19, 27).

7/ See text accompanying notes 18-22 infra.

8/ 10 U.S.C. §§ 816, 820 (1976) (Arts. 16, 20).

9/ See text accompanying notes 18-22 infra.

10/ See Appendix B at text accomapnying notes 211-215.

TABLE A-2

TRIAL COURT STATISTICS FOR FISCAL YEAR 1977*

Cases Potentially Within the Statutory Jurisdiction of the Court of Military Appeals	Tried	Convicted**
General Courts Martial	1,618	1,514
BCD Special Courts Martial	2,746	2,641
TOTAL	4,364	4,155
Cases Not Potentially Within the Statutory Jurisdiction of the Court of Military Appeals		
Non-BCD Special Court Martial	11,374	9,993
Summary Court Martial	9,147	8,421
TOTAL	20,525	18,414

* Figures may not reflect exact number of cases tried due to use of approximations for one period by the Department of the Navy.

** The actual jurisdiction of the Court of Military Appeals is dependent upon the severity of the sentence approved by intermediate reviewing authorities rather than the sentence imposed by the trial court. See this Appendix at text accompanying notes 18-22 infra. Accordingly, the number of cases within the potential jurisdiction of the Court of Military Appeals is greater than the number of cases within the actual jurisdiction of the Court.

b. Military reviewing authorities.

The record of trial in each court-martial must be reviewed at least by a senior military commander, normally the convening authority, prior to that officer's approval of the findings and sentence.[11/] Thereafter, the level of review is dependent upon the type of court that heard the case and the severity of the sentence.

Summary courts-martial and special courts-martial in which a bad-conduct discharge was not adjudged. These cases are reviewed by a judge advocate who is usually a member of the convening authority's staff.[12/] The judge advocate's recommendations, made to the commander who exercises supervisory powers over the court, are not binding. No further review is required, but the Judge Advocate General may vacate or modify the findings or sentence based upon newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused.[13/] Such cases are not within the statutory jurisdiction of the Court of Military Appeals, although developments in the case law have created

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11/ 10 U.S.C. § 864 (1976) (Art. 64).

12/ 10 U.S.C. §§ 861, 865 (1976) (Arts. 61, 65).

13/ 10 U.S.C. § 869 (1976) (Art. 69)

the possibility of such review through the issuance of extraordinary writs.[14/]

Cases subject to review in a Court of Military Review. The Courts of Military Review are the intermediate appellate courts in the military justice system. There is one Court of Military Review in each Military Department and one in the Department of Transportation.[15/] The courts, composed of senior judge advocates, automatically review the record in every case affecting a general or flag officer and every case in which there is an approved sentence of death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.[16/] In addition, the Judge Advocate General reviews the records of all other general courts-martial (i.e., those not within the automatic review jurisdiction of the Courts of Military Review) and may submit the record in any such case to a Court of Military Review "[i]f any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs . . . ."[16/] Cases considered by a Court of Military

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14/ See Appendix B at text accompanying notes 211-215.

15/ 10 U.S.C. § 866 (1976) (Art. 66).

16/ 10 U.S.C. § 869 (1976) (Art. 69).

Review potentially are within the statutory jurisdiction of the Court of Military Appeals.[17/]

Table A-3 illustrates the recent caseload of the Courts of Military Review.

TABLE A-3

WORKLOAD OF THE COURTS OF MILITARY REVIEW IN FISCAL YEAR 1977

	Army	Navy	Air Force	Coast Guard	TOTAL
Total Cases on Hand at Beginning of Fiscal Year	784	307	62	2	1,155
Cases Received for Review	1,623	2,241	207	11	4,084
Total Cases	2,052	2,234	222	11	4,518
Total Cases Pending at End of Fiscal Year	355	314	47	5	721

c. Jurisdiction of the Court of Military Appeals.

Automatic review in the Court of Military Appeals is limited to cases from the Courts of Military Review which affect a general or flag officer or in which the Court of Military Review has affirmed a death sentence.[18/] The Judge Advocate General also may certify a case from a Court of Military Review to the Court of Military Appeals.[19/] In addition, the accused may petition the Court of Military Appeals to review a decision of a Court of Military Review

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17/ See text accompanying notes 18-22 infra.

18/ 10 U.S.C. § 867(b)(1) (1976) (Art. 67(b)(1)).

19/ 10 U.S.C. § 867(b)(2)(1976) (Art. 67(b)(2)).

in those cases arising under the automatic appellate jurisdiction of the Court of Military Review.[22/] Because the statutory jurisdiction of the Court of Military Appeals is keyed to the Courts of Military Review, the statutory jurisdiction is limited to cases affecting a flag or general officer and cases in which there is an approved sentence of death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.[21/] Cases in which the sentence is not within the statutory jurisdiction are not subject to review in the Court of Military Appeals except insofar as the Court has asserted the power to issue extraordinary writs in such cases.[22/]

3. Organization.

The Court's organization consists of four components: the offices of each of the three judges, the Office of the

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20/ 10 U.S.C. §§ 867(b)(3) (1976) (Art. 67(b)(3)). If, under Article 69, the Judge Advocate General sends to a Court of Military Review the record of a general court-martial in which the sentence is not within the automatic appellate jurisdiction of the Court of Military Review, the Court of Military Appeals may not review the case unless it is certified to the Court of Military Appeals by the Judge Advocate General under Art. 67(b)(2). 10 U.S.C. § 869 (1976) (Art. 69).

21/ 10 U.S.C. § 866(b) (1976) (Art. 66(b)).

22/ The extent to which the Court will exercise the extraordinary writ power in such cases is unclear at this time. See Appendix B at text accompanying notes 211-215.

Clerk of the Court, the Office of the Staff Director, and the Office of the Court Executive.

a. Judicial Offices. Each judge has two attorneys on his staff and two persons who serve in administrative and clerical positions. The administrative and clerical assistants are federal employees in the civil service who serve at the pleasure of the judge. The attorneys are federal employees in the civil service who are in the excepted service; once appointed, they acquire tenure after meeting the minimum time in service requirements.

The legal staff is responsible for research and analysis of the petitions for review and motions for relief submitted to the Court, including review of the memoranda prepared by the attorneys in the Office of the Staff Director and Office of the Clerk of the Court. The judicial offices are responsible for preparing initial drafts of each judge's published decisions.

b. Office of Clerk of the Court. This Office consists of three attorneys, one librarian, and eleven clerical and administrative personnel. The librarian and the clerical and administrative personnel are federal employees in the civil service in competitive positions. The attorneys are federal employees in the civil service in the excepted service who acquire tenure after meeting time in service requirements. The Clerk represents the Court in

certain matters with regard to the Judge Advocates General, has primary responsibility for administration of the system of admitting and disciplining members of the Court's bar, and serves as an advisor to the Court on matters of appellate jurisdiction, practice, and procedure. The clerk maintains the Court's information system and supervises the following subordinate offices:

The Extraordinary Writs Counsel is responsible for initial review and preparation of legal memoranda on issues presented by petitions for extraordinary relief filed with the court. In addition to an analysis of the legal issues, the memoranda set forth recommendations as to disposition and initial draft orders or opinions.

The Reporter of Decisions is responsible for final review of the Court's opinions and development of standards for matters of style.

The Adminstrative Office is responsible for matters relating to personnel, travel, training, office supplies, equipment, building maintenance, budget review, and word processing.

The Docket Room is responsible for docketing and monitoring the flow of all papers filed with the Court.

The Librarian maintains the court's central law library and provides material for the offices of the individual judges.

c. Office of the Staff Director. The Office of Staff Director is responsible for dividing the caseload among staff attorneys, monitoring the progress of cases, and insuring that the judges act on each petition within the 30-day statutory limit. There are five attorneys and one administrative and clerical employee within the office. The latter is a federal employee in the competitive service. The attorneys are federal employees in the civil service in the excepted service. Attorneys in the Office of the Staff Director conduct the initial review of every petition for grant of review filed with the Court. The attorney assigned to a case is responsible for reviewing the record of trial independently, researching legal questions presented by the case, and preparing a written memorandum of law setting forth the issues presented, the positions of the parties, and the state of the law. The attorney is required to make recomendations as to the ultimate disposition and whether additional briefs and oral argument are necessary. In certain circumstances, the staff attorney may be requested to prepare an initial draft opinion for consideration by the judges. Each memorandum and draft opinion is reviewed by either the Staff Director or the Deputy Staff Director, who provides a second legal opinion for the judges.

d. Office of the Court Executive. General responsibility for administration of the court rests with the Court Executive, who is the chief of staff and reports

to the Chief Judge. The Staff Director and the Clerk of the Court report to the Court Executive. The Court Executive monitors and reviews the procedures for management of case-flow, policies on personnel and related matters, amendment of the Court's Rules of Practice and Procedure, and fulfillment of the Court's survey and reporting responsibilities under Article 67 of the Uniform Code of Military Justice.[23/]

4. Administrative and Budgetary Matters. For fiscal year 1980, the Court projects a staff of 49 permanent employees and an overall budget of $2,033,000. The average grade of employees at the Court is GS-9.93, with an average projected salary of $25,444 per staff member. The Court's budget is provided at Table A-4.

23/ Article 67(g) requires the Court and the Judge Advocates General to meet annually to survey the operation of the Uniform Code of Military Justice. These meetings have resulted in annual reports containing statistical date on military justice and a variety of information on developments in military law. In recent years, these meetings have been held on a quarterly basis, and have concentrated on matters such as review of legislative proposals and a implementation of the new Military Justice Reporter published by the West Publishing Company and Military Justice Citations published by Shepard's Inc.

TABLE A-4

BUDGET OF THE COURT OF MILITARY APPEALS FOR FISCAL YEAR 1980

Program and Financing (in thousands of dollars)

Identification code 97-0104-0-1-051	1978 actual	1979 est.	1980 est.
Program by activities:			
10.00 Military justice (obligations)	1,616	1,840	2,033
Financing:			
25.00 Unobligated balance lapsing	119	.....	.....
Budget authority	1,735	1,840	2,033
Budget authority:			
40.00 Appropriation	1,735	1,750	2,033
44.20 Supplemental for civilian pay raises	.....	90	.....
Relation of obligations to outlays:			
71.00 Obligations incurred, net	1,616	1,840	2,033
72.40 Obligated balance, start of year	44	763	803
74.40 Obligated balance, end of year	−763	−803	−836
83.00 Deficiency in prior year expired accounts, start of year	.....	−68	−68
84.00 Deficiency in prior year expired accounts, end of year	68	68	68
90.00 Outlays, excluding pay raise supplemental	964	1,710	2,000
91.20 Outlays from civilian pay raise supplemental	.....	90	.....

Object Classification (in thousands of dollars)

Identification code 97-0104-0-1-051	1978 actual	1979 est.	1980 est.
Personnel compensation:			
11.1 Permanent positions	989	1,222	1,308
11.8 Special personal services payments	10	10	10
Total personnel compensation	999	1,232	1,318
12.1 Personnel benefits: Civilian	88	115	123
21.0 Travel and transportation of persons	31	30	40
22.0 Transportation of things	1	.....	.....
23.1 Standard level user charges	213	205	243
23.2 Communications, utilities, and other rent	69	108	109
24.0 Printing and reproduction	14	10	15
25.0 Other services: Other	67	60	70
26.0 Supplies and materials	99	70	100
31.0 Equipment	35	10	15
99.0 Total obligations	1,616	1,840	2,033

Personnel Summary

Total number of permanent positions	41	43	49
Full-time equivalent of other positions	0	0	0
Total compensable work-years	38	40	47
Average GS grade	10.84	10.30	9.93
Average GS salary	$22,464	$25,788	$25,444
Average salary of statutory positions	$57,500	$57,500	$57,500

The Court occupies the court house at 450 E Street, N.W., Washington, D. C. The responsibility for maintenance of the building rests with the General Services Adminsitration. The Court is "located for administrative purposes only" in the Department of Defense.[24/] The Department of Defense is responsible for the Court's administrative matters such as personnel, travel, procurement, and preparation and submission of the Court's budget. The attorneys on the court's central staff and on the staffs of the individual judges are employees in the civil service and are appointed as members of the excepted service. Upon fulfilling the minimum time requirements, they acquire tenure. Administrative and clerical personnel are employees in the civil service and are generally appointed through the competitive service, with several exceptions noted in the previous section. The ultimate hiring authority for all personnel has been exercised by the Chief Judge. Insofar as consistent with personnel limitations and tenure of incumbents, the selection of attorneys to serve in the chambers of the judges has been delegated to the individual members of the Court.

5. Judicial Compensation.

a. Salary. The salary of each judge is $57,500 per annum. This compares with other judicial salaries as

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24/ 10 U.S.C. § 867(a) (1976) (Art. 67(a)).

follows: courts of appeals, $57,500; district courts, $54,500; Court of Claims, $57,500; Court of Customs and Patent Appeals, $57,500; Tax Court, $54,500.

b. Retirement. The judges of the Court of Military Appeals are not treated as federal judges for retirement purposes. Their retirement benefits are governed by the same nondisability option retirement system that covers career executive branch employees in the federal government. The basic requirement for eligibility in the federal civil service retirement system is five years of federal civilian service. Military service cannot be credited toward the minimum requirement for five years civilian service, but can be used in computing longevity for purposes of total federal service.

The option for immediate retirement with an annuity accrues as follows:

Years of Total Creditable Service	Age Eligible for Immediate Retirement
30	55
20	60
5	62

An employee who leaves the federal service prior to meeting the age requirement for immediate option retirement becomes eligible for a deferred annuity at age 62, depending on the years of creditable service.

The retirement annuity is computed based upon the highest annual pay received by the employee during any three consecutive years of service. This figure, known as the "high-3" amount, is entered into the following formula based upon total creditable service:

- For each of the first five years of creditable service, multiply the "high-3" figure at 1.5 percent.
- For each of the second five years of creditable service, multiply the "high-3" figure by 1.75 percent.
- For each year of creditable service thereafter, multiply the "high-3" by 2.0 percent.

Table A-5 illustrates the effect of the federal retirement system on members of the Court of Miltiary Appeals under various assumptions. The system is not designed for judges serving fifteen years or less who are not necessarily career federal employees. Members of the Court and other observers have noted that the Court's retirement system does not compare favorably with the retirement provisions made for the federal judiciary.

TABLE A-5

EXAMPLES OF NONDISABILITY RETIREMENT COMPENSATION FOR JUDGES ON THE COURT OF MILITARY APPEALS*/

Years of Service on the Court	2	2	5	5	15	10	15	15
Years of Other Federal Creditable Civilian Service	0	3	0	0	0	5	2	12
Years of Military Service	0	0	0	5	0	5	3	3
Total Federal Creditable Service	2	5	5	10	15	20	25	30
Age of Eligibility for Immediate Retirement Annuity	None	62	62	62	62	60	60	55
Age of Eligibility for Deferred Retirement Annuity	None	62	62	62	62	62	62	62
Gross Monthly Annuity (dollars)	None	359	359	778	1257	1737	2216	2695

*/ This table is based upon the assumption that the current salary of the judges of the Court of Military Appeals, $57,500, constitutes the "high-3" average of the time of retirement.

c. Other benefits. Judges on the Court of Military Appeals are entitled to civil service benefits available to executive branch employees, including health insurance. Each judge is allocated a parking space. Office and travel expenses are covered by the Court's budget.

6. Workload. The Court's workload and backlog, as reflected by actions in fiscal year 1978, is set forth in Table A-6. The Chief Judge recently stated that the court has a one year backlog in disposing of cases in which review has been granted.

TABLE A-6

WORKOAD OF THE COURT OF MILITARY APPEALS
FISCAL YEAR 1978

CUMULATIVE BEGINNING PENDING	
Master Docket*	345
Petition Docket**	451
Miscellaneous Docket***	13
TOTAL	809
CUMULATIVE FILINGS	
Certificates filed****	9
Petitions for grant of review filed	1,627
Extraordinary writs sought	99
Reconsideration filings granted	4
TOTAL	1,739

[Table A-6 Continued]

* Cases in which review is mandatory or has been granted in the discretion of the court.

** Petition for review filed by the accused, subject to review in the discretion of the Court.

*** Primarily extraordinary writs.

**** Cases certified for review by the Judge Advocates General.

[continued]

CUMULATIVE TERMINATIONS	
Master Docket	394
Petition Docket	1,384
Miscellaneous Docket	98
	1,876

CUMULATIVE END PENDING	
Master Docket	394
Petition Docket	265
Miscellaneous Docket	14
	673

FILINGS (MASTER DOCKET)	
Appeals filed	0
Certificates filed	9
Petitions granted	429
Petitions granted w/ certificate	1
Reconsideration granted	4
TOTAL	443

TERMINATIONS (MASTER DOCKET)			
Findings and sentence affirmed	204		
Reversed in whole or in part	170	Signed	67
Granted petitions vacated	9	Per curiam	12
Other disposition directed	11	Mem opn/order	315
TOTAL	394	TOTAL	394

PENDING (MASTER DOCKET)	
Assigned opinions pending	235
Judges' conference pending	0
Oral argument pending	22
Preargument conference pending	96
Calendar committee pending	5
Final briefs pending	36
TOTAL	394

FILINGS (PETITION DOCKET)	
Petitions for grant of review filed	1,626
Petitions for grant/new trial filed	1
TOTAL	1,627

[Table A-6 Continued]

[continued]

TERMINATIONS (PETITION DOCKET)	
Petitions for grant dismissed	37
Petitions for grant denied	1,326
Petitions for grant remanded	15
Petitions for grant withdrawn	6
TOTAL	1,384

Signed	0
Per curiam	0
Mem opn/order	1,384
TOTAL	1,384

PENDING (PETITION DOCKET)	
Petition briefs pending	176
Staff attorney action pending	69
Court action pending	20
TOTAL	265

FILINGS (MISCELLANEOUS DOCKET)	
Writs of error coram nobis sought	7
Writs of habeas corpus sought	24
Writs of mandamus/prohibition sought	40
Other extraordinary writs sought	28
TOTAL	99

TERMINATIONS (MISCELLANEOUS DOCKET)	
Petitions withdrawn	4
Petitions remanded	0
Petitions granted	2
Petitions denied	71
Petitions dismissed	21
TOTAL	98

Signed	0
Per curiam	0
Mem opn/order	98
TOTAL	98

PENDING (MISCELLANEOUS DOCKET)	
Briefs pending	1
Action by Writs Counsel pending	12
Show cause action by Court pending	0
Show cause response pending	1
Temporary stay in effect	0
Other final action pending	0
TOTAL	14

[Table A-6 Continued]

[continued]

RECOMMENDATIONS

CATEGORY	FILINGS	PENDING	DISPOSITIONS GRANTED	DISPOSITIONS REJECTED	TOTAL
MASTER DOCKET	34	2	5	29	34
PETITION DOCKET	52	5	7	42	49
MISC. DOCKET	2	7	1	1	2
TOTAL	88	7	13	72	85

MOTIONS

CATEGORY	FILINGS	PENDING	DISPOSITIONS GRANTED	DISPOSITIONS REJECTED	TOTAL
TOTAL MOTIONS	1078	34	733	257	1045

APPENDIX B

HISTORIAL BACKGROUND OF APPELLATE REVIEW IN THE MILITARY JUSTICE SYSTEM

HISTORICAL BACKGROUND OF APPELLATE REVIEW IN THE MILITARY JUSTICE SYSTEM

This Appendix sets out the historical background of appellate review in the military justice system in order to put into context the discussion of alternatives for reform with respect to the Court of Military Appeals. Section 1 describes appellate review from the inception of the American military justice system with the Articles of War in 1775 through World War II. Section 2 details the studies and Congressional action after World War II that led to the establishment of the Court of Military Appeals in 1951. Section 3 describes the developments in appellate review under the Court of Military Appeals from 1951 to the present.

1. APPELLATE REVIEW THROUGH WORLD WAR II

This Section describes the origins of appellate review in the American system of military justice. It focuses on the Army's Articles of War and notes parallel developments in the Articles for the Government of the Navy.

The military justice system has provided for appellate review from the outset. The first Articles of War adopted in 1775 provided for review of the decisions of courts-martial. Thereafter, there were two major sets of changes prior to World War II. The first significant changes in the system came during World War I, dictated by the pressures of

large scale mobilization of civilians. More changes were directed by Congress immediately following the war. The appellate system then remained essentially unchanged through World War II. An overview of these segments in the history of the military justice system is set out below.

a. Early Appellate Procedure.

Appellate procedure in the military justice system has its roots in the principle that the sentence of a court-martial has no force or effect unless approved by a superior authority, usually the commander who convened the court-martial.[1/] This requirement, which is similar to modern court-martial practice, is in sharp contrast to the judgments of common law courts which require no further approval to become effective.

The first American military codes were derived from the British Articles of War.[2/] The British Articles of War of

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1/ A court-martial is not a permanent body, but exists only insofar as it is convened by the order of a commander empowered to do so. 10 U.S.C. §§ 822-825 (1976) (Arts. 22-25). A detailed historical analysis of this subject is set forth in Fratcher, Appellate Review in American Military Law, 14 Mo. L. Rev. 15 (1949).

2/ Because the concept of a civilian Court of Military Appeals first emerged when Congress revised the Army's Articles of War after World War I, this section will focus primarily on the Army's experience. Prior to enactment of the UCMJ in 1951, Navy trial and appellate procedure was governed by the Articles for the Government of the Navy. A brief description of the process of review under the Navy's Articles is set forth in note 47 infra.

[Footnote Continued]

1774 required confirmation by a garrison commander prior to execution of a sentence adjudged by regimental and garrison courts-martial, which had jurisdiction over minor offenses.[3/] Because sentences adjudged by general courts-martial could not be executed until confirmed by the King or his designee, the judge advocate of a general court-martial was required to send the records of trial to a civilian minister in the War Office.[4/] The King, after being advised by the War Office, acted as confirming authority for all cases tried in Great

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2/ [Continued]

Early appellate procedure should be considered in the context of trial procedures during the period prior to World War I. Courts-martial were composed of officers appointed by a commander empowered to convene such tribunals. There was no provision for a judge to preside over the trial; instead, the senior member of the court acted as president. The case was prosecuted by a judge advocate, who normally was not professionally qualified as an attorney. The judge advocate also acted as legal advisor to the court-martial, and if the accused was not represented by counsel, the judge advocate also acted as advisor to the accused. Changes in practice during the nineteenth century provided the accused with the right to be represented by counsel, but there was no requirement that such counsel be professionally qualified as an attorney, and the duties of counsel normally were performed by line officers. On review, the convening authority was not required to seek any legal advice. Moreover, he was empowered to return a finding of not guilty to the court-martial for the finding to be reconsidered, and he could return to the court-martial a sentence with a view towards increasing its severity. See Brown, The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell, 35 Mil. L. Rev. 1, 18-33 (1967).

3/ Id. at 16-17.

4/ Id.

Britain. Because the confirming power for cases tried elsewhere was delegated to an overseas commander-in-chief, cases tried overseas did not reach the War Office until the sentences had been confirmed and executed. Otherwise, "the record of every general court-martial case tried in Great Britian received automatic review by a civilian minister of the crown learned in the law before the sentence could be put in execution."[5/]

The American Articles of War adopted in 1775 followed the British practice insofar as confirmation of sentences by regimental and garrison courts-martial by the convening authority was required.[6/] With respect to general courts-martial, however, there was no provision for such confirmation; instead, the commander was given the power to pardon or mitigate sentences.[7/] A year later, at the request of George Washington, the Continental Congress enacted a full revision of the Articles of War to follow British practice even more closely. Under the new Articles, the judge advocate of a court-martial was required to report the proceedings to the Secretary of War, and no sentence of a general court-martial could be executed unless confirmed by

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5/ Id. at 16.

6/ 2 J. Cont. Cong. 110-112 (1775) (Arts. 37-39), cited in Fratcher, supra note 1, at 17.

7/ Id. (Art. 62).

the Continental Congress, certain general officers, or the commander-in-chief.[8/]

In 1786 the Articles were revised again and included the following modification of the review requirement:[9/]

> But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before ... [the commander who appointed the court]; neither shall <u>any sentence of a general court-martial in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall either in time of peace or war respect a general officer,</u> be carried into execution, until after the whole proceedings shall have been transmitted to the secretary of war, to be laid before Congress for their confirmation, or disapproval, and their orders on the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.

The First Congress continued in force the Articles of War as amended in 1786, including the procedures for review.[10/] In 1796, Congress amended the Article governing execution of sentences to substitute the President for Congress as the authority empowered to approve the designated sentences.[11/]

8/ 5. J. Cont. Cong. 670-71, 764, 787-807 (1776) (Sec. XIV, Arts 3. 5; Sec. XVIII, Art. 3) <u>as amended</u>, 7 J. Cont. Cong. 265 (1777).

9/ 30 J. Cont. Cong. 316-22 (1786) (Art. 2), <u>quoted in</u> Fratcher, <u>supra</u> note 1, at 19-20 (emphasis added).

10/ Act of Sept. 29, 1789, ch. 25, § 3, 1 Stat. 96.

11/ Act of May 30, 1796, ch. 39, § 18, 1 Stat. 485. A subsequent revision of the Articles of War in 1806 made no changes in appellate procedure. Act of April 10, 1806, 2 Stat. 359 (Art. 65).

From 1783 to the Civil War no officer held the title of Judge Advocate General of the Army. During most of this period, records of general courts-martial were submitted to the Adjutant General who "reviewed such records of trial and occasionally sent letters of criticism or recommendation to the field commanders concerned. From 1844 on the Adjutant General performed this function through a series of captains and lieutenants on duty in his office, detailed as Acting Judge Advocate of the Army."[12/] In 1849, Congress authorized the President to detail an Army captain to serve as Judge Advocate of the Army.[13/] This individual, "a junior army officer who was not even a lawyer" received and "examined records of trials by general courts-martial, rendered opinions on those in which the sentences required confirmation by the President before their transmission to the President, and sent letters of criticism or advice to field commanders."[14/]

12/ Fratcher, supra note 1, at 21. In the Act of Mar. 3, 1797, ch. 16, § 2, 1 Stat. 507, a Captain was authorized to serve as Judge Advocate of the Army. The position was abolished by the Act of Mar. 16, 1802, ch. 9, 2 Stat. 132. In the Act of Jan. 11, 1812, ch. 14, § 19, 2 Stat. 674, civilians and line officers were authorized to serve as division judge advocates. This office was abolished by the Act of Mar. 2, 1821, ch. 13, 3 Stat. 615. See Fratcher, supra, at 21.

13/ Act of Mar. 2, 1849, ch. 83, 9 Stat. 351.

14/ Fratcher, supra note 1, at 22.

During the Civil War, Congress reinstated the position of Judge Advocate General of the Army with a grade of brigadier general.[15/] The position was further enhanced by President Lincoln's appointment of John Holt, a noted attorney who had held several positions in President Buchanan's cabinet.[16/] Congress directed that all records of courts-martial were to be submitted to the office of the Judge Advocate General, and modified earlier review statutes by providing that "no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President."[17/] The latter provision, however, was revised to permit execution of sentences for a wide variety of offenses after approval by the commanding general in the field.[18/] As a result,

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15/ The legislation originally authorized the position to be be filled by a colonel, Act of July 17, 1862, ch. 201, § 5, 12 Stat. 598, and subsequently was amended to authorize it to be filled by a brigadier general. Act of June 20, 1864, ch. 146, 13 Stat. 145.

16/ Fratcher, supra note 1, at 23.

17/ Act of July 17, 1862, ch. 201, § 5, 12 Stat. 598.

18/ Act of March 3, 1863, ch. 75, § 21, 12 Stat. 735 (spies, deserters, mutineers, and murderers); Act of July 2, 1864, ch. 215, § 1, 12 Stat. 356 (sentences against "guerilla marauders" for various offenses). The commander of a division or "separate brigade" was empowered to appoint a general court-martial in time of war, but a sentence extending to death or to dismissal of an officer was required to be confirmed by the commanding general of the Army in the field prior to execution. Act of December 24, 1861, ch. 3, 12 Stat. 330.

review by President prior to execution of the sentence was restricted to a rather narrow class of cases.19/

As part of the enactment of the Revised Statutes of 1874, the Articles of War were rearranged and modified slightly. Section 1342 eliminated the requirement that the President review sentences to confinement in a penitentiary and continued the other exemptions from Presidential review in time of war that had been enacted during the Civil War.20/ The Articles were recodified again in 1916, but the Army entered World War I with essentially the same provisions for

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19/ Most trials were subject to review only by the officer who convened the court-martial. In 1862, Congress authorized a single field officer to sit at a court-martial with respect to any sentence punishable by a garrison or regimental court. A sentence adjudged by a single officer court-martial could not be executed until approved by a brigade or post commander. Act of July 17, 1862, ch. 201, § 7, 12 Stat. 598.

20/ In addition, the Judge Advocate General was directed to "receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry and military commissions, and perform such other duties as have been performed heretofore by the Judge Advocate General of the Army." Rev. Stat., § 1199.

In 1913, Congress eliminated regimental and garrison courts-martial, substituting a one-member summary court-martial empowered to adjudge sentences of up to three months confinement, and a three member special court-martial, empowered to impose sentences of up to six months confinement. These courts could be convened by regimental and post commanders, and, like their predecessor inferior courts-martial, sentences adjudged by these courts were subject to approval by the convening authority. Act of March 2, 1913, 37 Stat. 721.

review and exceptions for wartime offenses that had been in effect during the most of the Civil War.[21/]

b. Developments in Appellate Review During World War I

In 1917, the pressures of mobilization for World War I brought substantial public attention to the appellate review procedures of the military justice system.[22/] Two separate incidents at different locations in Texas sparked the controversy. In the summer of 1917, a large group of black soldiers was involved in a major disturbance in Houston. The soldiers were tried by general court-martial for murder, mutiny, and riot. The 1916 Articles of War contemplated a review of the record of trial by the convening authority prior to approving the sentences. Rather than conducting a review of the completed transcript, the convening authority for the Houston cases reviewed the records of trial as they were transcribed on a daily basis while the trials were in progress. The courts-martial returned findings of guilty and adjudged death sentences. Based upon the daily reading of the record, the convening authority ordered the death sentences to be executed. Because it was in time of war,

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21/ Act of Aug. 29, 1916, ch. 418, §§ 3, 4. 39 Stat. 650.

22/ A detailed discussion of the World War I controversy is set forth in Brown, supra note 2, at 1-15.

the normal requirement for Presidential approval of death sentences was inapplicable.[23/] As a result, the death sentences were executed within two days after the completion of the trials. The records of trial did not reach Office of the Judge Advocate General until approximately four months after the sentences had been executed.[24/]

The second incident occurred in September, 1917 at Fort Bliss, Texas. A group of enlisted men who had committed several minor infractions were placed under "arrest" -- a term used in the military system to signify limited restraint pending disposition of charges.[25/] When the men were ordered to attend drill formation, they refused to do so on the grounds that regulations prohibited such duties for persons under arrest.[26/] They were charged with mutiny, found guilty, and sentenced to dishonorable discharge with terms of confinement ranging from five to twenty-five years.

23/ See text accompanying notes 17-21 supra.

24/ Brown, supra note 2, at 3-4.

25/ Manual for Courts-Martial, United States (rev. ed. 1969), para. 20a [hereinafter cited as 1969 Manual]. The term is to be distinguished in military law from "apprehension," which "is the taking a person into custody." Id., para. 18a.

26/ The present law is similar. See id., para. 20a.

The records of the cases from the Houston and Fort Bliss incidents were received in the Office of the Judge Advocate General in November, 1917. At that time, an unusual personnel situation had developed. The Judge Advocate General of the Army, Major General Enoch H. Crowder, had been assigned to administer the Selective Service Act. The next senior officer, Brigadier General Samuel T. Ansell, assumed the duties of the Judge Advocate General. In the Fort Bliss case, Ansell drafted an opinion for the Secretary of War directing that the findings be set aside based upon the illegality of the order to attend drill formations. He grounded his action on the authority set forth in section 1199 of the Revised Statutes for the Judge Advocate General to "revise" the provisions of courts-martial.[27/] When General Crowder learned of this action, he drafted a memorandum for the Secretary contending that section 1199 did not provide the Judge Advocate General with the authority to order findings to be set aside after the sentence had been ordered executed.[28/] Crowder also noted that if the

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27/ The basis for Ansell's interpretation of section 1199 is set forth in Brown, supra note 2, at 4-5.

28/ General Crowder's interpretation is summarized in id. at 5-6.

Secretary wished to take action, he had separate statutory authority to order an honorable restoration to duty.[29/] The Secretary of War relied upon the latter point to take clemency action at Fort Bliss case without adopting Ansell's interpretation, but he asked for further study of the issue.

In mid-December, Ansell filed a memorandum with the Secretary disputing the concept that courts-martial were agencies of the Executive. Instead, he contended that they were "courts created by Congress, sanctioned by the Constitution and their judgments . . . entitled to respect as such."[30/] From this perspective, he argued that section 1199 recognized the Office of the Judge Advocate General as the appropriate location for a Bureau of Military Justice to review courts-martial.[31/] Crowder responded that, as a matter of law, "there is no constitutional or necessary right of appeal."[32/]

29/ See Act of Mar. 3, 1873, ch. 249, § 6, 17 Stat. 583, as amended by Act of Mar. 4, 1915, ch. 143, 38 Stat. 1074-75.

30/ Hearings on S. 64 on the Establishment of Military Justice Before a Subcomm. of the Sen. Comm. on Military Affairs, 66th Cong., 1st Sess. 90 (1919) [hereinafter cited as 1919 Senate Hearings on S. 64], quoted in Brown, supra note 2, at 6.

31/ Brown, supra note 2 at 6.

32/ 1919 Senate Hearings on S. 64, supra note 30, at 90, quoted in Brown, supra note 2, at 7.

The Secretary of War sided with General Crowder on the issue of whether section 1199 authorized review of all courts-martial in the Office of the Judge Advocate General. In order to deal with the most serious cases, however, the Department issued a General Order requiring the convening authority to suspend execution of sentences involving death or dismissal of an officer pending legal review in the Office of the Judge Advocate General.[33/] The General Order establishing this limited review mechanism was promulgated on January 17, 1918.[34/] Two days later, the Secretary of War submitted through the Chairman of the Senate Military

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33/ U.S. Dep't of War, Gen. Order No. 7. (Jan 17, 1918). This order and subsequent modifications are discussed in Fratcher, supra note 1, at 41-43.

34/ In the opinion of the leading commentator on this period in military justice, the General Order was designed to preempt further action by proponents of reform:

> It was alleged by General Ansell . . . and seems supported by correspondence from General Crowder to Brigadier General Walter A. Bethel, that the purpose of issuing General Order No. 7 was to attempt to forestall congressional hearings and the establishment of a military court of appeals. An unarticulated purpose of the order . . . may have been a desire to preclude further agitation in this area by General Ansell.

Brown, supra note 2, at 8 (footnote omitted).

Affairs Committee a revised version of Section 1199, but it was not considered during the pendency of the war.[35/]

c. Post-war Legislative Changes.

In January, 1919, the American Bar Association announced that it was appointing a study committee to review the military justice system. The final report of the committee was favorable to the Articles of War.[36/] At the same time, legislation was introduced which, among other things, would have permitted the Judge Advocate General to modify or reverse findings and sentences and order new trials.[37/] Although hearings were held on the bill in the Senate Military Affairs Committee, the legislation was not reported out of committee.

As the Sixty-Fifth Congress drew to a close in the winter of 1919, it appeared that the military justice

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35/ Id. at 8.

36/ The Committee indicated that problems in the system resulted from failure to follow "the letter and spirit of these articles and [the Manual for Courts-Martial] rather than from any defects in the Articles or the Manual." Quoted in id. at 9 n. 47.

37/ S. 5320, 65th Cong., 3d Sess., discussed in Brown, supra note 2, at 9. The bill also required that a judge advocate be appointed to serve in a judicial capacity for each general and special court-martial, required the immediate announcement of acquittal, and called for a revision of the Articles of War to be submitted to Congress by the Judge Advocate General.

controversy would fade away. General Ansell, however, was determined to promote a vigorous debate and made several major public speeches declaring that the system was "in many respects patently defective and in need of immediate revision at the hands of Congress."[38/] Prominent members of the legal profession joined in the debate. Professor Edmund M. Morgan, who, after World War II, would serve as the principal draftsman of the Uniform Code, supported General Ansell, while the defense of military justice was led by Professor John H. Wigmore, drafter of the evidence provisons of the 1917 Manual for Courts-Martial.[39/]

A chief concern of Ansell and of his opponents was the structure of appellate review. As noted above, General Order No. 7, issued on January 17, 1918, modified that aspect of Article 48 of the 1916 Articles of War that permitted the commanding general in the field in time of war to order into execution death sentences for murder, rape, mutiny, desertion, and spying. Instead, all sentences extending to death or dismissal required Presidential confirmation. Review of cases in the Office of the Judge Advocate General was quite limited. Cases could

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38/ Quoted in Lockmiller, ENOCH H. CROWDER 200-01 (1955), reprinted in Brown, supra note 2, at 10.

39/ Brown, supra note 2, at 13-14.

be reversed only for lack of jurisdiction. In other cases of prejudicial error, the Judge Advocate General was limited to recommending revision through the Chief of Staff and the Secretary of War to the President.[40/] Ansell proposed a substantial reform of this system. The centerpiece was a three judge court of military appeals located in the Office of the Judge Advocate General "for the convenience of administration only."[41/] Although appointment to the court was not limited to civilians, it was clear that a civilian court was intended.[42/] The proposed court was given jurisdiction over all cases in which the sentence extended to death, dismissal of an officer, punitive discharge, or confinement for more than six months. Review was automatic, but the accused could waive review either in the record at trial or later in writing. The court's powers involved review for prejudicial error, with the ability to disapprove findings and sentences and advise the convening authority of proceedings that might be taken, such as a new trial, with respect to actions that were disapproved. If the sentence were valid but appeared to be excessive, the court could

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40/ Id. at 29-30.

41/ Id. at 30.

42/ See id. at 30-32. Members of the court were to be subject to Senate confirmation and would hold appointment for life during good behavior, with the pay and benefits of federal circuit court judges.

make a recommendation for clemency to the President through the Secretary of War.[43/] In testimony before the Senate Military Affairs Committee, General Ansell added that the scope of review would encompass errors of law and not errors of fact.[44/]

During the same hearings, General Crowder sharply attacked the proposal:[45/]

> The idea of a civil court of military appeals is wholly untenable . . . [I]t would affect in the most detrimental way the fighting efficiency of our forces.
>
> * * * *
>
> I can conceive this appellate jurisdiction as you have outlined it, but it gives me pause when I reflect upon the fact that what you propose is a completely new experiment which no great nation will ever attempt--except Russia.
>
> * * * *
>
> In judging . . . the personnel of your proposed court of appeals, it is important to bear in mind that about 90 percent of the cases coming before that court are military cases. It is unreasonable to assume that any but military men could judge . . . the weight or relevancy of the evidence in determining the conduct of a man on the field of battle where the evidence is strategical or tactical and wholly military. The issues are those which only a military man who has been trained in those matters can understand . . . .

43/ See id. at 30-32.

44/ See id. at 31 (citing 1919 Senate Hearings, supra note 30, at 284-88).

45/ Id. at 31-32 (quoting 1919 Senate Hearings, supra note 30, at 1263, 1266, 1267).

In November, 1919 when it enacted the 1920 Articles of War, Congress rejected the proposal for a Court of Military Appeals, but provided a statutory basis for the Army Boards of Review, created by regulation during World War I, and expanded the powers of the Boards slightly . Under Article 50½ of the 1920 Articles of War, the Judge Advocate General was required to establish a three officer Board of Review, with additional Boards if necessary. The Board was empowered to review all cases requiring Presidential confirmation and to provide a written recommendation to the Secretary of War.[46/] Article 50 1/2 also provided the Board of Review with jurisdiction to review for legal sufficiency any general court-martial in which the sentence included death, unsuspended dismissal, dishonorable discharge, or confinement in the penitentiary, but there was no provision for review if the accused pleaded guilty. The Board's decisions were binding on the convening authority, subject to approval by the Judge Advocate General. If the Judge Advocate General disagreed with the Board's findings, the matter was forwarded to the Secretary of War for action by the President, who could

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46/ Act of June 4, 1920, ch. 2, 41 Stat. 759 (Art. 50½).

approve or disapprove findings and the sentence adjudged by the court-martial in whole or in part.[47/]

47/ Article 50½ also provided detailed guidance for revision and rehearing proceedings when the sentence was found legally insufficient. Records of general courts-martial with sentences not within the automatic review jurisdiction of the Boards of Review were reviewed in the Office of the Judge Advocate General. If found legally insufficient, the record was referred to the Board of Review for additional action. The records of summary and special courts-martial, however, were subject to review only by the commander who convened the court-martial.

In addition to establishment of the Board of Review, the 1920 Articles of War made a number of other changes in military practice. The most notable for purposes of this memorandum involved: (1) the requirement that a member of the Judge Advocate General's Department be detailed as a member of each general court-martial if available, and (2) the prohibition against returning a case to the court-martial for reconsideration of an acquittal or increasing the severity of the sentence. A detailed comparison of the 1916 and 1920 articles, along with the Ansell proposals and the UCMJ, is set forth in Brown, supra note 2, at 15-45.

In contrast to the public debate concerning the Articles of War after World War I, there was comparatively little controversy surrounding the Articles for the Government of the Navy. The original American Articles adopted by the Continential Congress in 1775 had been deprived from the British Articles of 1749. Pasley & Larkin, The Navy Court-Martial: Proposals for its Reform, 33 Corn. L. Q. 195 (1947). With certain exceptions not relevant here, pretrial and trial procedure in the Navy prior to World War I was similar to Army practice during the same period. Pasley and Larkin noted in 1947 that "aside from the amendments which created summary courts-martial and deck courts, the . . . Articles for the Government of the Navy are not far removed, in content and phraseology, from the British Articles of 1749 . . . ." Id. at 198.

[Footnote continued]

d. Developments During World War II

During World War II, over 16,000,000 men and women served in the armed forces of the United States; and over 2,000,000 courts-martial were convened.[48/] The leading commentators on this period have emphasized that the operation of the court-martial system during the war produced widespread dissatisfaction among the press, the bar

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47/ [Footnote continued]

Under the Navy's Articles, as under the Articles of War, the initial review was conducted by the convening authority. Although he was empowered to return a finding of not guilty to the court or direct revision of a sentence to increase its severity, the practice was limited by requiring prior approval by the Secretary of the Navy. Id. at 217. The Navy, by regulation established further procedures for review.

During World War II, every general court-martial was reviewed for legality in the Office of the Judge Advocate General, and cases involving "controversial issues" were submitted to a Board of Review, but the recommendations of the Board were not binding on the Judge Advocate General. Id. at 223. After review by the Judge Advocate General, all records of general courts-martial found to be legally sufficient were submitted to the Chief of Naval Personnel or Commandant of the Marine Corps for comment as to disciplinary features. Id. at 225. If either the Judge Advocate General or the Chief of Naval Personnel (or the Commandant) recommended modification of the findings or sentence, the case was submitted to the Secretary of the Navy, who, under Article 54(a), could exercise all of the powers of a convening authority with respect to findings and sentences. The recommendations to the Secretary were not binding. Final review was performed by the Naval Clemency and Parole Board, which reappraised the records of Navy personnel confined to penal institutions. For a summary of the Navy Department reports critical of the World War II review procedures, see id. at 225-29.

48/ Willis, The United States Court of Military Appeals: Its Origin, Operation, and Future, 55 Mil. L. Rev. 39 (1972) [hereinafter cited as Willis I].

and the public.[49/] Lawyers who had been in the Service, veterans groups, particularly the American Legion, and others became vigorous proponents of drastic reforms in the court-martial process.[50/] The strongest criticism was focussed on improper command influence and inadequate performance by counsel, but the appellate process was also affected. Even before the end of the war, the Secretary of the Army and the Secretary of the Navy initiated a number of comprehensive inquiries into the operation of the military justice system.[51/] These studies pointed out numerous deficiencies in court-martial practice, with particular emphasis on command influence. The work of the clemency boards established by each of the Departments, which resulted in substantial mitigation of many sentences based upon instances of injustice, further fueled the movement for change.[52/]

49/ See, e.g., W. Generous, SWORDS AND SCALES 14-15, 23-24 (1973); H. Moyer, JUSTICE AND THE MILITARY 631-32 (1972); Morgan, The Background of the Uniform Code of Military Justice, 6 Vand. L. Rev. 169 (1953), reprinted in 28 Mil. L. Rev. 17, 21 (1965) [hereinafter cited to 28 Mil. L. Rev.]; Wacker, The "Unreviewable" Court-Martial Conviction: Supervisory Relief Under the All Writs Act from the United States Court of Military Appeals, 10 Harv. C.R.-C.L. L. Rev. 33, 34 (1975); Willis I, supra note 48, at 41-42.

50/ See Generous, supra note 49, at 23-24. See generally Mott, Hartnett, and Morton, A Survey of Literature of Military Law, 6 Vand. L. Rev. 331 (1953).

51/ See Willis I, supra note 48, at 48 n.42; Moyer, supra note 49, at 631-32.

52/ See Generous, supra note 49, at 15-21.

2. CHANGES IN APPELLATE REVIEW AFTER WORLD WAR II

After the war, the pressures for change brought a series of efforts in Congress and in the Defense Department that resulted in very substantial changes in the military justice system. The appellate review process was caught up in these changes with the result of the establishment of the Court of Military Appeals in 1951. This section describes the revision of the Articles of War in 1948, the drafting and congressional consideration of the provisions for appellate review in the Uniform Code of Military Justice, and the essential features of the appellate system under the Uniform Code as enacted.

a. 1948 Revision of the Articles of War

In 1946 a subcommittee of the House Military Affairs Committee conducted the first extensive post-war hearings on the military justice, leading to a highly critical report.[53/] A year later, a subcommittee of the newly created House Armed Services Committee, known as the Elston subcommittee, conducted further hearings with particular attention to the Army and the Articles of War.[54/] The Elston subcommittee

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53/ H.R. Rep. No. 2722, 79th Cong., 2d Sess. (1946).

54/ Hearings on H.R. 2575, To Amend the Articles of War, Before a Subcommittee of the House Committee on Armed Services, 80th Cong., 1st Sess. (1947) Although a

[Footnote Continued]

produced a bill, H.R. 2575, that proposed a number of important changes in appellate procedure. A judicial council would be created in the Office of the Judge Advocate General. The council, composed of three generals, would review cases involving sentences of death, confinement for life, dismissal of an officer, or any other case referred to it by the Judge Advocate General. It would be empowered to weigh evidence, to judge the credibility of witnesses, and to determine questions of fact as well as law.

Although H.R. 2575 passed the House easily in January of 1948,[55/] it seemed to reach a dead end in the Senate. The Berlin crisis in the summer of 1948, however, not only revived selective service but also breathed new life into H.R. 2575. When the selective service legislation reached the floor of the Senate, Senator James P. Kem led critics of

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54/ [continued]

bill to amend the Article for the Government of the Navy was pending before the Elston Subcommittee, Generous notes:

> For a number of reasons--the spotlight of public and Congressional interest on the Army system, Durham's spadework, and some high-level reluctance in the Navy Department--the Elston panel put aside the Navy bill for the moment and went to work on the Articles of War.

Generous, supra note 49, at 23.

55/ 94 Cong. Rec. 217 (1948).

the Articles of War in arguing that it would be unconscionable to reinstate compulsory military service without reforming the military justice system. Kem proposed to amend the selective service bill by adding a separate title consisting of H.R. 2575 as approved by the House.[56/] Chairman Gurney of the Senate Armed Services Committee argued that the amendment was inappropriate because his committee had not held hearings and because the House bill failed to deal with the Navy's Articles.[57/] With strong lobbying assistance from veterans groups and the Reserve Officers Association, Kem's views prevailed and the amendment was carried by a five vote margin.[58/] The House concurred, and the "Elston Act" which included creation of a Judicial Council in the Army, was enacted in the summer of 1948, to be effective February 1, 1949.[59/]

b. The Morgan Committee: Drafting a Uniform Code.

On May 3, 1948, Senator Gurney wrote to Secretary of Defense Forrestal requesting that the Secretary submit a uniform code for all of the military services for consideration by the Congress.[60/] Eleven days later, Forrestal

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56/ Id. at 7510-15.

57/ Id. at 7519-21.

58/ Id. at 7525.

59/ Act of June 24, 1948, ch. 625, tit. II, §§ 209, 210, 62 Stat. 629.

60/ See U.S. Dep't of the Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975, at 196 (1975).

announced the formation of a Committee on a Uniform Code of Military Justice to draft a statute applicable to all members of the armed forces.[61/] Acting upon the advice of

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61/ Id. The Military Departments were represented on the Morgan Committee by the Under Secretary of the Navy and Assistant Secretaries from the Army and Air Force. Felix Larkin, Assistant General Counsel (and later General Counsel) of the Department of Defense served as Executive Secretary of the Morgan Committee, Chairman of the Committee's Working Group, and Director of its Research Group. Willis I, supra note 48, at 55 n.73; Larkin, Professor Edmund M. Morgan and the Drafting of the Uniform Code, 28 Mil. L. Rev. 7, 12 (1965); Morgan, supra note 66, at 49; Generous, supra note 49 at 38. Secretary Forrestal outlined the following objectives for the new Code:

> First, it should integrate the military justice system of the three services. To this end, provisions of the code should apply to the three services on as uniform a basis as possible.
>
> Second, modernization of the existing systems should be undertaken with a view to protecting the rights of those subject to the code and increasing public confidence in military justice, without impairing the performance of military functions.
>
> Third, the new code should represent an improvement in the arrangement and draftsmanship of the resultant articles, as compared with present Articles of War and Articles for the Government of the Navy.

Letter from James Forrestal, Secretary of Defense, to the Committee on a Uniform Code of Military Justice, Aug. 18, 1948, quoted in Willis I, supra note 48, at 55.

The drafting process is discussed in Larkin, supra, at 8-11 and Generous, supra, at 37-42. Most issues were resolved by the drafting committee. Those issues that could not be resolved among the military departments were resolved by Secretary Forrestal.

Marx Leva, General Counsel of the Department of Defense, Forrestal appointed Professor Edmund Morgan of Harvard -- the same Professor Morgan who, thirty years before, had been a leading proponent of the Ansell reforms -- as Chairman of the Committee.[62/]

One of the major issues before the Committee was whether to create a mechanism for appealing decisions of the Boards of Review, and if so, what role, would be played by civilians. Contemporary proposals included:[63/]

- A permanent Supreme Court-Martial consisting of nine judges appointed from military service to serve during good behavior for the remainder of their military service. Certain cases would be subject to further appeal to a United States Court of Appeals.
- Appeal of sentences consisting of more than a year's confinement to the Court of Appeals in the circuit in which the prisoner was incarcerated, with certiorari to the Supreme Court.
- A civilian board responsible only to the Secretary of Defense.

62/ The selection of Professor Morgan and his role in drafting the Code--including the influence of his experiences in World War I--is discussed in Larkin, supra note 78, at 7-11. Professor Morgan's career, including his numerous contributions in areas other than military law, is outlined in Sutherland, Edmund Morris Morgan: Lawyer-Professor and Citizen-Soldier, 28 Mil. L. Rev. 3 (1965).

63/ The proposals described herein were derived from various sources, including materials requested by Professor Morgan, proposals developed by the various post-war advisory committees to the military departments, and legislation then pending before Congress. Willis I, supra note 48, at 57-63 (citations omitted).

- An Armed Forces Supreme Court with judges selected in the same manner as federal judges.
- Final review of general courts-martial by the Judge Advocate General.
- Boards of Review with mixed civilian and military membership.
- An Office of Chief Defense Counsel to appeal jurisdictional and constitutional decisions of the Boards of Review to the Supreme Court.

Agreement on the appellate structure was difficult to achieve.[64/] In October 1948, Morgan proposed to the Committee that a Judicial Council including civilians be established in the Office of the Secretary of Defense. Members would be nominated by the Secretary and appointed by the President for life, with the pay of a federal circuit court judge. The Council would have appellate jurisdiction over all cases involving a general or flag officer, a death sentence, dismissal or discharge, and all cases certified by a Judge Advocate General or received on petition from the accused. In addition to reviewing questions of law, the Council would be empowered to weigh evidence, judge

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64/ The following account is derived from Willis I, supra note 48, at 58-63, and Generous, supra note 49, at 38-41. Willis based his research on memoranda of the working group and the Morgan Committee now located in Papers of Professor Morgan on the Uniform Code of Military Justice, on file in Treasury Room, Harvard Law School Library. Generous relied upon the Morgan Papers and personal interviews with many of the participants in the drafting process.

credibility, and determine issues of fact. The Boards of Review would be retained as intermediate appellate tribunals.

Representatives of the Military Departments on the Morgan Committee all registered varying degrees of opposition to the plan. The Committee tentatively adopted the concept of a Judicial Council, but with substantial modification, including vesting the appointment power in the Secretaries of the Military Departments, rendering the members removable at will by the Secretaries, and limiting review to questions of legal sufficiency.

Even the modified proposal provoked controversy. The Assistant Secretary of the Army took the position that the plan was contrary to the National Security Act which, he asserted, required the military departments to maintain separate administration of courts-martial. He also objected on the basis that the proposal would dilute the judicial authority of the Judge Advocates General and the service secretaries while placing such authority in the hands of persons without military experience or responsibility. He added that the proposal would produce delay in a system that required speed and finality. The Navy and Air Force representatives, however, concurred in the modified plan and a proposed Article was drafted.[65/]

65/ The draft article is reprinted in Willis I, supra note 48, at 60-61.

In December 1948, the proposed article was approved by the Morgan Committee with the Army dissenting. The issue was submitted to the Secretary of Defense Forrestal who, after meeting with the Morgan Committee, decided against the Army and ruled in favor of a Judicial Council.[66/]

66/ With the exception of two other issues, other differences among the services were resolved within the Morgan Committee. The two controverted points involved decisions as to whether enlisted members should be permitted to sit on courts-martial and the role of law members of a general court-martial. The Army and Air Force, with Morgan's support, proposed those at least one third of the membership of a court-martial be comprised of enlisted members upon request of an enlisted accused. The Navy, with Morgan's support, proposed that the law member be given powers similar to those possessed by a trial judge and that the law member not sit as a member of the court. Secretary Forrestal sided with Morgan on both issues. On a third issue--whether members could demand trial by court-martial in lieu of nonjudicial punishment--the members could not develop a uniform proposal. Instead, they proposed that the matter be left the discretion of the military department, an approach eventually recommended by the Department of Defense and enacted by the Congress, Act of May 5, 1950, ch. 169, § 1 (Art. 15), 64 Stat. 108. Generous, supra, note 49, at 40-42, 122-25. In 1962, a more uniform approach to nonjudicial punishment was adopted by Congress. Act of Sept. 7, 1962, Pub. L. No. 87-648, § 1, 76 Stat. 447.

Two changes were made in the proposal developed by the Morgan Committee prior to submission to Congress: (1) a committee comprised of the Judicial Council and the Judge Advocates General was directed to meet annually and to report to the Secretary of Defense and the Secretaries of the Military Departments on the status of various matters regarding military justice; (2) at the insistence of the Bureau of Budget (now Office of Management and Budget), the bill was amended to provide for Presidential appointment to the Judicial Council rather than appointment by the service secretaries. Willis I, supra note 48, at 62.

On February 8, 1948, a proposed Uniform Code of Military Justice was transmitted to Congress. It was a compromise proposal, reflecting the various pressures generated in the post-war era both from within the services and from the public.[67/] The Judicial Council represented the major innovation in the Code and a substantial departure from the previous determination of the military establishment to resist any civilian judicial role in the military justice appellate system.

c. House Action.

The House and Senate hearings[68/] involved detailed consideration of the individual Articles of the proposed

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67/ The central role of the commander was preserved by providing the convening authority with the power to order investigations, refer charges to trial, appoint members of the court, order reconsideration of rulings on motions not amounting to a finding of not guilty, order rehearings in certain cases, and take initial action on the findings and sentence. At the same time, the role of attorneys in the system was enhanced considerably. In addition to providing for a law officer to preside at trial, the proposal required the convening authority to obtain legal advice at various stages of general courts-martial and to provide the accused in a general court-martial with the right to be represented by professionally qualified legal counsel.

68/ Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Comm. on Armed Services, 81st Cong. 1st Sess. (1949) [hereinafter cited as 1949 Senate Hearings]; Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. (1949) [hereinafter cited as 1949 House Hearings].

Code, along with extensive debate on the permissible extent of command control and the role of the Judicial Council. In his testimony before the House Subcommittee, Professor Morgan gave a very expansive interpretation of the duties and status of the Judicial Council:[69/]

> It is apparent that such a tribunal is necessary to insure uniformity of interpretation and administration throughout the armed forces. Moreover, it is consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians.

Witnesses before the subcommittee urged that the legislation be amended to strengthen the Council, including changing its name to the Military Court of Appeals, providing the members with life tenure, expanding the types of cases that would come before the Council, and increasing the time limit for appeal.[70/] A spokesman for the American Legion praised the concept of the Council adding that if it were given enough

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69/ 1949 House Hearings, supra note 68, at 604.

70/ Willis I, supra note 48, at 64-65, (citing 1949 House Hearings at 673 (testimony of General Franklin Riter on behalf of the American Legion); id, at 689, 695 (testimony of John J. Finn on behalf of the American Legion); id. at 642 (testimony of Richard Wels, New York County Lawyers Ass'n); id. at 725 (testimony of George A. Spiegelberg, Chairman ABA Comm. on Military Justice); id. at 758 (testimony of Col. John P. Oliver, Legislative Counsel of Reserve Officers of the United States)).

power, it would almost eliminate the need for further reform.[71/] Other witnesses criticized the proposal for a Council as a potential source of delay that would endanger national security and interfere with military operations.[72/]

The Subcommittee rejected the nomenclature of "Council" and moved ahead to a full-fledged court in the following colloquy among Mr. Smart, the Committee Counsel, Mr. Larkin from the Office of General Counsel, Department of Defense, and members of the subcommittee:[73/]

> Mr. Smart. . . . I don't think that the committee should adopt the term "Judicial Council" purely because we had it in H.R. 2575 . . . Now here you are creating a court equally applicable, for purposes of review, to all of the services. They are civilians, not officers. I think you should adopt some judicial terminology and get away from the "Council" which suggests to me one of the usual basement operations here in Washington.
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>
> Mr. Elston. How about "Supreme Court of Military Appeals ". . . . ? But we ought to have something different than "Judicial Council!" That sounds too much like a city council.

71/ Id. at 65 (citing testimony of John J. Finn on behalf of the American Legion, 1949 House Hearings, supra note 68, at 686).

72/ Id. at 65 (citing 1949 House Hearings, supra note 68, at 772-73 (testimony of Maj. Gen. Raymond H. Fleming on behalf of the National Guard Bureau); id. at 778-806 (testimony of Col. Frederick Bernays Wiener, a leading writer on the history of military justice and practice before courts-martial)).

73/ 1949 House Hearings, supra note 68, at 1276, quoted in Willis I, supra note 48, at 65-66.

Mr. Larkin. It sounds like a round table instead of a court.

* * * *

Mr. Elston. I would suggest, Mr. Chairman, to bring the issue to a vote, that we make it "The Court of Military Appeals."

The suggestion was adopted[74/] along with a modification of the legislation to provide the members with life tenure conditioned on good behavior.[75/] The full committee approved these provisions without modification and reported the legislation to the to the House on April 28, 1949.[76/] The Committee noted that it had preserved command control of the court-martial process but had instituted a number of safeguards against improper command influence, including establishment of the Court of Military Appeals.[77/] The Report described the appellate procedures for the Court

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74/ Id.

75/ Id. at 1272. The Subcommittee also discussed the court's potential caseload and the meaning of appointment "from civil life" but took no action on these matters. Id. at 1274-75.

76/ The Committee amended proposed Article 67(g) to add the Armed Services Committees as recipients of the annual report on military justice to be made by the Court and the Judge Advocates General. H.R. Rep. No. 491, 81st Cong., 1st Sess. 6 (1949). The Committee also proposed a limit on the number of judges who could be appointed from the same political party. Id. at 12.

77/ Id. at 7-8 (emphasis added).

of Military Appeals as "the most revolutionary changes which have ever been incorporated in our military law."[78/] In its analysis of the proposed court, the Committee noted:[79/]

> The Court of Military Appeals provided for in this article [67] is established in the National Military Establishment and is to review cases from all the armed forces. The members are to be highly qualified civilians and the compensation has been set to attract such persons.

On the House floor, Representative Philbin, a member of the Armed Services Committee, emphasized the importance of the court in providing for civilian review of military justice:[80/]

> This court will be completely detached from the military in every way. It is entirely disconnected with [sic] the Department of Defense or any other military branch, completely removed from outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish . . . a break in command control over courts-martial cases and civilian review of the judicial proceedings and decisions of the military.

78/ Id. at 6.

79/ Id. at 32.

80/ 95 Cong. Rec. 5726 (1949). Similar views were expressed by Representative Sabath. Id. at 5719.

The House version passed easily on May 5, 1949.[81/]

d. Senate Action

Stronger opposition to the proposal for a Court of Military Appeals emerged in the Senate Subcommittee hearings. In addition to those who reiterated the positions they had taken during the House hearings,[82/] the Judge Advocate General of the Army urged that the court be composed of military officers because of the specialized nature of military justice.[83/] The Judge Advocate General of the Air Force called for a mixed military and civilian court.[84/] The President of the Judge Advocates Association urged that a civilian court at the head of the military justice system would be an impediment to discipline, and he reported that an overwhelming majority

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81/ Id. at 5744.

82/ E.g., 1949 Senate Hearings, supra note 68, at 128-40 (testimony of Frederick Bernays Wiener). Col. Wiener made two major points in opposition to a civilian Court of Military Appeals. First, "by providing for the appointment of civilians, you practically guarantee that you get people who won't know about what they have got to decide because they have no background for wartime military offenses." Id. at 132. Second, the "experience with the specialized tribunals has been that they haven't the same degree of talent that our Courts of general jurisdiction have attracted . . . . A Court of Military Appeals is bound to be a haven for lame ducks." Id. at 137-38.

83/ Id. at 259-65, 272-73 (testimony of Maj. Gen. Thomas H. Green).

84/ Id. at 289 (testimony of Maj. Gen. R. C. Harmon).

of the Association's membership--former officers with military legal experience--opposed the proposed court.[85/] The Court was also opposed by a majority of the New York State Bar Committee on Military Justice.[86/] In support of the Court, the subcommittee heard testimony from Professor Morgan and various veterans groups and bar associations.[87/] The Judge Advocate General of the Navy stated that the proposal for the Court of Military Appeals was "workable."[88/]

The concept of a civilian court was never in doubt within the subcommittee, but there was much concern, particularly by Senator Kefauver, that the appointees would be

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85/ Id. at 226-40 (testimony of William J. Hughes, Jr.).

86/ Id. at 300 (testimony of Knowlton Durham).

87/ Willis I, supra note 48, at 67 (citing 1949 Senate Hearings, supra note 68, at 37-52 (testimony of Professor Morgan); id. at 91-92 (testimony of Arthur E. Farmer on behalf of the War Veterans Bar Ass'n); id. at 141-43 (testimony of Joseph A. Clorety, Jr. on behalf of the American Veterans Committee); id. at 187-88, 195, 199 (statement of General Franklin Riter and John J. Finn on behalf of the American Legion); id. at 207-08 (statement of Richard H. Wels on behalf of the New York County Lawyers' Association)).

88/ 1949 Senate Hearings, supra note 68, at 287 (testimony of Rear Adm. George L. Russell, Judge Advocate General of the Navy).

political "lame ducks."[89/] He added: "[W]e want to see how this committee is going to operate and what kind of personnel we are going to get, and it may be that experience will show that we should have a man with military experience."[90/] At his suggestion, the committee removed the House proposal for life tenure and substituted staggered eight year terms.[91/]

On the Senate floor, the entire Uniform Code of Military Justice, as well as the Court of Military Appeals, encountered some resistence. Senator Tobey, apparently acting on behalf of the Department of the Army, offered numerous changes to the proposal including replacement of the Court.[92/] The amendments were rejected. Senator McCarran, chairman of the Senate Judiciary Committee, proposed that the entire bill be referred to the Senate Judiciary Committee.[93/] He was concerned that the proposed Court of Military Appeals and the "finality" provisions of Article 76 would preclude federal

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89/ Id. at 311.

90/ Id. at 312.

91/ Id. at 314; S. Rep. No. 486, 81st Cong. 1st Sess. 28 (1949).

92/ 96 Cong. Rec. 1293 (1950). Willis I, supra note 48, at 68 n.148.

93/ Willis I, supra note 48, at 68 n.151.

court review of court-martial decisions by writ of habeas corpus. Senator Saltonstall, on behalf of the Armed Services Committee, assured the Senate that nothing in the bill was intended to deprive the federal courts of their habeas corpus powers, and the McCarran motion was defeated 43-33.[94/] Senator Morse unsuccessfully attempted to strengthen the court by restoring the House version making it a "court of the United States."[95/] After further debate on various aspects of the Code, the Senate Armed Services Committee's version was passed without amendment on February 3, 1950. The Conference Committee increased the term for each set on the court from 8 to 15 years, provided for staggered terms, and granted civil service benefits to the judges.[96/]

e. Appellate Review Under the Uniform Code of Military Justice

The essential characteristics of the trial appellate structure are much the same today as they were when the

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94/ 96 Cong. Rec. 1414, 1417 (1950).

95/ Id. at 1442-43.

96/ H.R. Rep. No. 1946, 81st Cong. 2d Sess. 4 (1950).

Code became effective on May 31, 1951.[97/] The system has four tiers of review:

97/ There are three types of trial courts authorized by the Code: summary, special, and general courts-martial.

A summary court-martial consists of one officer who acts as fact-finder, represents all parties, and, in the event of a finding of guilty, adjudges a sentence. The summary court officer normally is not a judge advocate, and the accused has no right to counsel. The court has jurisdiction to try enlisted personnel for any noncapital offense and to adjudge any sentence other than death, a punitive discharge, confinement for more than a month, hard labor without confinement for more than forty-five days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds pay for one month. The accused may object to trial by summary court-martial, in which case the charge may be referred to a general or special court-martial. 10 U.S.C. § 816, 820 (1976) (Arts. 16, 20); 1969 Manual, supra note 25, para. 16.

A special court-martial consists of not less than three members. The Military Justice Act of 1968, Pub.L. No. 90-632, 82 Stat. 1335, amended the Uniform Code to permit a special court-martial also to consist of not less than three members plus a military judge, or a military judge sitting alone at the request of the accused. 10 U.S.C. §§ 816 (1976) (Art. 16). A special court-martial may adjudge any sentence authorized by the President except death, a dishonorable discharge, confinement at hard labor for more than six months, hard labor without confinement for more than three months, or forfeiture of two thirds of monthly pay for six months. In addition, a bad-conduct discharge may be adjudged only when a vebatim record is kept, a military judge is detailed, and the accused is provided with qualified defense counsel. 10 U.S.C. §§ 819, 827 (1976) (Arts. 19, 27). A military judge and qualified counsel are detailed to most special courts-martial. The use of summarized records at the direction of the convening authority precludes the adjudication of a bad-conduct discharge in most special courts-martial.

A general court-martial consists of at least five members and a military judge, or a military judge sitting alone at the request of the accused. The accused has a right to representation by legally qualified counsel. Before charges can be referred to a general court-martial,

[footnote continued]

1) Command review. Each trial must be reviewed at least by a senior military commander prior to approval of the findings and sentence.[98/] Under Article 60, this review normally is performed by the commander who convened the court-martial.[99/] The convening authority may approve only those findings and so much of the sentence found to be "correct in law and fact."[110/] In addition, the convening authority has complete discretion to approve any lesser

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97/ [continued]

there must be a pretrial investigation and the convening authority must receive written advice on the charge from the staff judge advocate. A verbatim record of the proceedings is kept. The court is empowered to adjudge any punishment authorized for the offense by the President and not prohibited by the Code. 10 U.S.C. §§ 816, 818, 826, 827 (1976) (Arts. 16, 18, 26, 27).

98/ 10 U.S.C. § 864 (1976) (Art. 64). A sentence to confinement, however, becomes effective when announced by the court-martial, but the confinement may be deferred in the discretion of the commander. 10 U.S.C. §§ 857, 858 (1976) (Arts. 57, 58).

49/ The review may also be conducted by a successor in command or any officer empowered to convene a general court-martial. 10 U.S.C. § 860 (1976) (Art. 60). Prior to taking action on the record of a general court-martial or a special court-martial at which a bad-conduct discharge has been adjudged, the convening authority must submit the case to a staff judge advocate for a nonbinding legal opinion. 10 U.S.C. §§ 861, 865 (1976) (Arts. 61, 65). This post-trial legal review is not required with respect to the records of summary courts-martial and those special courts-martial in which the sentence does not include a bad-conduct discharge.

100/ 10 U.S.C. § 864 (1976) (Art. 64).

findings and sentence, or disapprove the sentence, or disapprove the findings or sentence or both in their entirety even if correct as a matter of law.[101/]

The records of inferior courts-martial (summary courts-martial and special courts-martial in which the sentence approved by the convening authority does not include a bad conduct discharge)[102/] are reviewed by a judge advocate, who is usually a member of the convening authority's staff.[103/] The judge advocate's recommendations, made to the commander who exercises supervisory powers over the commander who convened the court, are not binding.[104/] No further review is required, but the Judge Advocate General may vacate or modify the findings or sentence in any case based upon "newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the

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101/ Id. The convening authority also may return a record of trial to the court-martial for reconsideration when a specification has been dismissed on motion and the ruling does not amount to a finding of not guilty, 10 U.S.C. § 862(a) (1976) (Art. 62(a)), or for revision of a matter that can be rectified without material prejudice to a substantial right of the accused, with specified limitations. 10 U.S.C. § 862(b) (1976) (Art. 62(b)).

102/ See note 97 supra.

103/ 10 U.S.C. § 865(c)(1976). See Strassburg, Civilian Judicial Review of Military Criminal Justice, 66 Mil. L. Rev. 1, 23 (1974).

104/ See id.

substantial rights of the accused."[105/] The records of such inferior courts are not subject to review by the Courts of Military Review or the Court of Military Appeals under the statutory provisions governing appeals, but developments in case law have created the possibility of such review through the issuance of extraordinary writs.[106/]

2) Courts of Military Review. The records of cases affecting general or flag officers and cases in which there is an approved sentence of death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable or bad-conduct discharge; or confinement for one year or more are reviewed by the Court of Military Review of the

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105/ 10 U.S.C. § 869 (Art. 69). Appellate review by the Judge Advocate General in cases not reviewed by the Courts of Military Review was not contained in the Uniform Code of Military Justice as enacted, but was added as part of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

106/ See text accompanying notes 195-98 infra. Because of the limits on the statutory jurisdiction of the Courts of Military Review and the Court of Military Appeals, most cases tried in the military justice system are not subject to review in these appellate tribunals. Writing in 1972, Willis reported that since the UCMJ became effective on May 31, 1951, there had been 2,873,470 courts-martial. The Court of Military Appeals had acted in 22,594 cases and had rendered 2,659 opinions. He added that from 1962 to 1970, the Courts of Military Review had acted in six percent of all courts-martial, and the Court of Military Appeals had acted in approximately 17.3 percent of the cases referred to a Court of Military Review. Willis I, supra note 48, at 76 & n.189.

military department concerned.[107/] In addition, the Judge Advocate General reviews the records of all other general courts-martial (i.e., those not within the automatic review jurisdiction of the Courts of Military Review) and may submit the record in any such case to a Court of Military Review "[i]f any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs . . . ."[108/] As with the Boards of Review under the Articles of War, the Courts of Military Review are empowered to weigh evidence, judge credibility, and determine issues of fact as well as questions of law.[109/] Although civilians may be appointed to serve on a Court of Military Review, it has been customary for positions on the courts to be filled from within the military.

3) Court of Military Appeals. Automatic review in the Court of Military Appeals is limited to cases from the Courts of Military Review which affect a general or flag officer or in which the Court of Military Review has affirmed a death sentence.[110/] The Court has certiorari jurisdiction

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107/ 10 U.S.C. § 866 (1976). These appellate tribunals are the successors to the Boards of Review. The title Court of Military Review was added by the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (Art. 66).

108/ 10 U.S.C. § 869 (1976) (Art. 69).

109/ 10 U.S.C. § 866(c) (1976). See Strassburg, supra note 103, at 24.

110/ 10 U.S.C. § 867(b)(1) (1976) (Art. 67(b)(1)).

under which it can elect to review a decision of a Court of Military Review on petition of the accused.[111/] The Judge Advocates General also may certify a case from a Court of Military Review to the Court of Military Appeals.[112/]

4) Secretarial review. Although the Court of Military Appeals is the highest judicial tribunal in the military justice system, there are other avenues of review under the Code. Every sentence involving death or affecting a general or flag officer must be approved by the President.[113/] A sentence of dismissal of an officer must be approved by the service secretary.[114/] In addition, the service secretaries have broad clemency power to remit or suspend any sentence not approved by the President and to substitute an administrative discharge for a punitive discharge or dismissal.[115/]

111/ 10 U.S.C. § 867(b)(3) (1976) (Art. 67(b)(3)). If, under Article 69, the Judge Advocate General sends to a Court of Military Review the record of a general court-martial in which the sentence is not within the automatic appellate juridiction of the Court of Military Review, the Court of Military Appeals may not review the case unless it is certified to the Court of Military Appeals by the Judge Advocate General under Art. 67(b)(2). 10 U.S.C. § 869 (1976) (Art. 69).

112/ 10 U.S.C. § 867(b)(2) (1976) (Art. 67(b)(2)).

113/ 10 U.S.C. § 871(a)(1976) (Art. 71(a)).

114/ 10 U.S.C. § 871(b) (1976) (Art. 71(b)).

115/ 10 U.S.C. § 874 (1976) (Art. 74).

3. APPELLATE REVIEW UNDER THE COURT OF MILITARY APPEALS

This section describes developments in appellate review after the establishment of the Court of Military Appeals. Subsection (a) describes the development of the doctrine of civilian review during the period from 1951 to 1968. This period included assertion of power to interpret the Code and the Manual for Courts-Martial, application of certain civilian constitutional guarantees, and consideration of the standard of review. Subsection (b) then describes military justice legislation enacted in 1968 which made significant changes in the trial and intermediate appellate system, but left the Court of Military Appeals substantially unchanged. Subsection (c) sets out developments in appellate review during the period 1968 through 1978, including general exercise of the court's supervisory powers, relief under the All Writs Act, and further developments with respect to constitutional guarantees.

a. Development of the Doctrine of Civilian Review.

The court turned its attention first to organizational matters. It then quickly faced the initial examination of its powers to interpret the Uniform Code of Military Justice and the Manual for Courts-Martial. Other early decisions charting a course for the court involved the constitutional rights of service members and the standard for review.

1) Organization of the court

The first nominations to the court were submitted to Congress by President Truman in the spring of 1951.[116/] For the post of Chief Judge, Truman nominated Robert E. Quinn, a Democrat who had been Lieutenant Governor and Governor of Rhode Island. At the outbreak of World War II, he was serving as a judge on the Superior Court of Rhode Island. He resigned his state court judgeship in 1942 to spend the balance of the war in the Navy's legal department. Paul W. Brosman was the second Democrat nominated by Truman. Prior to World War II, he had been Dean of the Law School at Tulane. During the war, he had served as Chief of Military Justice for the Army Air Force. Although he was serving on active duty during the Korean War at the time of his selection, he obtained relief from active duty prior to formal nomination in order to meet the statutory requirement

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116/ The original enactment of the UCMJ provided for the Articles of the Code to become effective on May 31, 1951, but permitted members of the court to begin service any time after February 28, 1951. Act of May 5, 1950, ch. 159, § 5, 64 Stat. 107. The following account of the selection process is drawn from Generous, supra note 49, at 58-63; Willis I, supra note 48, at 70-71; Hanlon, Ten Year Chronology of the United States Court of Military Appeals, reprinted in the Annual Report of the United States Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury pursuant to the Uniform Code of Military Justice for the period January 1, 1961 to December 31, 1961, at 47-61 [hereinafter cited to the year of the report, e.g., 1961 Annual Report].

for appointment from civil life.[117/] For the third seat, Truman nominated George W. Latimer of Utah. Latimer, a Republican,[118/] had been involved in National Guard affairs prior to the war and had served during the war in a nonlegal position as Chief of Staff of the Fortieth Infantry Division in the Pacific campaign. He was elected to the Utah Supreme Court after the war, but interrupted that service several times in 1948 and 1949 to serve short tours of duty with the Army.

In order to avoid a situation in which all seats would become vacant at the same time, the Code provided that each of the three seats on the court would carry a different initial term.[119/] Quinn was nominated for the seat carrying the fifteen year term, while Brosman and Latimer were nominated for five and ten year terms respectively. There was little controversy over the proposed members of the

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117/ 10 U.S.C. § 867(a)(1976)(Art. 67(a)).

118/ The Uniform Code of Military Justice precludes appointment to the court of more than two members "from the same political party." 10 U.S.C. § 867(a)(1976)(Art. 67(a)).

119/ Act of May 5, 1950, ch. 169, § 1, art. 67(a)(2), 64 Stat. 107. Article 67(a), 10 U.S.C. § 867(a) (1976), provides that if there is a vacancy on the court during an unexpired term, the appointee serves only for the balance of the term rather than for a new fifteen year term.

court, and the nominees were confirmed by the Senate on June 19, 1951.[120/]

The court held its initial meeting in the Pentagon, and then moved to temporary quarters in the Internal Revenue building, sharing facilities with the United States Court of Customs and Patent Appeals. In 1952, when the United States Court of Appeals for the District of Columbia vacated its facility at 5th and E Streets (N.W.), the Court of Military Appeals accquired the building, which it now occupies as its permanent quarters.[121/]

Several weeks after the members were appointed, the Court published its first rules of procedure governing

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120/ 96 Cong. Rec. 6746-47 (1951). One commentator has described the legal qualifications of the original appointees as "excellent." Willis I, supra note 65, at 71. Another student of the period, however, notes that the more reform minded proponents of the Uniform Code of Military Justice were disappointed in the first appointees: "In Quinn, they saw a former governor who, in an intraparty war over a race track, had once taken upon himself nearly dictatorial powers in suppressing the process of law. In Latimer, they saw an old crony of President Truman's military fix-it man [Harry Vaughan]. And in Brosman, a man with otherwise excellent qualifications, they saw the practically illegal appointment of an active duty Air Force Officer." Generous, supra note 49, at 63.

121/ See Willis I, supra, note 48, at 72; Generous, supra note 48, at 74. In 1951, the Secretary of Defense requested the Director of the General Services Administration to find permanent space for the court because it was "contrary to the wishes of Congress and the judicial character of the Court" for it to be located in the Pentagon. Letter from Robert A. Lovett to Jess Larson, June 15, 1951, quoted in Generous, supra at 214 n.3.

matters such as filing requirements and oral argument.[122/] An internal structure was developed, including Commissioners to assist in reviewing cases and a Clerk to handle administrative matters. Arrangements were made with the Lawyers Cooperative Publishing Company for publication of the Court's decisions.[123/] The first case was docketed on

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122/ See Generous, supra note 49, at 76. The current rules of practice and procedure before the court appear in 4 M.J. at XCV (1977). A brief history and annotated version of the rules appears in E. Fidell, Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals (1978).

123/ Generous states that the West Publishing Company proposed to print selected from the Court of Military Appeals decisions in The Federal Reporter, which prints decisions of the federal Courts of Appeals, but the Court rejected this approach as inadequate in light of the desire to establish a complete body of case law through a single reporter. Separate arrangements were made with Lawyers Cooperative Publishing Company for a reporter covering of all decisions of the Court of Military Appeals (cited as C.M.A.). A separate reporter, Court-Martial Reports, (cited as C.M.R.), also published by Lawyers Cooperative Publishing Company, covered the decisions of the Court of Military Appeals, plus selected decisions of the Boards of Review. See Generous, supra note 49, at 75. The arrangement, which continued through the mid-seventies, produced 23 bound volumes of C.M.A. and 50 bound volumes of C.M.R., plus an additional unbound volume. After this arrangement was terminated, the West Publishing Company initiated publication of all decisions by the Court of Military Appeals and selected decisions by the Courts of Military Review in the Military Justice Reporter (cited as M.J.). To date, there are four bound volumes of M.J. and the advance sheets to volume 6 are being distributed. The decisions are indexed in the West Key Number System under the topic heading "Military Justice." The advance sheets contain a complete outline of the key number system for military justice plus a table of parallel references to similar topics under other headings in the West System. E.g., 5 M.J. Adv. Sh. No. 13 at LVI to LXXVII (1978).

July 8, 1951 and the first oral arguments were heard on September 7, 1951.[124/] The first decision was handed down on November 8, 1951.[125/]

2) Examination of the power of the court to interpret the Uniform Code of Military Justice and the Manual for Courts-Martial

The President's rulemaking power is set forth, in part, in Article 36 of the Uniform Code of Military Justice which provides:[126/]

> (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
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> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

This provision was drawn from earlier Articles of War, which had authorized the President to promulgate rules of procedure

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124/ Willis I, *supra* note 48, at 72.

125/ United States v. McCrary, 1 C.M.A. 1, 1 C.M.R. 1 (1951).

126/ 10 U.S.C. § 836 (1976) (Art. 36). Articles 18-20 and 56 authorize the President to establish maximum punishments for offenses. 10 U.S.C. §§ 818-820, 856 (1976). The President's rules on punishments are set forth in 1969 *Manual*, *supra* note 25, ch. 25.

for courts-martial.[127/] Prior to enactment of the Uniform Code of Military Justice, the provisions of the Manual were virtually immune from civilian judicial review.[128/] Although the Court of Military Appeals was established as an element of the executive rather than judicial branch of government, the Court quickly asserted the judicial power to interpret the Code and to invalidate rules that the President promulgated thereunder.

In 1951, the President promulgated a new edition of the Manual for Courts-Martial which contained rules of procedure and other administrative details concerning the military justice system.[129/] Within a year, the Court of Military Appeals was faced with an apparent conflict between the Manual and the Code which led the court to interpret a permissive feature of the Manual in a mandatory fashion in

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127/ The first official Manual for Courts-Martial was published in 1898. See Moyer, supra note 49, at 469. Article 38 of the 1916 Articles of War, which is quite similar to Article 36 of the Uniform Code of Military Justice, contained the first statutory provision governing the Manual. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650.

128/ Development of civilian judicial review of military cases is described in Appendix C infra.

129/ Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951) [hereinafter cited as 1951 Manual].

order to avoid a direct confrontation.[130/] A year later, the court was faced with a clear conflict between the Manual and the Code and responded by invalidating the Manual provision.[131/] During the remainder of the decade, the Court invalidated other provisions of the Manual,[132/] bringing an

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130/ United States v. Clark, 1 C.M.A. 201, 2 C.M.R. 107 (1952), noted in Willis I, supra note 48, at 84 n.249. In view of the mandatory requirement for instructions on "a lower degree of guilt" contained in Article 51(c), 10 U.S.C. § 851(c)(1976), the court construed paragraph 73(c) of the 1951 Manual as requiring instructions on lesser included offenses despite use of the word "may" in the Manual.

131/ United States v. Wappler, 2 C.M.A. 393, 9 C.M.R. 23 (1953) the court found that the legislative history of the Code demonstrated congressional disapproval of confinement on bread and water, limiting that penalty to nonjudicial punishment under Article 15 for persons attached to or embarked on vessels, and and limiting the duration for a period of no more than 3 days. The court then found that to the extent that paragraphs 125 and 127c of the Manual purported to grant authority to a court-martial to adjudge confinement on bread and water to persons not attached to or embarked on vessels or for periods longer than three days, these provisions were in conflict with the Code.)

132/ See Willis I, supra, note 48, at 85 (citing cases decided in the 1950's overrulling provisions of the Manual, including United States v. Rosato, 3 C.M.A. 143, 11 C.M.R. 143 (1953)(self-incrimination provision in Article 31 of the Uniform Code of Military Justice precludes compelling an accused to produce a handwriting sample); United States v. Green, 3 C.M.A. 576, 11 C.M.R. 132 (1953)(Article 31 precludes compelling an accused to speak for voice identification); United States v. Drain, 4 C.M.A. 646, 16 C.M.R. 220 (1954)(deposition used in general court-martial must be taken by qualified counsel); United States v. Cothern, 8 C.M.A. 158, 23 C.M.R. 382 (1957)(desertion, a more serious offense than absence without leave, may not be inferred merely from prolonged absence); United States v.

[Footnote continued]

end to the concept that a civilian judicial tribunal could not review the executive's interpretation of nonjurisdictional statutes governing military justice.

In addition to cases involving conflicts between the Manual and the Code, the Court was also faced with questions of law that had not been addressed expressly in the Manual. The Court looked to the practice of the federal district courts for guidance on various matters, including comment on the evidence by the law officer,[133/] waiver of certain objections and defenses,[134/] and rules governing sentencing.[135/] In addition, by reversing court-martial

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132/ [continued]

Rinehart, 8 C.M.A. 402, 24 C.M.R. 212 (1957)(use of the Manual for Courts-Martial by court members during the trial prohibited as contrary to the intent of the UCMJ in requiring rulings of law and instructions to be in the sole province of the law officer of a general court-martial)).

133/ Willis I, supra note 65, at 48 (noting United States v. Andis, 2 C.M.A. 364, 8 C.M.R. 164 (1953)).

134/ Id. (noting United States v. Dupree, 1 C.M.A. 665, 5 C.M.R. 93 (1952); United States v. Bodenheimer, 2 C.M.A. 130, 7 C.M.R. 6 (1953); United States v. Kreitzer, 2 C.M.A. 284, 8 C.M.R. 84 (1953)).

135/ Id. (noting United States v. McVey, 4 C.M.A. 167, 15 C.M.R. 167 (1954)).

decisions based on inadequate instructions to the members of the court-martial on legal issues, the court frequently supplemented the Manual's guidance on the elements of offenses.[136/] The approach taken in these early cases established the principle of looking to the law of the federal courts to supply rules of decision except in matters where civilian law offered no analogous practice.

3) Application of civilian constitutional guarantees

Another early issue facing the court was the degree to which civilian concepts of constitutional due process would be used as the basis of the court's legal review of courts-martial. In one of the court's first cases, United States v. Clay,[137/] Judge Latimer's opinion for the court sought to sidestep the issue by stating that the constitutional rights of service-members were those right granted by Congress. He added,

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136/ Id. (noting United States v. Jones, 1 C.M.A. 276, 3 C.M.R. 10 (1952); United States v. Lookinghouse, 1 C.M.A. 660, 5 C.M.R. 68 (1952), United States v. Grossman, 2 C.M.A. 406, 9 C.M.R. 36 (1953)).

137/ 1 C.M.A. 74, 1 C.M.R. 74 (1951), discussed in Willis, The Constitution, the United States Court of Military Appeals and the Future, 57 Mil. L. Rev. 27, 28-32 (1972) [hereinafter cited as Willis II].

however, that in giving effect to those rights, the Court would look to civilian practices:[138/]

> Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we cannot give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.
>
> As we have stated in previous opinions, we believe Congress intended, insofar as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system.

Relying upon this dicta, the Navy Board of Review subsequently overturned a conviction on the basis that the court-martial had violated the accused's constitutional right of confrontation when it had received into evidence a deposition taken without the presence of the accused and counsel.[139/] This decision overturned a practice authorized

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138/ Id.

139/ United States v. Sutton, No. B-52-6-441 (N.B.R. 1953), discussed in Willis II, supra note 137, at 31.

by the Manual[140/] and not expressly in conflict with the Code. The case was certified by the Judge Advocate General of the Navy to the Court of Military Appeals, where the Board of Review was reversed.[141/] For the court, Judge Latimer drew a sharp distinction between rights guaranteed by Congress and those found only in civilian constitutional law. He distinguished his opinion in Clay by noting:[142/]

> In that case we specifically stated we were building "military due process" on the laws enacted by Congress and not on the guarantees found in the Constitution. Particularly were we speaking of the [Uniform Code of Military Justice] as the source and strength of military due process. Therefore, when we enumerated confrontation of witnesses as one of the privileges accorded an accused by Congress, we had to be considering it in the light of any limitations set out in the Code. Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level.

140/ 1951 Manual, supra note 129, para. 117.

141/ United States v. Sutton, 3 C.M.A. 220, 11 C.M.A. 220 (1953), discussed in Willis II, supra note 137, at 31-32.

142/ Id. at 222-23, 11 C.M.R. at 222-23, quoted in Willis II, supra note 137, at 31.

Judge Latimer's position provoked a sharp dissent from Chief Judge Quinn:[143/]

> I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself. . . With only a single express exception, there is no withholding of the protection of these rights and privileges from an accused because he is, at the time, serving with the armed forces of his country . . . To this express exception may be added the implied limitation of the right of trial by jury . . .No other recognized exceptions have been cited and I know of none.

The position of the Court on the application of the civilian constitutional guarantees in courts-martial shifted after Judge Brosman's death in 1955. The new appointee, Homer Ferguson, initially concurred without comment in the Sutton approach,[144/] but subsequently indicated he would take a different approach to constitutional issues:[145/]

> [I]t . . . cannot be contended that a man who joins our armed forces and offers his person to fight for the Constitution and the institutions predicated thereon forfeits the fundamental guarantees granted to citizens generally, except those excluded by the Constitution expressly or by necessary implication . . .

143/ Id. at 227-28, 11 C.M.R. at 277-28, quoted in Willis II, supra note 137, at 31-32.

144/ United States v. Parrish, 7 C.M.A. 337, 22 C.M.R. 127 (1956).

145/ United States v. Ivory, 9 C.M.A. 516, 523, 29 C.M.R. 296, 303 (1953).

In the 1960 case of United States v. Jacoby,[146] Judge Ferguson, with Chief Judge Quinn concurring, overruled Sutton and established a new standard of constitutional review:[147]

> [T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.

In subsequent decisions, the court has strengthened the doctrine enunciated in Jacoby and focused its inquiry on the application of specific constitutional guarantees to the military setting.[148]

4) Consideration of the standard of review.

Since 1916, Congress has prescribed a harmless error rule to be used by reviewing authorities as the standard for

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146/ 11 C.M.A. 428, 29 C.M.R. 244 (1960).

147/ Id. at 430-31, 29 C.M.R. at 246-47. Judge Latimer, dissenting, stated that in effectively invalidating a portion of Article 49, the majority had divested "the Supreme Court of the United States of jurisdiction to be the final arbiter of the constitutionality of a Federal statute." Id. at 434, 29 C.M.R. at 250. Reiterating the position he enunciated in Sutton, Latimer criticized the majority for ignoring that "the Constitution entrusted to Congress the task of striking a precise balance between the rights of men in the service and the overriding demands and discipline and duty . . . ." Id. at 441, 29 C.M.R. at 257.

148/ E.g., United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967). For a summary of cases from the past decade involving constitutional issues, see text accompanying notes 200-23 infra.

reversal.[149] Article 59(a) of the Uniform Code of Military Justice continued this practice in the form of a prejudicial error standard:[150]

> A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

In its implementation of this provision, the 1951 Manual drew upon the opinion of Justice Ruttledge in Kotteakos v. United States[151] in developing the following guidance:[152]

> An error prejudicial to the rights of the accused must be held to require the disapproval of a finding of guilty of an offense. . . unless the competent evidence of record is of such quantity and quality that a court of reasonable and conscientious men would have made the same finding had the error not been committed.

From its earliest decisions, the court began to shape a different standard. For Judge Latimer, prejudicial error

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148/ Act of Aug. 29, 1916, ch. 418, § 3, Art. 37, 39 Stat. 650.

150/ 10 U.S.C. § 859(a) (1976).

151/ 328 U.S. 750 (1946). See U.S. Dep't of the Army, Legal and Legislative Basis for the Manual for Courts-Martial, United States 124 (1951), noted in Willis I, supra note 48, at 80 n.218.

152/ 1951 Manual, supra note 129, para. 87c (emphasis added).

was limited to certain fundamental rights set forth in the Code.[153/] Judge Brosman, however, had a more expansive notion which he expressed in United States v. Berry,[154/] a case in which the president of a court-martial had usurped the judicial functions of the law officer. The concept of "general prejudice" was used by Judge Brosman to reverse the conviction in Berry because the trial[155/]

> disclosed an inherently and generally prejudicial disregard for an important segment of the procedures deemed necessary by Congress . . . . To condone the practices reflected in this record would be to invite subversion of what we cannot escape regarding as an overriding policy of vital import--a 'critical and basic norm operative in the area' of military justice.

Chief Judge Quinn concurred in the opinion. Judge Latimer concurred in the result, but asserted vigorously that there had been "specific prejudice" to the accused adding that "general prejudice" did not provide a valid basis for reversal.[156/]

153/ E.g., United States v. Clay, 1 C.M.A. 74, 77 1 C.M.R. 74 (1951) discussed at text accompanying notes 137-40 supra.

154/ 1 C.M.A. 235, 2 C.M.R. 141 (1952).

155/ Id. at 241, 2 C.M.R. at 147, quoted in Willis I, supra note 48, at 81.

156/ Id. at 242-44, 2 C.M.R. at 148-50.

The doctrine of general prejudice subsequently was used by Chief Judge Quinn in United States v. Keith[157/] to reverse a conviction where the law officer advised the court members during closed deliberations contrary to the mandate of Article 26(b) of the Code which separated the judicial role of the law officer from the fact-finding role of the members. Judge Latimer had not participated in Keith, but when the other two members of the court voted to reverse a later "jury intrusion" case based upon "general prejudice," he filed a strong dissent attacking the theory that reversal could be based on errors not amounting to specific prejudice.[158/]

As experience was gained under the Code, the doctrine of general prejudice fell into disuse,[159/] and the court developed a means of regulating the military justice system

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157/ 1 C.M.A. 493, 4 C.M.R. 85 (1952), discussed in Generous, supra note 49, at 82. For Chief Judge Quinn, the doctrine of general prejudice was not designed as a permanent standard of review: rather, as he wrote in Keith, once the dictates of the Code became "well-established in the service, it may be possible to assess the occasional lapses in terms of specific prejudice." Id. at 496, 4 C.M.R. at 88.

158/ United States v. Woods, 2 C.M.A. 203, 214-22, 8 C.M.R. 3, 14-22 (1952). Judge Latimer argued that the concept in general prejudice was not only contrary to the mandate of Article 59(a), but also was inappropriate in light of the many new features of the Uniform Code.

159/ Willis I, supra note 48, at 81; Moyer, supra note 49, at 639.

through the exercise of broad supervisory powers.[160/] During the fifties, the court exercised this power to go beyond the Code and the Manual in providing the law officer with the power to declare mistrials, challenge court members sua sponte, and grant changes of venue.[161/] These developments, as the court noted in United States v. Biesak,[162/] were "in accordance with our aim to assimilate the status of the law officer, whereever possible, to that of a civilian judge of the Federal system." In exercising supervisory power, the court took on an important attribute of the authority exercised by the federal courts.[163/]

b. Legislative Changes in 1968

In 1962 and 1966, Senator Sam J. Ervin of North Carolina, a member of both the Judiciary and Armed Services Committees, chaired extensive hearings on the

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160/ Wacker, supra note 49, at 45-51. This aspect of the court's development is discussed at text accompanying notes 180-201 infra.

161/ Id. at 48 (citing United States v. Stringer, 5 C.M.A. 122, 17 C.M.R. 122 (1954) (mistrials); United States v. Jones, 7 C.M.A. 283, 22 C.M.R. 73 (1956) (challenges); United States v. Gravitt 5 C.M.A. 249, 17 C.M.R. 249 (1954) (venue)).

162/ 3 C.M.A. 714, 14 C.M.R. 132 (1954).

163/ See Wacker, supra note 49, at 45-49.

operation of the military justice system.[164/] During both hearings, there was considerable discussion of the Court by members of Congress, lawyers, members of the armed forces, and the judges of the court. In testimony before Senator Ervin's Committee, Chief Judge Quinn recommended that the judges on the court be given life-time appointments.[165/]

A great deal of testimony focused on whether to give the Court of Military Appeals jurisdiction to review administrative issuance of less than honorable discharges.[166/] The potential for conflicting decisions on military justice between the Court and the federal civilian courts was addressed by a spokesman

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164 Hearings on the Constitutional Rights of Military Personnel Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, (1962) [hereinafter cited as 1962 Hearings]; Joint Hearings on Bills to Improve the Administration of Justice in the Armed Services, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services, 89th Cong., 2d Sess., pts. 1-3 and Addendum to pt. 3 (1966) [hereinafter cited as 1966 Hearings].

165/ 1966 Hearings, supra note 164, at 282. Senators Ervin and Thurmond noted the work of the Court with approval. Id. at 290-91.

166/ The proposal was generally favored by members of the court, see note 168 infra, but was opposed by the military departments. 1966 Hearings, supra note 164, at 71-72, 99-100, 103-04, 385 (testimony of Brig. Gen. Kenneth J. Hodson, Assistant Judge Advocate General of the Army for Military Justice); id. at 89 (testimony of Rear Adm. Wilfred A. Hearn, Judge Advocate General of the Army)).

for the American Civil Liberties Union, who suggested that[167/]

> a bill permitting the U.S. Supreme Court to review certain decisions of the Court of Military Appeals might be desirable.
>
> This is not in any way intended as a criticism of the court, but rather it is an attempt to reconcile what may be conflicting decisions coming out of the courts.

Following the 1962 hearings, Senator Ervin introduced eighteen bills proposing substantial changes in the procedures for courts-martial and administrative discharges.[168/]

167/ Id. at 347 (testimony of Edward S. Cogen).

168/ S. 2002 through S. 2019, 88th Cong. 1st Sess. (1963); S. 745 through S. 762, 89th Cong., 1st Sess. (1965), reprinted in 1966 Hearings, supra note 164, at 464-641.

Senator Ervin proposed that the summary court-martial be abolished, a law officer be provided for all special courts-martial, and that a special court-martial be prohibited from adjudging a punitive discharge unless the defendant were provided with legally qualified counsel. He also called for pretrial sessions with the law officer for purposes of hearing motions. The law officer would be redesignated as the "military judge" and the Board of Review would be renamed the "Courts of Military Review." His legislation also called for the creation of a separate Judge Advocate Generals Corps in the Navy.

With respect to administrative discharges, Senator Ervin's legislation would have given the Court of Military Appeals jurisdiction over the Discharge Review Boards, 10 U.S.C. 1553 (1976), and the Boards of Correction of Military [or Naval] Records, 10 U.S.C. 1552 (1976). The Discharge Review Boards and the Correction Boards would have been removed from the military departments and placed in the Office of the Secretary of Defense. Service members would

[Footnote continued]

None of these bills were enacted. Senator Ervin submitted revised proposals in subsequent sessions of Congress, but was unable to generate support for an omnibus reform bill.[169/] A more modest series of reforms were

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168/ [Continued]

have been given the right to request court-martial proceedings in lieu of administrative discharge boards, and would have been protected against double jeopardy in discharge proceedings. The proceedings of discharge boards would have been revised to provide for a law officer and the right to confrontation. Generous, supra note 49, at 189-90. Chief Judge Quinn expressed strong support for most of the Ervin proposals. With respect to jurisdiction over administrative decisions, he objected to limiting the Court's review to issues certified by the service secretaries and recommended that review be based on petitions from former service members demonstrating good cause. 1966 Hearings, supra note 164, at 279-81, 283-88. Judge Kilday generally concurred in the views of Chief Judge Quinn. Id. at 294. Judge Ferguson requested express authority for the issuance of extraordinary writs. Id. at 303. With respect to administrative discharges, Judge Ferguson recommended that review by the Court be limited to due process issues. Id. at 304. The Chief Judge of the Court of Claims opposed such legislation to the extent it purported to oust the Court of Claims from its jurisdiction to hear administrative discharge cases. Id. at 448-49 (testimony of Chief Judge Wilson Cowen).

The issue was discussed subsequently in the 1969 Annual Report, supra note 116, at 2: "A majority of the court and the other members of the Code Committee oppose the review by the Court of Military Appeals of administrative discharges under other than honorable conditions. Such a review could hardly be accomplished by the court without enlarging its size and staff and interfering with its efficient administration of military justice."

169/ See Generous, supra note 49, at 195-96.

proposed in 1968.170/ The revised proposals easily won congressional approval, and on October 24, 1968, President Johnson signed the Military Justice Act of 1968 into law.171/

The legislation was designed to make practice and procedure in courts-martial more compatible with criminal trials in federal district courts. As the Senate Armed Services Committee's Report stated:172/

> [T]he bill...amends the Uniform Code of Military Justice to streamline court-martial procedures in line with procedures in U.S. district courts, to redesignate the law officer of a court-martial as a "military judge" and powers more closely allied to those of Federal district judges, to increase the availability of legally qualified counsel to represent the accused in courts-martial, to redesignate appellate boards of review as "courts of military review" and change somewhat their structure, to increase the independence of military judges and members and other officials

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170/ Ervin, The Military Justice Act of 1968, 45 Mil. L. Rev. 77, 80 (1969) (reprinted from 5 Wake Forest Intra. L. Rev. 223 (1969)).

171/ Pub. L. No. 90-632, 82 Stat. 1335.

172/ S. Rep. No. 1601, 90th Cong., 2d Sess. 3 (1968) (emphasis added). Reflecting on legislative and judicial developments in military practice, Chief Judge Quinn wrote in 1968: "Currently, courts-martial procedures and the federal criminal procedures are sufficiently similar to make a civilian practitioner feel comfortable and knowledgeable in a court-martial case." Quinn, Some Comparisons Between Courts-Martials and Civilian Practice, 46 Mil. L. Rev. 77, 80 (1969) (reprinted from 15 U.C.L.A. L. Rev. 1240 (1968)).

> of courts-martial from unlawful influence by convening authorities and other commanding officers, and to increase the postconviction safeguards and remedies available to the accused.

In a separate enactment in 1968, Congress amended Article 67(a)(1) to rename the court and clarify its status as follows:173/

> 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.

By the addition of the designation "United States," Congress sought to resolve finally the earlier challenges to the court's judicial authority. As noted in the report of the House Armed Service Committee:174/

> One of the purposes of this bill is to make it abundantly clear in the law that the Court of Military Appeals is a court, although it is a court under article I of the Constitution.

173/ Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178. The legislation also authorized retired judges of the court to sit by designation of the Chief Judge and provided limited authority for temporary appointments from Court of Appeals for the District of Columbia.

174/ H.R. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968). In discussing the provision for a retired judge of the court to sit by designation, the Report noted: "While the House, upon the request of the Armed Services Committee has on three separate occasions, voted to have the judges of the Court of Military Appeals have life tenure, as do judges of regular courts of appeals, the Senate has so far refused to agree." Id.

> There has been some claim that the court, having been put under the Department of Defense for administrative purposes, is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Courts-Martial since the manual had been promulgated by Presidential order. The bill makes it clear that the Court of Military Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under article III of the Constitution.

With these two pieces of legislation, the court approached the end of its second decade in a much different posture than when it was established. There had been relatively little change in personnel over this period.[175/] This stability in personnel may have contributed substantially to the steady progress over this period. In 1951, civilian review of courts-martial was virtually nonexistent and regulations governing trial procedure were practically immune from challenge. The status of a law officer in a general court-martial was uncertain and there was no provision for a law

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175/ Judge Brosman died in office in 1955 near the end of his term. In 1956 President Eisenhower appointed Homer Ferguson to serve on the court for the term expiring in 1971. Judge Ferguson previously had served as a Circuit Judge in Wayne County, Michigan, United States Senator from Michigan, and was serving as United States Ambassador to the Phillipines at the time of his appointment. The term of Judge Latimer, who had dissented frequently from the court's activist role in the 1950's, expired in 1961. President Kennedy nominated Paul J. Kilday, who had been a member of the House Armed Services Committee, as his replacement. In 1966, Judge Quinn was reappointed to a second fifteen year term by President Johnson.

officer or legally qualified counsel in special courts-martial. The dominant role in the court-martial process was played by the commander. By the end of 1968, the Court of Military Appeals had established as routine the exercise of civilian appellate powers over courts-martial and regulations governing military justice. The law officer had been redesignated as a judge and had acquired many of the powers exercised by a federal judge in a criminal trial. Legally qualified counsel represented the parties in virtually all proceedings. The commander retained important powers, but the conduct of the trial in court--and the legal power to review the actions of the commander--was placed in the hands of lawyers.

c. Appellate Review During the Period 1968-1978

One of the most noticeable features of the history of the court during the period 1968-1978 was the frequent changes in membership. During the past ten years eight different judges have held the court's three seats.176/ Within a four-year period, there were seven judges who

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176/ Judge Kilday had been appointed in 1961 for the term expiring in 1976. He died in office in 1968. President Johnson appointed William H. Darden, a member of the staff of the Senate Armed Services Committee, to serve the unexpired balance of his term. Judge Darden was named Chief Judge by President Nixon in 1971. He resigned in 1973, three years short of completing the balance of his term. He was replaced in 1974 by William H. Cook, a member of the staff of the House Armed Services Committee. Judge Cook served the remainder of the term and in 1976 received an appointment for a full 15 year appointment.

[Footnote Continued]

sat at various times in nine different combinations.[177/] Such personnel turbulence may well have contributed to what some commentators perceived as a lack of clarity in the court's doctrine,[178/] and what others saw as uncertainty in decisionmaking characteristic of a three judge court.[179/]

176/ [continued]

Chief Judge Quinn was reappointed in 1966 for a term to expire in 1981. He resigned from the court in 1975 due to ill health and died shortly thereafter. Matthew J. Perry, who had been an attorney in private practice, was appointed by President Ford and took office in 1976 for the unexpired portion of Judge Quinn's term.

Judge Ferguson was appointed in 1956 and served his complete term. In 1971, he became a senior judge on the court. His successor was Robert M. Duncan, a judge on the Supreme Court of Ohio, who was appointed for the term expiring in 1986. He was designated by President Ford to be Chief Judge in 1974. During the same year, he resigned to accept a federal district court judgeship in Ohio. In 1975 President Ford appointed Albert J. Fletcher, a judge from the Eighth Judicial District of the State of Kansas, to fill the unexpired term of Chief Judge Duncan in 1975. President Ford designated Judge Fletcher to be Chief Judge.

Because of the numerous vacancies from 1974-76, Senior Judge Ferguson sat as an active member of the Court during that period. He retired from active service on May 21, 1976. Information on appointment and service of members of the court may be found in the Annual Reports, *supra* note 116, *passim*.

177/ Willis, *The United States Court of Military Appeals -"Born Again,"* 52 Ind. L.J. 151, 155 (1976).

178/ *E.g.*, *id.* at 152.

179/ Miller, *Three is Not Enough*, The Army Lawyer, Sept. 1976, at 13-14.

This period has produced some substantial changes in doctrine in the key areas of supervisory powers and constitutional rights of service members. The developments in these areas are summarized below.

1) General exercise of supervisory power

The exercise of the Court's supervisory authority over the military justice system increased dramatically in the late sixties.[180/] In United States v. Dubay,[181/] the court developed an innovative procedure for taking evidence when the issue of command influence was raised for the first time on appellate review.[182/] Two years later, stringent requirements for the conduct of inquiries by the military judge into the providency of a guilty plea were established

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180/ See Wacker, supra note 49, at 48-50; Moyer, supra note 49, at 640-41.

181/ 17 C.M.A. 14, 37 C.M.R. 411 (1967), enforced United States v. Board of Review Nos. 2, 1, 4, 17 C.M.A. 150, 37 C.M.R. 414 (1967).

182/ "Under this procedure a case involving a post-trial allegation of improper command influence is referred by the Court of Military Review to another convening authority who 'convenes a general court-martial' before a judge without court members solely for the purpose of taking evidence or the question of command influence. With the benefit of the judge's findings on this issue, the second convening authority then performs another review of the original trial." Wacker, supra note 49, at 49 n.83.

in United States v. Care.[183/] During the same year the Court issued a similar ruling requiring the judge to make a detailed explanation to the accused of the rights to counsel provided by the Uniform Code of Military Justice.[184/] In 1973, the court exercised its supervisory power to preclude a convening authority from withdrawing a case from a court-martial deemed to be too lenient.[185/]

Reflecting concern about undue delays in the military justice system, the Court of Military Appeals not only established a requirement that an accused in confinement be brought to trial within ninety days,[186/] but also required the convening authority to complete the post-trial review within ninety days when the accused was confined.[187/] Both the speedy trial and speedy disposition

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183/ 18 C.M.A. 535, 40 C.M.R. 247 (1969). Recent cases are discussed in Cooke, the United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System, 76 Mil. L. Rev. 43, 61-65 (1976).

184/ United States v. Donohew, 18 C.M.A. 149, 39 C.M.R. 149 (1969). Recent cases are discussed in Cooke, supra note 183, at 65-66.

185/ United States v. Walsh, 22 C.M.A. 509, 47 C.M.R. 926 (1973).

186/ United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

187/ Dunlap v. Convening Authority, 23 C.M.A. 135, 48 C.M.R. 751 (1974).

rules were enforced against the government by the harsh remedy of dismissal.[188/] The court provided guidance on the standards for pretrial release and authorized the military judge to rule on the legality of confinement after the case had been referred to trial.[189/] In a major decision strengthening the role of the judiciary, the court invalidated portion of the Manual that had permitted the convening authority to reverse the trial judge on matters of law.[190/] A key feature throughout this process was the court's frequent reference to standards applied in civilian

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188/ See Cooke, supra note 183, at 133.

189/ See id. at 86-88 (discussing Courtney v. Williams, 1 M.J. 267, 24 C.M.A. 87, 51 C.M.R. 760 (C.M.A. 1976); United States v. Heard, 3 M.J. 14 (C.M.A. 1977)).

190/ United States v. Ware, 24 C.M.A. 102, 51 C.M.R. 275, 1 M.J. 282 (C.M.A. 1976). Article 62(a), 10 U.S.C. § 862 (a) (1976) permits the convening authority to return the record of trial to the court-martial for "reconsideration" of certain rulings not amounting to a finding of not guilty. Paragraph 67f of the Manual implemented this provision in a manner that had the effect of permitting the convening authority to reverse the military judge on certain rulings of law. See Cooke, supra note 183, at 88-89. Under the holding in Ware, the convening authority can return a matter to the military judge "for another look; he cannot reverse him." Cooke, supra, at 90. While the decision clearly enhances the status of the trial judge, the decision "leaves the government without redress against an erroneous ruling by the military judge." Cooke, supra at 90n. 174 (citing United States v. Rowel, 24 C.M.A., 137, 138, 51 C.M.R. 327, 328, 1 M.J. 289 (1976) (Fletcher, C.J., concurring)).

courts, particularly those promulgated by the American Bar Association.[191/]

2) Relief under the All Writs Act

The most striking development in the exercise of supervisory power has involved the grant of extraordinary relief under the All Writs Act.[192/] The Court first asserted its power to grant such relief in United States v. Frischholz.[193/] Using standards developed by the federal courts for application of the All Writs Act, the Court issued writs in a substantial number of cases in the

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191/ "[R]eliance on the trial judge is conjunctive with the court's persistent citation to the American Bar Association Standards, Code of Professional Responsibility and Canons of Judicial Ethics. The court has proposed adopting the Standards and Code in its own rules and has referred to them at virtually every opportunity in cases involving the conduct of trial counsel. . . , the performance of defense counsel, the responsibilities of the trial judge and even the role of intermediate appellate courts." Willis III, supra note 177, at 163 (citations omitted).

192/ 28 U.S.C. § 1651(a) (1970) A detailed discussion of the issuance of such writs in the federal courts and by COMA is set forth in Wacker, supra note 49, passim. For more recent cases, see Cooke, supra note 183, at 11-16; Brown, Building a System of Military Justice Through the All Writs Act, 52 Ind. L.J. 189 (1976).

193/ 16 C.M.A. 150, 36 C.M.R. 306 (1966) (writ of error coram nobis issued to conduct further review of a case previously considered by the Court six years earlier).

late sixties and early seventies "in aid of jurisdiction."[194/] When first confronted with a petition for an extraordinary writ to review special court-martial not within its statutory appellate jurisdiction, the Court held that issuance of the writ was not within its power.[195/] This position was reversed in the 1976 case of United States v. McPhail,[196/] which involved a special court-martial not within the court's statutory appellate jurisdiction. The court held that extraordinary relief could be granted to review denial of relief under Article 69[197/] by the Judge Advocates General if such denial were contrary to a rule of decision issued by the court. For a unanimous court, Judge Cook emphasized the central position of the Court in the military justice system:[198/]

194/ See Moyer, supra note 49, at 642-60.

195/ United States v. Snyder, 18 C.M.A. 480, 40 C.M.R. 192 (1969).

196/ 24 C.M.A. 304, 52 C.M.R. 15,1 M.J. 457 (C.M.A. 1976).

197/ 10 U.S.C. § 869 (1976) (Review by the Judge Advocate General on his own motion or petition in cases not otherwise reviewed by a Court of Military Review).

198/ 24 C.M.A. at 309-10, 52 C.M.R. at 20, 1 M.J. at 462-63 (C.M.A. 1976). The extent to which the Court will go beyond its statutory jurisdiction to exercise supervisory powers is unclear at this time. In Harms v. United States Military Academy, Misc. Docket No.76-58 (C.M.A., Sept. 10, 1976), the court gave serious consideration to a petition for

[Footnote Continued]

> [T]his court is the supreme court of the military judicial system. To deny that it has authority to relieve a person subject to the Uniform Code of the burdens of a judgment by an inferior court that has acted contrary to constitutional command and decisions of this Court is to destroy the "integrated" nature of the military court system and to defeat the high purpose Congress intended this Court to serve. Reexamining the history and judicial applications of the All Writs Act, we are convinced that our authority to issue an appropriate writ in "aid" of our jurisdiction is not limited to the appellate jurisdiction defined in Article 67.
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> . . . .

198/ [continued]

extraordinary relief regarding administrative matters growing out of alleged honor code violations, but denied the petitions. See Cooke, supra note 183, at 115. In 1978, the court was presented with petitions for extraordinary relief growing out of allegations that nonjudicial punishment, 10 U.S.C. § 815 (Art. 15), had been administered to a sailor for an offense not subject to the Codes. The petition was denied. Stewart v. Stevens, petition for extraordinary relief dismissed, 5 M.J. 220 (C.M.A. 1978). Judge Cook stated "I was wrong in McPhail as to the scope of this Court's extraordinary relief jurisdiction." Id. at 221. He based this view on the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1355, in which Congress granted the Judge Advocates General of the military departments authority under Article 69, 10 U.S.C. § 869 (1976), to grant appellate relief in cases not reviewed by the Courts of Military Review. After noting to the power of the Judge Advocate General to grant "other relief" in S. Rep. No. 1601, 90th Cong., 2d Sess. 15 (1968), he concluded:

> In the context of the Senate Report, the power of the Judge Advocate General to grant relief under Article 69 impresses me as so broad as to encompass extraordinary relief of the kind that might otherwise be within the cognizance of this Court. It seems to me that, at least as to court-martial cases established as not being within the actual or potential authority of this Court, Congress intended this new authority to be exclusive [and] effectively withdrew such authority from this Court.

> [A]s to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, [the Court of Military Appeals has] jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.

As a general matter, the Court's exercise of jurisdiction to grant relief under the All Writs Act has followed closely federal court practice.[199/]

3) Fourth, Fifth, and Sixth Amendment Rights

The fourth amendment protection against unreasonable searches and seizures has been the subject of frequent litigation in the court. Although the Uniform Code of Military Justice contains no provision with respect to illegally seized evidence, paragraph 152 of the Manual provides an exclusionary rule substantially incorporating basic constitutional law as it existed when the latest version of the Manual was drafted in 1969. Two key

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198/ [Continued]

> . . . I think the authority of this Court, as the highest judicial authority in the military justice system, should encompass the kind of extraordinary jurisdiction posited in McPhail, but in the face of the clear purpose of Congress to have it otherwise, I am bound to accept the limitations it imposed. Accordingly, I . . . hold now that the Court has no jurisdiction to entertain a petition to inquire into the legality of Article 15 and Article 69 proceedings.

Id. at 221-22. Chief Judge Fletcher and Judge Perry voted to deny the petition but did not express an opinion on the issues raised by Judge Cook regarding McPhail.

199/ See Wacker, supra note 49, at 53.

differences between military and civilian practice were maintained by the 1969 Manual. First, the Manual authorizes a commanding officer rather than a magistrate to issue search warrants within the command. Second, the Manual provides broad authority for the commander to conduct administrative inspections without probable cause. Although the court has ruled that commanders are not per se disqualified from issuing search wrrants, the court has established broad standards for disqualifying commanders who are performing investigative or prosecutiorial functions.[200/] The scope of permissible inspections has split the court as to the types of intrusions that may be ordered without probable cause.[201/]

200/ United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

201/ In two recent cases, the court considered barracks inspections conducted after the commander, who having received information not amounting to probable cause indicating possible drug use by unidentified persons, ordered an inspection of the living areas by a marijuana detection dog. In United States v. Thomas, 1 M.J. 397 (C.M.A. 1976), the court unanimously reversed the conviction, but for separate reasons. Judge Cook voted for reversal on the narrow grounds that the officer in charge did not obtain proper authorization for the search following the inspection. Id. at 401-02. Chief Judge Fletcher declared that the inspection was permissible, but that "the fruits of all such inspections may not be used either as evidence in a criminal or quasi-criminal proceeding or as a basis for establishing probable cause under the Fourth Amendment." Id. at 405. Judge Ferguson voted for reversal on the grounds that use of the dog constituted a search rather than an inspection, thereby requiring a determination of probable cause. Id. at 405-08.

In United States v. Roberts, 2 M.J. 31 (C.M.A. 1976), Chief Judge Fletcher reiterated his position supporting both

[Footnote Continued]

Otherwise, except for situations in which the court has adopted a more expansive view of fourth amendment protections than the federal courts,[202/] "it is undisputed that the Court of Military Appeals operates under the strictures of the Fourth Amendment and Supreme Court guidelines."[203/]

201/ [Continued]

the legality of the seizure and the exclusion of the evidence. 2 M.J. at 36. Judge Perry, who replaced Judge Ferguson, provided a second vote for reversal on the grounds that a "shakedown inspection" (an inspection to ferret out fruits of criminality) required a probable cause determination. He apparently would have upheld the admissibility of evidence seized during a routine inspection of the fitness of the unit. Id. Judge Cook dissented on the grounds that the inspection was a lawful intrusion into the barracks for a legitimate military purpose, and that the subsequent search was ordered by the appropriate commander based on probable cause supplied by the dog. Id. at 36-37.

Several commentators have noted these decisions critically because of problems in their analytical approach and as examples of problems caused by personnel turnover and lack of clear doctrine in a three judge court. Cooke, supra note 183, at 156-61; Note, Searches and Seizures in the Military Justice System, 52 Ind. L.J. 223 (1976).

202/ In United States v. Jordan, 23 C.M.A. 525, 50 C.M.R. 644 (1975), the court ruled that a search conducted by foreign authorities must either meet the standards of the fourth amendment, or be conducted in accordance with the law of the host country without any instigation or participation by the United States, and that it not shock the conscience. The decision is contrary to the decisions of federal courts that have faced the issue, see Cooke, supra note 183, at 150 n.434 and cases cited therein. For a discussion of the justification for application of a military rule more protective of the accused than the civilian rule, see id.

203/ Willis II, supra note 137, at 54-55.

Fifteen years before the Supreme Court's decision in Miranda v. Arizona,[204/] Article 31 of the Code provided military personnel suspected of crimes with the right to be warned of the right to remain silent and other aspects of the privilege against self-incrimination.[205/] Article 31, however, did not require a warning of the right to consult with counsel, and the issue was brought before the court soon after the Miranda decision. In United States v. Tempia,[206/] the court held that the Supreme Court's constitutional decision was binding upon it as a subordinate federal court. Judge Ferguson declared:[207/]

> The time is long since past--as, indeed, the United States recognizes--when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights.

Judge Kilday added: [225/]

> The decision of the Supreme Court on this constitutional question is imperatively binding upon us, a subordinate Federal court, and we have

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204/ 384 U.S. 436 (1966).

205/ 10 U.S.C. § 831 (1976).

206/ 16 C.M.A. 629, 37 C.M.R. 249 (1967).

207/ Id. at 633, 37 C.M.R. at 253, quoted in Willis II, supra note 137, at 36.

208/ Id. at 643-44, 37 C.M.R. at 261, quoted in Willis II, supra note 137, at 36.

> no power to revise, amend, or void any of the holdings of Miranda, even if we entertained views to the contrary or regarded the requirements thereof as onerous to the military authorities.

In the years following Tempia, the self-incrimination privilege has continued to receive favored treatment from the court, providing the military accused with rights under Article 31 not available to the civilian accused under Miranda.[209/]

With minor exceptions, the Uniform Code of Military Justice requires the government to provide counsel for the accused in trials by courts-martial.[210/] Although there has been little recent litigation before the Court on the sixth amendment right

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209/ See generally Lederer, Rights Warnings in the Armed Services, 72 Mil. L. Rev. 1 (1976). Recent decisions follow the traditional trend of deciding self-incrimination issues on statutory rather than constitution grounds. In United States v. McOmber, 1 M.J. 380, 24 C.M.A. 207, 51 C.M.R. 452, (C.M.A. 1976) the court cited the right to counsel in Article 27, 10 U.S.C. § 827 (1976) and the self-incrimination privilege in Article 31 as the basis for the following rule: "[O]nce an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code." 24 C.M.A. at 209, 51 C.M.R. at 454, 1 M.J. at 383, quoted in Cooke, supra note 183, at 148.

210/ See note 97 supra.

to representation,[211/] there has been litigation over the last decade on the quality of representation. Convictions have been overturned based on conflicts of interest,[212/] inadequacy of representation,[213/] improper argument,[214/] and failure to provide proper advice on appellate rights.[215/]

With respect to confrontation and compulsory process, the court has built upon its constitutional holding in

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211/ Although the Court of Military Appeals held that service members were entitled to counsel before summary courts-martial, the Supreme Court later ruled that the right to counsel did not extend to summary courts. See Appendix C infra at text accompanying notes 122-29.

212/ See Willis II, supra note 154, at 48 n. 118 (citing inter alia United States v. Collier, 20 C.M.A. 261, 43 C.M.R. 101 (1971) (officer who previously advised the accused on a charge cannot act as trial counsel)).

213/ See id. n.119 (citing inter alia United States v. Colarusso, 18 C.M.A. 94, 39 C.M.R. 94 (1969) (mistake of counsel resulting in judicial admission by accused)).

214/ See id. n.120 (citing inter alia United States v. Holcomb, 20 C.M.A. 309, 43 C.M.R. 149 (1971)) (defense counsel's argument contained the remark that the accused "doesn't deserve another chance")).

215/ United States v. Palenius 2 M.J. 86 (C.M.A. 1977), discussed in Cooke, supra note 183, at 96-99 (defense counsel advised accused to waive the right to free appellate counsel on the grounds that the request for counsel would only delay the proceedings and any relief to which the accused might be entitled on appeal).

United States v. Jacoby,[216/] limiting the government's ability to use deposition evidence.[217/] In order to insure that the convening authority complies with the Manual's requirement that compulsory process be issued to obtain witnesses material and necessary to the defense,[218/] the court has ordered dismissal of charges where the convening authority has refused to comply with the military judge's order to subpoena witnesses.[219/]

The court also has developed detailed rules of decision with respect to constitutional issues involving jurisdiction over the person[220/] as well as jurisdiction over the

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216/ 11 C.M.A. 428, 29 C.M.R. 244 (1960), discussed supra at text accompanying notes 146-47.

217/ See Willis II, supra note 137, at 51-52 (citing inter alia United States v. Graines, 20 C.M.A. 557, 43 C.M.R. 269 (1972) (where departure of two witnesses from Vietnam "was effectuated by the Government and for its convenience" deposition testimony at the trial would not be permitted)).

218/ 1969 Manual, supra note 25, para. 115.

219/ See Willis II, supra note 137, at 53 (citing United States v. Sears, 20 C.M.A. 380, 43 C.M.R. 220 (1971)). For a discussion of recent cases on the right to subpoena defense witnesses, see Cooke, supra note 183, at 66-74.

220/ E.g., United States v. Catlow, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (in violation of Army regulations, a recruiter had enlisted a juvenile who had been given the alternative of "jail or the Army" by a civilian judge; the Court held that this type of defect would preclude a finding of a subsequent constructive enlistment, thereby defeating court-martial jurisdiction).

the offense,[221] particularly in the wake of the Supreme Court's ruling in 1969 that offenses must be "service-connected" in order to provide courts-martial with jurisdiction.[222]

What emerges from the cases considered by the Court of Military Appeals in these constitutional areas is not that there is an identity of constitutional guarantees in military and civilian criminal proceedings, but rather that subjects considered by the Court of Military Appeals involve the same type of constitutional issues routinely handled by the federal civilian courts. As one commentator has noted:[223]

> Under orthodox theory and practice the military establishment was essentially unfettered in the administration of its court-martial system as Congress only occasionally enacted legislation, the President generally agreed with his military advisors, and federal courts rarely interfered with military tribunals. The creation of the Court of Military Appeals partially lifted the shelter from judicial review and the very performance of that Court demonstrates that a judicial tribunal is well suited to perform the delicate balancing between individual rights and military necessity. It is probably better able to perform this function than intermittent legislative or executive rule-making. As in every area of law the three branches of government should have a role in military justice.

221/ See Cooke, supra note 183, at 126-32.

222/ O'Callahan v. Parker, 395 U.S. 258 (1969).

223/ Willis II, supra note 137, at 76.

APPENDIX C

REVIEW OF MILITARY CASES BY CIVILIAN COURTS

REVIEW OF MILITARY CASES BY CIVILIAN COURTS

Throughout the development of appellate review in the military justice system, there have been avenues for review of military cases in civilian courts. This appendix describes the development of that review process in order to put into context the proposals for reform with respect to the Court of Military Appeals that involve substituting review in civilian appellate courts for the present last resort review in the Court of Military Appeals. Section 1 of this Appendix describes review of court-martial decisions by civilian courts prior to adoption of the Uniform Code of Military Justice in 1951 and the creation of the Court of Military Appeals. Section 2 describes review of court-martial decisions by federal courts subsequent to the establishment of the Court of Military Appeals.

1. REVIEW BY CIVILIAN COURTS PRIOR TO ENACTMENT OF THE UNIFORM CODE OF MILITARY JUSTICE

This Section sets out the background of civilian review of decisions of courts-martial. Subsection (a) describes briefly the English experience. Subsection (b) assesses early collateral review in federal courts in the United States. Subsection (c) reviews developments in civilian review for procedural defects, both statutory and constitutional, from the late nineteenth century through World War II.

a. The English Experience.

Eighteenth century developments in England also provided the basis for American ideas regarding the appropriate role of civilian courts in reviewing trials by courts-martial. Although the English Articles of War date from the seventeenth century, there is little evidence of civilian review of courts-martial in that century. As early as 1738, however, one court granted damages to a civilian plaintiff who had been imprisoned after trial by court-martial even though the military court did not have personal jurisdiction over him.[1/] Although some eighteenth century commentators asserted that the common law courts could correct the errors of courts-martial in the same fashion that they corrected the rulings of other inferior courts,[2/] the courts took a narrow view of the scope of the review.[3/] In the leading case, decided in 1792, Lord Loughborough of the Court of Common Pleas held:[4/]

1/ See Strassburg, Civilian Judicial Review of Military Criminal Justice, 66 Mil. L. Rev. 1, 3-4 (1974).

2/ See id. at 7-8 (citing Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293, 320 (1957)).

3/ There appears to have been at least one case, however, in which a civilian court awarded damages after determining that a court-martial had erred on an evidentiary ruling, not a jurisdictional matter. See id. at 4 (discussing S. Adye, A TREATISE ON COURT-MARTIAL (1769)).

4/ Grant v. Gould, 2 H. Black. 69, 100-01 (1972), quoted in id. at 5.

> [C]ourts martial...are all liable to the controlling authority which the [civilian] courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given them: the general ground of prohibition being an excess of jurisdiction when they assume a power to act in matters not within their cognizance.
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> [I]t does not occur to me that there is any other [ground] that can be stated, upon which the courts of Westminster Hall can interfere in the proceedings of other courts where the matter is clearly within their jurisdiction. . . . It cannot be a foundation for a prohibition, that in the exercise of their jurisdiction the court has acted erroneously.

By the end of the eighteenth century it had become clear that there were only two modes of obtaining review of English courts-martial: (1) a petition to the King requesting that he exercise his absolute discretion to seek an opinion of his judges as to the legality of the proceedings; or (2) a petition to the common law courts for a writ of prohibition or habeas corpus, which was limited to a review of whether the court-martial had exceeded its jurisdiction.[5/]

b. Early Collateral Review of Jurisdictional Question by Federal Courts

In an early American case,[6/] a person convicted by court-martial brought an action in trespass against the official

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5/ See id. at 7-8.

6/ Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806), discussed in Strassburg, supra note 1, at 8.

empowered to collect the fine on the grounds that the court-martial lacked jurisdiction because the plaintiff was lawfully exempt from militia duty. The Supreme Court agreed that the court-martial lacked jurisdiction and held that the official who sought to enforce the decision of the court-martial would not be protected from an action for damages.[7/]

In 1827, the Supreme Court considered whether a state court could issue a judgment against an officer of the United States in an action of replevin when the officer seized property of the plaintiff in satisfaction of a fine imposed by a court-martial.[8/] The Court found that the court-martial had jurisdiction over the plaintiff and reversed a state court judgment that had protected him from paying the fine. Justice Story noted that certain issues other than jurisdiction raised by plaintiff were "properly matters of defense before the Court-Martial, and its sentence being upon a subject within its jurisdiction, is conclusive. . . ."[9/]

7/ 7 U.S. at 337.

8/ Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

9/ 25 U.S. at 38, quoted in Strassburg, supra note 1, at 8.

Strict limitations on civilian judicial review of courts-martial were established thirty years later in Dynes v. Hoover:[10/]

> Congress has the power to provide for the trial and punishment of military and naval offenses in the manner . . . practiced by civilized nations; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed . . . the two powers are entirely independent of each other.
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> When confirmed, [a court-martial sentence] . . . is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case which the court had not [sic] jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise.

In two Civil War decisions, the Supreme Court established the basic principles of review in military cases. In Ex parte Vallandingham,[11/] the Court ruled that it had no

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10/ 61 U.S. (20 How.) 65, 79, 81 (1857), (emphasis in original) discussed in Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 7-8 (1975); Strassburg, supra note 1, at 8-9. The case involved a suit for damages based upon a sentence to confinement adjudged by a court-martial.

11/ 68 U.S. (1 Wall.) 243 (1863), discussed in Strassburg, supra note 1, at 11. The case involved a civilian not connected with the armed forces who challenged his conviction by a military commission--a tribunal established to administer justice when the military exercises the judicial function of government. Although a military commission has a mission that is distinct from the function of a court-martial, the civilian courts generally have applied the same principles of review to both tribunals. See Strassburg, supra, at 9 n.44.

jurisdiction to issue a writ of certiorari to the Judge Advocate General of the Army for purposes of reviewing a sentence by a military commission. In Ex parte Milligan,[12/] however, the Court held that the exercise of jurisdiction by military tribunals was subject to collateral attack in the federal courts through the writ of habeas corpus.

In the latter half of the nineteenth century, there were a number of cases in which military prisoners sought pretrial release through writs of habeas corpus in federal courts.[13/] Although the writ was issued when the military tribunal clearly lacked jurisdiction over the prisoner,[14/] courts rejected challenges to the legality of proceedings within the jurisdiction of courts-martial.[15/] The Supreme Court emphasized that courts-martial derived their authority from congressional power under Article I of the Constitution rather than the judicial power of Article III, and that

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12/ 71 U.S. (4 Wall.) 2 (1866) discussed in Strassburg, supra note 1, at 9-10. The Court ruled in favor of Milligan, holding that military commissions did not have jurisdiction over American citizens when the civil courts were open and functioning. Id. at 121.

13/ Strassburg, supra note 1, at 12-13 and cases discussed therein.

14/ E.g., In re Baker, 23 F. 30 (C.C.D.R.I. 1885), discussed in Strassburg, supra note 1, at 13.

15/ E.g., In re Davison, 21 F. 618 (C.C.S.D.N.Y. 1884) (reversing 4 F. 507 (D.C.S.D.N.Y. 1880) in which the lower court issued a writ of habeas corpus ordering relese of a military prisoner on the grounds that his pending trial for desertion was barred by the statute of limitations).

federal court review was limited to a determination as to whether the court-martial had jurisdiction and whether it had the power to impose the sentence adjudged.[16/] The nineteenth century also saw the development of attacks on the judgments of courts-martial through suits in the Court of Claims for back pay, but the Supreme Court usually found that the courts-martial had acted within their jurisdiction, thereby precluding such collateral attack.[17/]

c. Early Review for Procedural Errors as Jurisdictional Defects

Challenges with respect to procedural defects were reviewed both for statutory and constitutional defects. During the early period of review and continuing through World War II there was little expansion of civilian review.

16/ Wales v. Whitney, 114 U.S. 564 (1885) (an order by the Secretary of the Navy that the former Surgeon General of the Navy remain within the limits of Washington, D. C., apparently pending trial by court-martial, did not restrain liberty sufficently to warrant a writ under existing habeas corpus doctrine limits on federal court review of courts-martial discussed in dicta); Smith v. Whitney, 116 U.S. 167 (1886) (writ of prohibition denied because there had been no showing that the court-martial would exeed its jurisdiction); Ex parte Reed, 100 U.S. 13 (1879) (the first major case on review of courts-martial through the writ of habeas corpus); In re Grimley, 137 U.S. 147, 150 (1890) (the leading case on the binding nature of a military enlistment; limits on federal court review of military tribunals discussed in dictum).

17/ See Strassburg, supra note 1, at 11 (discussing Swaim v. United States, 165 U.S. 553 (1897); United States v. Fletcher, 148 U.S. 84 (1893); Mullan v. United States, 140 U.S. 240 (1891); Keyes v. United States, 109 U.S. 336 (1883).

1) Statutory issues as jurisdictional errors

Near the end of the nineteenth century, William Winthrop, the leading authority of the period on military law, painted a stark picture of the limits on civilian review of courts-martial:[18/]

> [A court-martial] is not only the highest but the only court by which a case of a military offence can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offences tried by a court-martial--no more authority to entertain a rehearing of a case tried by it, or affirm or set aside its finding or sentence as such--than has a court of a foreign nation.

It soon became apparent, however, that Winthrop's argument, based on executive exercise of statutory authority, would provide a sword for attacking such courts as well as a shield from review.[19/] It was argued that because such courts derived their power solely from statutes promulgated under Article I, rather than an independent judicial power under Article III, they were powerless to act unless constituted properly in accordance with statutory authority. Although this theory potentially applied to any Article I court, it was of particular importance to the review of courts-martial. In contrast to statutes that give civilian courts a permanent existence, the statutes governing

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18/ Winthrop, Military Law and Precedents 50 (2nd ed. 1920 reprint).

19/ See generally Strassburg, supra note 1, at 15-16.

military justice traditionally have provided that a court-martial is a temporary body whose existence is limited to trial of the matter referred to it by the command. As a result, each trial potentially was subject to attack based upon failure to follow the statutory requirements for appointment of members to the court-martial and related matters.

Although the Supreme Court had suggested such a basis for attacking courts-martial as early as 1830, it was not until the 1902 case of McClaughry v. Deming[20/] that the Court granted relief from a court-martial conviction based upon defects in the composition of the court-martial. Although the Court seemed to suggest that any failure to adhere to the Articles of War would provide the basis for collateral attack in the civilian courts,[21/] subsequent cases took a much narrower view of the permissible scope of review. When challenges to court-martial convictions arose that were based on alleged violations of most of the procedural guarantees in the statutes governing military justice, the federal courts generally held that such procedural errors did not amount to jurisdictional defects.[22/]

20/ 186 U.S. 49 (1902).

21/ Id. at 69.

22/ Seven years after McClaughery v. Deming, the Court held that an alleged violation of former Article 60 (prohibiting the use of certain former testimony as evidence) did not constitute a jurisdictional error. Mullan v. United States,

[Footnote continued]

In response to criticism that such a decision rendered the statutory provision a "virtual dead letter," the Supreme Court stated:[23/]

> This contention must rest on the premise that the Army will comply with the. . .Article[s] of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article [of War]. We cannot assume that judicial coercion is essential to compel the Army to obey th[e] Article[s] of War . . . .A reasonable assumption is that the Army will require compliance. . . .

22/ [Continued]

212 U.S. 516 (1909), discussed in Strassburg, supra note 1, at 16-17.

Through the World War II era and beyond, federal courts rejected collateral attacks "where allegations have been made that the evidence did not support the conviction, that there was error in the admission of evidence, that the law officer erred in his instructions to the court, that the trial cousel made prejudicial comments, that the pleadings were defective, that the pretrial investigation was inadequately performed, that the court members of the law officer were not impartial . . . or that other non-constitutional procedural errors or irregularities . . . were present." Weckstein, Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities, 54 Mil. L. Rev. 1, 33-34 (1971) (citations omitted).

During the World War II era, the federal courts entertained numerous challenges based on alleged failures to comply with the statutory requirement for an impartial pretrial investigation. See Strassburg, supra at 17. The Supreme Court abruptly terminated this line of attack in Humphrey v. Smith, 336 U.S. 695 (1949).

23/ Humphrey v. Smith, 336 U.S 695, 700 (1949), quoted in Strassburg, supra note 1, at 17-18.

Although challenges to jurisdiction based on statutory procedural rights proved unsuccessful, the traditional jurisdiction challenges remained available. Federal court decisions during the first half of this century established four criteria for determining whether the judgment of a military tribunal was void for want of jurisdiction: (1) improper appointment or composition of the court-martial; (2) lack of jurisdiction or authority over the person of the accused; (3) lack of jurisdiction or authority over the offense charged; or (4) lack of power or authority to impose the sentence adjudged.[24/]

2) Constitutional issues as jurisdictional errors

The post-World War II era saw an attempt to expand the basis of collateral attack on courts-martial convictions on the basis that the court-martial had proceeded in an unconstitutional manner. This development followed Supreme Court decisions expanding the scope of review of state court convictions for constitutional violations by writs of habeas corpus.[25/] Although several lower federal courts reviewed the procedural aspects of court-martial in habeas corpus

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24/ Weckstein, supra note 22, at 29 and cases cited therein.

25/ Waley v. Johnston, 316 U.S. 101 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938).

proceedings for constitutional violations,[26/] this trend was rejected by the Supreme Court in 1950 in Hiatt v. Brown:[27/]

> The Court of Appeals . . . concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report . . . the adequacy of the pretrial investigation, and the competence of the law member and defense counsel. It is well settled that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial . . . .The single inquiry, the test, is jurisdiction." . . . In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.

Despite this sweeping pronouncement, however, another decision later in the same year left open the possibility of habeas corpus review of allegations that procedural due process was denied a servicemember in a court-martial. In Whelchel

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26/ See Weckstein, supra note 22, at 36 n.214.

27/ 339 U.S. 103, 110-11 (1950) (citation omitted), quoted in Weckstein, supra note 22, at 37. The Fifth Circuit had affirmed the grant of habeas corpus based on failure to comply with the statutory requirement that an "available" judge advocate be appointed as the law member, and a record "replete with highly prejudicial errors and irregularities which have manifestly operated to deprive this petitioner of due process of law." 175 F.2d 273, 277 (5th Cir. 1949). After discussing the irregularities--including erroneous interpretations and application of military law, an incompetent law member and defense counsel, and lack of a pre-trial investigation--the Court of Appeals concluded that the cumulative effect of the errors amounted to denial of a fair trial. See Weckstein, supra at 36.

v. McDonald,[28/] the Court, in dicta, suggested that if an accused were denied the opportunity to raise an insanity defense, jurisdiction of the court-martial would be defeated.

In summary, on the eve of the establishment of the Court of Military Appeals, the Supreme Court rejected the efforts of the lower courts to establish a broadly based review of allegations of statutory and constitutional errors by courts-martial. With the exception of traditional jurisdictional concerns and the possibility of due process review should there be a total denial of the opportunity to present a defense, there was no role for the civilian courts in the review of trials by courts-martial.

2. FEDERAL COURT REVIEW SUBSEQUENT TO ESTABLISHMENT OF THE COURT OF MILITARY APPEALS

After the court-martial system began to operate under the Uniform Code of Military Justice in 1951, there was a dramatic expansion of civilian review of courts-martial by the Court of Military Appeals.[29/] During the same period, the federal courts also increased the scope of review beyond the narrow jurisdictional questions considered prior to enactment of the Uniform Code of Military Justice. The major result of federal court action during the last 25

28/ 340 U.S. 122 (1950), discussed in H. Moyer, JUSTICE AND THE MILITARY 1229 (1972).

29/ See Appendix B supra at text accompanying notes 126-159.

years has been to provide the accused with a variety of avenues to challenge courts-martial convictions. This creates an anomalous situation in which the detailed civilian review provided by the Court of Military Appeals is subject to further consideration by federal district courts and the Court of Claims at the request of the accused, but judgments in the Court of Military Appeals adverse to the government are not subject to review by any federal civilian court, including the Supreme Court of the United States.

This section describes the issues raied by collateral attacks on courts-martial since enactment of the Uniform Code and establishment of the Court of Military Appeals. Subsection (a) describes the various jurisdictional bases used to obtain collateral review of trials by courts-martial. Subsection (b) considers the procedural complications imposed by the doctrines of equitable restraint and exhaustion of remedies. Subsection (c) discusses the difficulties imposed by the doctrines that limit the scope of substantive review.

a. Development of Jurisdiction in the Federal Courts to Review Cases Arising Under the Uniform Code of Military Justice

Article 76 of the Uniform Code of Military Justice appears to preclude collateral review of trials by courts-martial:[30/]

30/ 10 U.S.C. § 876 (1976). There is no express provision for direct review in Article III courts of cases decided by

[Footnote continued]

> The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

Despite the absolute language in the statute, the federal courts have found jurisdiction to review through several channels, including habeas corpus, mandamus, suits for back pay, and declaratory judgment relief.

1) Habeas Corpus

The legislative history of the Code makes it clear that Article 76 does not preclude collateral review by habeas corpus,[31/] and the federal courts have reviewed numerous

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30/ [continued]

the Court of Military Appeals or otherwise rendered final under the Code. Moyer, supra note 28, at 1182 (citing United States v. Crawford, motion for leave to file petition for writ of cert. denied, 380 U.S. 970 (1965); Shaw v. United States, 209 F. 2d 811 (D.C. Cir. 1954) (refusing an appeal from the Court of Military Appeals directly to the Court of Appeals for the District of Columbia)).

31/ S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess 35 (1949); 96 Cong. Rec. 1414 (1950) (remarks of Sen. Kefauver).

military proceedings under the jurisdiction provided by the habeas corpus statute.[32/] There is some uncertainty, however, as to the availability of habeas corpus review of a court-martial conviction when a former servicemember is not actually "in custody."[33/]

2) Mandamus.

Another form of collateral attack on the sentences of courts-martial has been through actions "in the nature of mandamus."[34/] A servicemember may request administrative action to have a court-martial sentence altered or removed from his or her military file by the Board for Correction of Military (or Naval) Records within the military departments.[35/]

32/ 28 U.S.C. § 2241 (1970). See generally Moyer, supra note 28, at 1158-60.

33/ Although habeas corpus traditionally was available only when a person was actually confined, Supreme Court decisions in the 1960's virtually eliminated the "in custody" requirement of the habeas corpus statute. Jones v. Cunningham, 371 U.S. 236 (1963) (parole status satisfies "in custody" requirement); Carafas v. La Vallee, 391 U.S. 234 (1968) (even when release is unconditional, the collateral consequences of a conviction provide a basis for habeas corpus review).

Commentators have argued that the same principles should be applied in military habeas corpus cases, e.g., Strassburg, supra note 1, at 39; Weckstein, supra note 22, at 17, but the impact of the civilian development on military cases is "uncertain." Moyer, supra note 28, at 1160.

34/ 28 U.S.C. § 1361 (1976)

35/ 10 U.S.C. § 1552 (1976).

If relief is denied, several circuits have permitted judicial review of the Correction Board's action under the jurisdiction provided for actions in the nature of mandamus.[36/] Mandamus, like the other forms of collateral attack, does not provide a basis for appellate action on behalf of the government.

3) Suits for back pay

Although review of court-martial proceedings through suits for back pay in the Court of Claims has been recognized since the 19th century,[37/] it was argued by the government in Augenblick v. United States[38/] that the language of Article 76 and establishment of the Court of Military Appeals precluded exercise of jurisdiction by the Court of Claims. The Court responded:[39/]

> The "finality" provision of the Uniform Code . . . does not make the military appellate court truly final. . . . In several habeas corpus cases the Supreme Court has considered issues which have been passed upon by the military court. . . . These cases involved court-martial

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36/ E.g., Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). Smith v. McNamara, 395 F.2d 896 (19th Cir. 1968, cert. denied sub nom. Smith v. Laird, 394 U.S. 934 (1969).

37/ See text accompanying note 17 supra. Suits against the government in the Court of Claims are authorized by 28 U.S.C. § 1491 (1970). Similar suits for amounts less than $10,000 may be brought in the district courts. 28 U.S.C. § 1346 (1970).

38/ 377 F.2d 586 (Ct. Cl. 1967), rev'd on other grounds, 393 U.S. 348 (1969).

39/ Id. at 593.

> jurisdiction" in the more traditional sense, but once it is admitted that this court (or a district court) still has power to consider that kind of "jurisdiction" -- even after the establishment of the Court of Military Appeals -- we do not see how it can be said that the civil court's power is restricted to old fashioned "jurisdiction" and cannot extend to "jurisdiction" in the more modern sense. . . . In any event, the existence of the Court of Military Appeals does not preclude consideration by this court of constitutional issues other than those calling for a reassessment of particular evidence or particular circumstances.

The Supreme Court reversed the Court of Claims, but the reversal was based on matters relating to the scope of review rather than on the jurisdiction of the court.[40/]

4) Declaratory judgment relief

The Declaratory Judgment Act[41/] has been cited by several courts as the basis for collateral attacks on court-martial convictions. The Act, however, is not a grant of jurisdiction, but only provides authority in cases otherwise within the jurisdiction of a federal court. Consequently, the power of the court to act must be based upon an independent grant of jurisdiction, such as the "federal question" statute,[42/]

40/ United States v. Augenblick, 393 U.S. 348, 351-52 (1969) discussed at text accompanying notes 105-109 infra. Collateral review by the Court of Claims was noted with approval by the Supreme Court in Schlesinger v. Councilman, 420 U.S. 738 (1975) (dicta), discussed at text accompanying notes 50-55 & 74 infra.

41/ 28 U.S.C. §§ 2201 (1970).

42/ 28 U.S.C. § 1331 (1970).

which requires that the amount in controversy be at least $10,000.[43/] At least two circuits accepted this method as a means of attacking courts-martial convictions,[44/] but two others rejected it.[45/] In Avrech v. Secretary of the Navy,[46/] the Court of Appeals for the District of Columbia issued a declaratory judgment that Article 134 of the Uniform Code was void for vagueness. The Supreme Court granted certiorari and, in addition to discussion of Article 134, the Court asked the parties to brief the issue of whether the federal courts have jurisdiction other than by

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43/ Other methods of obtaining review are discussed in Moyer, supra note 28, at 1180-81 (citing, inter alia, Owings v. Secretary of Air Force, 298 F. Supp. 849 (D.D.C. 1969), rev'd on other grounds 447, F.2d 1245 (D.C. Cir. 1971) (plaintiff's claim included damages of $50,000); United States ex rel. Schoenbrun v. Commanding Officer, 403 F.2d 371, 375 n.2 (2d Cir. 1968), cert. denied, 394 U.S. 929 (1969) (an "intimation" that relief may be sought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976)). Robson v. United States, 279 F. Supp. 631 (E.D.Pa. 1968), aff'd 404 F.2d 885 (3rd cir. 1968) (per curiam) (held that coram nobis was not an appropriate means for federal court review of court-martial convictions)). A motion to vacate the sentence of a court-martial under 28 U.S.C. § 2255 (1970) was rejected in Palomera v. Taylor, 344 F.2d 937 (10th Cir. 1965). See Moyer, supra at 1181.

44/ See Strassburg, supra note 1, at 34-35 (noting Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970); Cole v. Laird, 468 F.2d 829 (5th Cir. 1972)).

45/ See id. (noting United States v. Carney, 406 F.2d 1328 (2d Cir. 1969) (per curiam); Davies v. Clifford, 393 F.2d 496 (1st Cir. 1968)).

46/ 477 F.2d 1237 (D.C. Cir. 1973).

habeas corpus to review court-martial proceedings.[47/] In a companion case, Parker v. Levy,[48/] which originated through a habeas corpus petition, the Court ruled that Article 134 was not unconstitutional. In Avrech, the Supreme Court reversed the Court of Appeals on the basis of the substantive holding in the Levy case, without reaching the jurisdictional issues.[49/]

The effect of Article 76 was resolved authoritatively by the Supreme Court's decision in Schlesinger v. Councilman.[50/] The District Court for the Western District of Oklahoma had enjoined a pending court-martial on the grounds that the military tribunal did not have jurisdiction over an off-post drug offense under the rule of O'Callahan v. Parker.[51/] The original complaint did not allege a jurisdictional basis for the collateral attack, but it apparently was brought under the district court's general federal question jurisdiction.[52/] After the decision was affirmed by the Tenth Circuit,[53/] the

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47/ See Strassburg, supra note 1, at 32.

48/ 417 U.S. 733 (1974).

49/ Secretary of Navy v. Avrech, 418 U.S. 676 (1974).

50/ 420 U.S. 738 (1975), discussed at text accompanying notes 65-74 infra.

51/ 395 U.S. 258 (1969).

52/ 420 U.S. at 744 (citing 28 U.S.C. § 1331 (1970)).

53/ 481 F.2d 613 (10th Cir. 1973).

Supreme Court granted certiorari. The Court held that the District Court should have refrained from intervention pending resolution of the controversy by the military courts.[54/] On the question of the District Court's jurisdiction over the case, however, the Court rejected the government's argument that Article 76 precluded collateral attack by means other than habeas corpus:[55/]

> [C]ertain remedies alternative to habeas, particularly suits for backpay, historically have been available. . . . [N]othing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack.

b. Procedural Limitations

The process uncertainties of obtaining collateral review is complicated by limiting doctrines such as the requirement that military remedies be exhausted prior to seeking review in the federal courts.[56/]

1) Exhaustion of remedies.

The Supreme Court considered the exhaustion requirement in the context of the appellate structure of the Uniform

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54/ 420 U.S. at 758.

55/ Id. at 751.

56/ Gusik v. Schilder, 340 U.S. 128 (1950) (in a case arising under the Articles of War, the accused was required to petition the Judge Advocate General for a new trial under the provisions of former Article 53 prior to seeking review in the federal courts).

Code of Military Justice in the 1969 case of Noyd v. Bond.[57/] Captain Noyd had been convicted by general court-martial of willful disobedience and was sentenced to a year's confinement, total forfeitures, and dismissal. While his case was under consideration by the Air Force Board of Review, Noyd sought a writ of habeas corpus to preclude his transfer to the disciplinary barracks at Fort Leavenworth.[58/] Although the writ was issued by the District Court for the District of New Mexico, the district court was reversed by the Tenth Circuit. At the time the collateral attack reached the Supreme Court, Noyd's conviction had been affirmed by the Air Force Board of Review[59/] and the Court of Military Appeals had granted his petition for review.[60/]

In an opinion upholding the position of the Court of Appeals rejecting the writ, the Supreme Court pointed out:[61/]

> In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts.

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57/ 395 U.S. 683 (1969).

58/ Id. at 686-88.

59/ 39 C.M.R. 937 (A.F.B.R. 1968).

60/ 395 U.S. at 686.

61/ Id. at 694.

> It is for these reasons that Congress, in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces, "has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

The Court noted with approval the assertion by the Court of Military Appeals of the authority to exercise power under the All Writs Act to grant the type of relief requested by Noyd.[62/] Based upon the availability of a remedy in the Court of Military Appeals, the Court concluded:[63/]

62/ Id. at 695 (citing Levy v. Resor, 17 C.M.A. 135, 37 C.M.R. 399 (1967)).

63/ Id. at 695-96. In a subsequent case, Middendorf v. Henry, 425 U.S. 25 (1976) discussed infra at text accompanying notes 122-29, the Supreme Court noted but did not reach the exhaustion issue in the context of a case not within the appellate jurisdiction of Court of Military Appeals:

> These plaintiffs arguably failed to exhaust their administrative remedies. However, the defendants urge that exhaustion not be required here because the practice of the Judge Advocate General has been to defer consideraion of any petitions on the right-to-counsel pending the completion of litigation on this issue in the federal courts.
>
> Since the exhaustion requirement is designed to protect the military from undue interference by the federal courts, . . . the military can waive that requirement when it feels that review in the federal courts is necessary.

425 U.S. at 29 n. 6.

> Petitioner . . . has made no effort to invoke the jurisdiction of the Court of Military Appeals. Nevertheless, he would have civilian courts intervene precipitately into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad.
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> * * *
>
> If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance. Moreover, if we were to reach the merits of petitioner's claim for relief pending his military appeal, we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.

Although the exhaustion requirement is applied easily in cases such as Noyd v. Bond, where appeal is pending before the Court of Military Appeals it becomes quite complicated in other circumstances. The military justice system includes a wide range of remedies that may be subject to the exhaustion requirement.[64/] Varying interpretations

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64/ Moyer, supra note 28, at 1194-95. The remedies discussed by Moyer include automatic appellate review, id. at 1195-96 (10 U.S.C. § 866 (1976)); discretionary appellate review, id. at 1196-97 (10 U.S.C. § 867, 869 (1976); petition for new trial, id. at 1197-98 (10 U.S.C. §§ 873 (1976)); Boards for Correction of Military Records, id. at 1198-1201 (10 U.S.C. § 1552 (1976)); writ of error coram nobis by the Court of Military Appeals, id. at 1201-02 (citing, inter alia, United States v. Frischolz, 16 C.M.A.

[Footnote Continued]

of the exhaustion requirement by the federal courts further complicates the current review system.

2) Equitable restrint

In Schlesinger v. Councilman,[65/] the Supreme Court considered the problems created by the tension between the judicial nature of the military justice system and the absence of direct review in the federal courts of decisions under the Uniform Code of Military Justice. The case arose when Captain Councilman sought and received an injunction against his pending trial for an off-post drug offense.[66/] The Supreme Court ruled that the District Court should have refrained from the exercise of jurisdiction on equitable grounds.[67/] Although the Court noted that similar considerations supported the doctrine requiring exhaustion of remedies prior to review of administrative action, the Court chose to focus on the judicial rather than administrative characteristics of the

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305/ [Continued]

150, 36 C.M.R. 306 (1966)); extraordinary relief at the Court of Military Appeals, id. at 1203-04; Article 138 complaints, id. at 1204 (10 U.S.C. § 938 (1976)); application for deferment of post-trial confinement, id. at 1205-06 (10 U.S.C. § 857(d) (1976)).

65/ 420 U.S. 738 (1975).

66/ Id. at 739-42.

67/ Id. at 754-59.

court-martial system.[68/] In the opinion, the policies of federalism underlying the relationship between state and federal courts was analogized to the separate nature of military society underlying the relationship between military courts and the federal judiciary.[69/] This point was emphasized through a discussion of the judicial character of the military justice system:[70/]

> In enacting the Code, Congress attempted to balance . . . military necessities against the equally significant interest of ensuring fairness to servicemen . . . and to formulate a mechanism by which these often competing interests can be adjusted. As a result, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges "completely removed from all military influence or persuasion," who would gain over time thorough familiarity with military problems.

The Court declined to express an opinion on whether off-post drug offenses could be service-connected, but a lengthy footnote on the problem of drugs in the armed forces strongly suggested that the Court would not overturn a

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68/ Id. at 756.

69/ Id. at 754-56 (citing Younger v. Harris, 401 U.S. 1 (1971)).

70/ Id. at 757-58. Justice Brennan, in a dissenting opinion joined by Justices Marshall and Douglas, said:

> [T]he Court utterly fails to suggest any special "expertise of military courts," including the Court of Military Appeals, that even approximates the far greater expertise of civilian courts in the determination of constitutional questions of jurisdiction.

court-martial conviction based on such an offense.[71/] Although the Court intimated that pretrial intervention might be appropriate in cases challenging jurisdiction over the person, no further guidance was provided as to situations in which equitable intervention in a pending court-martial might be justified.[72/] As outlined by the Court, the purpose of equitable restraint is not to preclude federal court review of courts-martial but rather to structure the issues considered during such review:[73/]

> [I]f the offenses with which he is charged are not "service connected," the military courts will have had no power to impose any punishment whatever. But that issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society. and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. . . . More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts.

In drawing upon the doctrines developed to govern relationships between state and federal courts, the opinion provides a useful framework for structuring the inter-

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71/ Id. at 760 n.34.

72/ Id. at 758-59, 761.

73/ Id. at 760.

relationship between military courts and the federal courts in terms of pretrial proceedings. The analogy breaks down, however, with respect to post-trial review. A defendant in a state proceeding may appeal directly from the highest court of state to the Supreme Court if there is an allegation involving deprivation of constitutional right. Even the prosecution may appeal to the Supreme Court for review of an adverse ruling by the state court on a federal constitutional issue. With respect to court-martial proceedings, however, there is no means of obtaining direct review.

The opinion in Schlesinger v. Councilman underscores the uncertainty surrounding the different methods of review by emphasizing "that the grounds upon which military judgments may be impeached collaterally are not necessarily invariable. For example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief."[74/] The case may serve as a useful description of how the relationship between military and federal courts should be handled under the present statutory arrangement, but it does not address adequately the needs of either the accused or the government for a system of appellate review that is responsive to the judicial nature of the military justice system.

74/ Id. at 753.

c. Doctrines Limiting the Scope of Review

The uncertainty arising from the conflicting views of the federal courts as to the procedural requirements for obtaining review is compounded by confusion as to the appropriate scope of substantive review. This subsection describes development of the doctrine limiting consideration by the federal courts of issues "fully and fairly" considered by the courts of appeal, and sets forth those issues not subject to limitations by the doctrine of full and fair consideration.

1) Issues "fully and fairly" considered by military authorities

In 1953 the Supreme Court expanded considerably federal court review of state court actions by holding that the federal court could decide any federal constitutional issue arising out of the state proceeding regardless of whether the state had fully and fairly considered the matter.[75/] The same year, in Burns v. Wilson,[76/] the Supreme Court was presented with a habeas corpus action involving substantial constitutional issues from a court-martial tried and reviewed

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75/ Brown v. Allen, 344 U.S. 443 (1953), discussed in Moyer, supra note 28, at 1230.

76/ 346 U.S. 137 (1953), discussed in Moyer, supra note 28, at 1230; Strassburg, supra note 1, at 25-28; Peck, supra note 10, at 27-28; Weckstein, supra note 22, at 37-40.

by military authorities under the old Articles of War.[77/] The district court had dismissed the habeas corpus petition, applying the traditionally narrow jurisdictional test.[78/] The Court of Appeals interpreted the Supreme Court's previous pronouncements on military law as suggesting that "due process applies to courts-martial," although the application of constitutional guarantees was not the same in a court-martial as in a civilian trial.[79/] After a complete review of the trial record and opinions of the reviewing authorities, the Court of Appeals also denied the petition.[80/]

77/ In these applications petitioners alleged that they had been denied due process of law in the proceedings which lead to their conviction by the courts-martial. They charged that they had been subjected to illegal detention; that coerced confessions had been extorted from them; that they had been denied counsel of their choice and denied effective representation; that the military authorities on Guam had suppressed evidence favorable to them, procured perjured testimony against them and otherwise interfered with the preparation of their defenses. Finally, petitioners charged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play.

Burns v. Wilson, 346 U.S. at 138.

78/ Burns v. Lovett, 104 F. Supp. 312 (D.D.C. 1952).

79/ Burns v. Lovett, 202 F.2d 335, 341 (D.C. Cir. 1952), quoted in Weckstein, supra note 22, at 37.

80/ Id.

A divided Supreme Court affirmed the dismissal of the habeas corpus petition, but there was no agreement on the rationale. The opinion of the Court was written by Chief Justice Vinson, who was joined by Justices Reed, Clark, and Burton. His plurality opinion made four general points, summarized by Professor Weckstein:[81/]

> (1) The constitutional guarantee of due process of law protects soldiers -- as well as civilians -- from trials that dispense with rudimentary fairness. (2) Nevertheless, the law applied in habeas corpus review of state and federal convictions cannot simply be incorporated by reference into military collateral reviews. (3) The scope of inquiry in military habeas corpus is more narrow than in civil cases since the Constitution has entrusted to Congress, and not to the federal courts, the task of balancing the rights of men in the military with the overriding demands of discipline and duty. (4) Since Congress has provided elaborate safeguards and review procedures to secure the rights of servicemen and has decreed that the military determinations shall be final and binding, when denials of such rights are alleged in a habeas corpus petition, "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."

In support of the second point, the Chief Justice outlined the reforms contained in the Uniform Code of Military Justice, with specific reference to the Court of Military Appeals.[82/] Justice Minton concurred on the grounds that

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81/ Weckstein, supra note 22, at 39-40 (quoting in part 346 U.S. at 142, 144) (citations omitted).

82/ 346 U.S. at 141 & n.7.

civilian court review was limited to the traditionally narrow test of jurisdiction,[83/] while Justice Jackson concurred without an opinion.[84/] Justice Frankfurther expressed strong doubts about the proposition that review of military cases should be narrower than review of criminal cases from the state courts, and he took the position that the case should be set for reargument.[85/] Justices Black and Douglas dissented on the ground that the records of the court-martial indicated inadequate consideration in light of Supreme Court rulings on coerced confessions, and the petitioners should have been granted a judicial hearing based on the circumstances surrounding the confessions.[86/]

83/ 346 U.S. at 146-48.

84/ 346 U.S. at 146.

85/ 346 U.S. at 148-50. Dissenting from a denial of a rehearing, 346 U.S. at 844-50, Justice Frankfurter declared that Chief Justice Vinson was inaccurate as an historical matter in contending that the scope of review "has always been more narrow than in civil cases." He traced in great detail the development of habeas corpus review of both military and state court decisions, pointing out that the traditionally narrow jurisdictional test had been applied historically to both, and that there had been no special rule for the review of courts-martial. Numerous commentators have agreed with Justice Frankfurter's criticism. See Calley v. Callaway, 519 F.2d 184, 198 n.20 (5th Cir. 1975) and materials cited therein.

86/ 346 U.S. at 150-55.

2) Application of the "fully and fairly" test in the courts of appeals

Although the Chief Justice's opinion did not command a majority of the Court, it has provided the most frequently cited test for habeas corpus review of courts-martial convictions.[87/] Moyer notes, however, the test has produced[88/]

> wide spread conflicts among the federal courts. . . . Not only have circuits disagreed among themselves, but there has been considerable inconsistency within a number of circuits. Moreover, in recent years the conflicts have tended to grow rather than dissipate.

The district courts and courts of appeal have applied at least seven contradictory interpretations of the "fully and fairly" test, as illustrated by the Moyer's list describing the standards variously used in the federal courts:

> Scope of review is limited to questions of jurisdiction . . . restat[ing] the rule that exists prior to the Burns decision.89/

> Civilian courts may collaterally review a constitutional issue only if the military tribunal did not consider the issue at all.90/

87/ See Weckstein, supra note 22, at 39.

88/ Moyer, supra note 28, at 1241. A circuit-by-circuit analysis of cases decided through the early 1970's, including decisions in the Court of Claims, is provided in id. at 1244-1254. A more recent survey is set forth in the detailed consideration of the scope of review by the Fifth Circuit in Calley v. Callaway, 519 f.2d 184, 194-203 (5th Cir. 1975).

89/ Moyer, supra note 28, at 1242 (citing, inter alia, Wiliams v. Heritage, 323 F.2d 731 (5th Cir. 1963), cert. denied, 377 U.S. 945 (1964)).

90/ Id. (citing, inter alia, Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953)).

> Civilian courts should review if the military tribunals fail to consider the issue in a fair manner.91/

> Civilian courts will independently review certain types of constitutional issues [e.g.,] if a constitutional issue goes to the "fundamental fairness" of the trial.92/

> Civilian courts will independently review all constitutional issues which are pure questions of law with no factual determination involved.93/

> Civilian courts will independently review any constitutional issue.94/

> Civilian courts will collaterally review not only constitutional questions but also questions of federal statutory law.95/

The uncertain state of the law is further complicated by the tendency of some courts to pick and choose among the various interpretations of "fully and fairly" and to provide alternative grounds for their decisions.96/ Moreover, the

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91/ Id. (citing, inter alia, King v. Mosely, 430 F.2d 732 (10th Cir. 1970)).

92/ Id. (citing, inter alia, Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965)).

93/ Id. at 1243 (citing, inter alia Kennedy v. Commandant 377 F.2d 339 (10th Cir. 1967)).

94/ Id. (emphasis in original). "This interpretation allows de novo review of all constitutional issues on the grounds that the application of an incorrect constitutional rule of law by military courts is not a "fair" consideration by them." Id. (citing Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970)).

95/ Id. (citing Allen v. Van Cantfort, 436 F.2d 625 (1st Cir.), cert. denied, 402 U.S. 1008 (1971)).

96/ See id. at 1243-44.

courts have differed as to the permissible scope of review available under specific forms of collateral attack. For example, the traditional mandamus writ was issued only to compel a nondiscretionary ministerial duty clearly owed to the plaintiff.[97/] Although several courts have indicated that "fundamental fairness" in the underlying court-martial requires the military department to take corrective action as a nondiscretionary matter,[98/] other courts have held that the review in a mandamus case is limited to a determination of whether the military department acted arbitrarily and capriciously in failing to take corrective action, and that the federal court's determination is limited to consideration of the administrative record.[99/]

In recent years, the commentators and the courts have attempted to synthesize the various strands of the "fully and fairly" test into a uniform standard.[100/] In the absence of further guidance from the Supreme Court, however, the effort has not been successful.

97/ See Moyer, supra note 28, at 1166.

98/ See text accompanying notes 34-36 supra.

99/ E.g., Ragoni v. United States, 424 F.2d 261 (3rd Cir. 1970).

100/ E.g., the Fifth Circuit's opinion in Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) set forth detailed guidance on the scope of review, id. at 199-203, which it summarized as follows:

> Military court-martial convictions are subject to collateral review by federal civil

[Footnote Continued]

3) Issues not within the "fully and fairly" doctrine

The Supreme Court has not applied the "fully and fairly" test to jurisdictional issues. Without regard to the limitations set forth in Burns, the Court has reversed court-martial convictions as unconstitutional based upon absence of jurisdiction over the person[101/] and over the offense.[102/] The

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100/ [Continued]

> courts on petitions for writs of habeas corpus where it is asserted that the court-martial acted without jurisdiction, or that substantial constitutional rights have been violated, or that exceptional circumstances have been presented which are so fundamentally defective as to result in a miscarriage of justice . . . Accordingly, they may not retry the facts or reevaluate the evidence, their function in this regard being limited to determining whether the military has fully and fairly considered contested factual issues. Moreover, military law is a jurisprudence which exists separate and apart from the law governing civilian society so that what is permissible within the military may be constitutionally impermissible outside it. Therefore, when the military courts have determined that factors peculiar to the military require a different application of constitutional standards, federal courts are reluctant to set aside such decisions.

101/ See Moyer, supra note 28, at 1240 (citing, inter alia, Toth v. Quarles, 350 U.S. 11 (1955)).

102/ O'Callahan v. Parker, 395 U.S. 258 (1969) (courts-martial do not have jurisdiction to try servicemen for offenses that are not "service-connected"); Relford v. Commandant, 401 U.S. 355 (1971) (setting forth the factors to be used in determining whether an offense is "service-connected.")

Court also has interpreted the Articles of the Uniform Code of Military Justice without applying the Burns test. For example, the extent of sentencing authority granted by Article 66 to the Boards of Review was considered by the Supreme Court in Jackson v. Taylor.[103/] The Court upheld the convictions after reviewing the legislative history of Article 66, previous Supreme Court decisions on military sentencing procedures, and decisions of the Court of Military Appeals.[104/] In United States v. Augenblick,[105/] the Supreme Court reviewed two decisions from the Court of Claims that had broadly interpreted "fully and fairly" test. In one case,[106/] the Court of Claims had determined that the

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103/ 353 U.S. 569 (1957)

104/ Id. at 574-79. In a companion case, Fowler v. Wilkinson, 353 U.S. 583 (1957), the petitioner claimed that the sentence, although within the statutory maximum, was arbitrary. In a brief opinion, the Court cited Burns for the proposition that the Supreme Court does not exercise supervisory power over the administration of military justice, and that Congress had entrusted the executive with discretion over sentences. Id. at 584 (citing 346 U.S. at 140). The Court added that the petitioner had misinterpreted the decisions of the Court of Military Appeals that had been relied upon for the argument that the sentence was arbitrary. Id. at 584-85 (citing United States v. Voorhees, 4 C.M.A. 509, 16 C.M.R. 83 (1954); United States v. Bigger, 2 C.M.A. 297, 8 C.M.R. 97 (1953)). Because the Court found that the case presented "no constitutional questions," 353 U.S. at 585, the decision sheds little light on the appropriate scope of review under the "fully and fairly" test.

105/ 393 U.S. 348 (1969).

106/ Juhl v. United States, 383 F.2d 1009 (Ct. Cl. 1967), rev'd 393 U.S. 348 (1969).

court-martial and reviewing authorities had weighed the evidence incorrectly in basing a conviction on self-contradictory accomplice testimony in violation of paragraph 153a of the 1951 Manual for Courts-Martial. In the second case,[107/] the Court of Claims had held that violations of the Jencks Act[108/] amounted to constitutional errors. The Supreme Court reversed on the grounds that neither issue alleged an error of constitutional dimensions, although it was suggested that unspecified aspects of the Jencks Act, not present in the case, might pose a constitutional question.[109/] Although the case could be read to imply that collateral challenges to courts-martial are limited to constitutional issues, lower court cases subsequent to Augenblick have pointed out that review on habeas corpus is broader than review on a back-pay suit.[110/]

In a 1974 habeas corpus case, Parker v. Levy,[111/] the Supreme Court engaged in an extensive discussion of the application of constitutional guarantees to members of the

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107/ Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), rev'd 393 U.S. 348 (1968).

108/ 18 U.S.C. § 3500 (1976).

109/ 393 U.S. at 356.

110/ See Strassburg supra note 1, at 30 (citing Allen v. Van Cantfort, 436 F.2d 625 (1st Cir. 1971), cert denied, 402 U.S. 1008 (1971); Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972), cert. denied, 410 U.S. 942 (1973)).

111/ 417 U.S. 733 (1974).

armed forces without consideration of the "fully and fairly" test. The Court of Appeals for the Third Circuit had held that Article 133 and 134 of the Uniform Code of Military Justice[112/] were void for vagueness under civilian first amendment standards.[113/] Then, recognizing that different standards might apply to military cases, the circuit court examined the case for "countervailing military considerations" to justify application of a different standard in courts-martial. Finding none, the court overturned the conviction.[114/]

The Supreme Court reversed in a 5-3 decision.[115/] Justice Rehnquist followed the same pattern of consideration used by the Court of Appeals, measuring the standards of civilian constitutional law against the need for possible differences in the military.[116/] Without

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112/ 10 U.S.C. §§ 933, 934 (1976).

113/ Levy v. Parker, 478 F.2d 772 (3rd Cir. 1973).

114/ Id. at 795-96. Levy also had been convicted of disobedience of a lawful order in violation of Article 90, 10 U.S.C. § 890 (1976). The Court of Appeals found that the conviction under Article 90 was inextricably connected with the convictions under Article 133 and 134. Id. at 798-99.

115/ Justice Marshall took no part in the consideration or decision in the case. 417 U.S. at 762.

116/ Id. at 743-62.

discussing whether military authorities had "fully and fairly" considered the constitutional issue,[117/] he concluded that there was a legitimate basis for using a standard different from the civilian test when testing the possible vagueness of a statute, concerning criminal offenses in the armed forces.[118/] He then proposed a new standard for measuring the constitutionality of military offenses when challenged under the first amendment:[119/]

> Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the Articles of the Code is the standard which applies to criminal statutes regulating economic affairs.

The applicability of the Bill of Rights to members of the armed forces, a question which Chief Justice Vinson was unwilling to face in Burns, did not trouble Justice Rehnquist.

117/ The conviction had been affirmed within the military system and the Court of Military Appeals had denied a petition for review. United States v. Levy, 39 C.M.R. 672 (1968), pet. denied, 18 C.M.A. 627 (1969).

118/ 417 U.S. at 743-62. Justice Rehnquist relied upon prior Supreme Court cases, the views of scholars, opinions in other cases by the Court of Military Appeals, and the legislative history of the Uniform Code of Military Justice. Although he did not apply the Burns "fully and fairly" test, he cited Burns for the proposition that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . . and that "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." Id. at 744 (citing 346 U.S. at 140).

119/ Id. at 756.

In his view, the issue was not a matter of applicability, but rather the measure of application:[120/]

> While the members of the military are not excluded from the protection granted by the First Amendment the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

At a minimum, the Levy case suggests that the "fully and fairly" test enunciated in Burns does not apply to determinations of whether specific constitutional principles may apply to courts-martial. The opinion suggests that although the federal courts must recognize the differences between the armed forces and civilian society, they are not limited to determining whether the military reviewing authorities "fully and fairly" considered whether a particular constitutional guarantee should be applicable in court-martial proceedings. The decision provides little guidance, however, as to whether there is any change in the Court's thinking on the scope of review with respect to specific actions alleged to be in violation of constitutional and statutory guarantees applicable to the military.[121/] In those cases, the uncertainty produced by the "fully and fairly" test continues to pose problems.

120/ Id. at 758.

121/ Levy also challenged his conviction under Article 90 on the basis that his commander had given the order, knowing

The Supreme Court's decision in Middendorf v. Henry[122/] also suggests that the "fully and fairly" test does not require deference to the decisions of the Court of Military Appeals on constitutional issues involving the application of specific constitutional guarantees to members of the armed forces.

121/ [Continued]

it would not be obeyed, solely for the purpose of increasing the punishment. The Court of Appeals had declined to review this contention:

> In isolation, these factual determinations adverse to appellant under an admittedly valid article are not of constitutional significance and resultantly, are beyond our scope of review.

478 F.2d at 979.

The Supreme Court quoted with approval this portion of the Court of Appeals' opinion and added:

> Appellee in his brief here mounts a number of alternative attacks on the sentence imposed by the court-martial, attacks which were not treated by the Court of Appeals in its opinion in this case. To the extent that these points were properly presented to the District Court and preserved on appeal to the Court of Appeals, and to the extent that they are open on federal habeas corpus review of court-martial convictions under Burns v. Wilson, 346 U.S. 137 (1953), we believe they should be addressed by the Court of appeals in the first instance.

417 U.S. at 761-62.

In light of the widely divergent application of the Burns case by the lower courts, see text accompanying notes 319 - 326 supra, Levy provides little additional guidance.

122/ 425 U.S. 25 (1976).

The case involved the issue of whether there is a right to counsel in summary court-martial[123/] equivalent to the right to counsel in civilian misdemeanor prosecutions, as provided by the Supreme Court's decision in Argersinger v. Hamlin.[124/] The Court first determined that a summary court-martial is a unique military disciplinary proceeding and not a "criminal prosecution" within the meaning of the Sixth Amendment.[125/] The servicemembers had claimed in the alternative that the right to counsel was guaranteed by the due process clause of the Fifth Amendment. As in the Levy case, the applicability of the Bill of Rights to members of the Armed Forces as a general matter presented no problem to the Court:[126/]

> We recognize that plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment.

123/ A summary court-martial consists of one officer, who is not required to be an attorney and who, as characterized by the Court, "acts as judge, factfinder, prosecutor, and defense counsel." Id. at 32-33 (citing 10 U.S.C. 820 (1976) (Art. 20)). Article 20 further provides that only enlisted members may be tried by summary courts, the maximum imposable confinement adjudged by a summary court is one month at hard labor, and a person has the right to object to trial by summary court-martial, in which case the accused may be tried by special or general court-martial.

124/ 407 U.S. 25 (1972).

125/ 425 U.S. at 34.

126/ Id. at 43.

Instead, the question was one of application. In approaching the problem, the Court cited Burns, but only on the question of deference to Congress, not on the "fully and fairly" test:[127/]

> [W]hether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject .
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> . . .
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> In making such an analysis we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8, that counsel should not be provided in summary courts-martial. As we held in Burns v. Wilson, 346 U.S. 137, 140 (1953):
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>> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress.

The Supreme Court, moreover, expressly rejected the views of the Court of Military Appeals on the same constitutional issue:[128/]

> The United States Court of Military Appeals has held that Argersinger is applicable to the military and requires counsel at summary courts-martial . . . . Dealing with areas of law

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127/ Id. (citation omitted).

128/ Id. at 43-44 (citing United States v. Alderman, 22 C.M.A. 298, 46 C.M.R. 298 (1973)).

> peculiar to the military branches, the Court of Military Appeals' judgements are normally entitled to great deference. But the 2-to-1 decision, in which the majority itself was sharply divided in theory, does not reject the claim of military necessity. Judge Quinn was of the opinion that Argersinger's expansion of the Sixth Amendment right to counsel was binding on military tribunals equally with civilian courts . . . . Judge Duncan, concurring in part, disagreed, reasoning that decisions such as Argersinger were not binding precedent if "there is demonstrated a military necessity demanding nonapplicability." . . . . He found no convincing evidence of military necessity which would preclude application of Argersinger. Chief Judge Darden, dissenting, disagreed with Judge Quinn, and pointed to that court's decision recognizing "the need for balancing the application of the constitutional protection against military needs." . . . Taking issue as well with Judge Duncan, he stated his belief that the Court of Military Appeals "possesses no special competence to evaluate the effect of a particular procedure on morale and discipline and to require its implementation over and above the balance struck by Congress. . . .
>
> Given that only one member of the Court of Military Appeals took issue with the claim of military necessity, and taking the latter of Chief Judge Darden's statements as applying with at least equal force to the Members of this Court, we are left with Congress' previous determination that counsel is not required. We thus need only decide whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress.

Having dismissed the opinion of the Court of Military Appeals the Supreme Court then independently balanced the various interests. Noting that the accused had the right to object to trial by court-martial and thereby obtain the

right to counsel before a general or special court-martial, the Court concluded that there was no due process right to counsel in summary courts-martial.[129/]

The Supreme Court's decision in Henry leaves the scope of review more uncertain than ever. In an era of increasing similarity between military and civilian jurisprudence, it is difficult to determine what subjects are included in those "areas peculiar to the military branches" in which the federal courts will be required to give deference to the Court of Military Appeals. To the extent that the Court of Military Appeals applies civilian standards to courts-martial, the federal courts may be free to reach constitutional judgments without regard to the views of the Court of Military Appeals. While Henry strengthens the concept that the military is a separate society in which the balancing of interests for due process purposes must give strong consideration to military needs, the case substantially weakens the concept that an appellate court isolated from the federal courts of appeal is needed to review military cases.

129/ Id. at 47.

APPENDIX D

LEGISLATION

LEGISLATION

This Appendix provides general guidance for drafting legislation with respect to implementation of the proposals for reform of the Court of Military Appeals. A draft bill is set out in Section 1 to illustrate the drafting options. This draft sets out the legislative changes that would be necessary to implement the first option which provides for direct review by a division for military appeals within an existing federal court of appeals. In many ways this option presents the most difficult drafting problems. Other proposals, such as the second through fifth options would follow a similar but less complex pattern. Section 2 sets out a section-by-section analysis to explain the draft bill. Section 3 contains a list of statutes affecting the Court of Military Appeals that would have to be considered for amendment if any legislative reform is proposed.

1. Legislative Proposal

A Bill

To permit the United States Courts of Appeals for the District of Columbia Circuit to consider appeals from final decisions of the courts of Military Review, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 47 of title 10, United States Code, is amended as follows:

(a) Section 867 is amended to read as follows:

"§ 867. Art. 67. Review by the United States Court of Appeal for the District of Columbia Circuit

"(a) As used in this section, 'court of appeals' means the United States Court of Appeals for the District of Columbia Circuit.

"(b) A division for military appeals of the court of appeals established pursuant to section 46 of title 28, United States Code, shall review the record in--

"(1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;

"(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the court of 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 appeals has granted a review.

"(c) The accused has sixty days from the time of notification of the decision of a Court of Military Review to petition the court of appeals for review.

"(d) In any case reviewed by the court of appeals under this section, the court may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the

Court of Military Review. In a case which the Judge Advocate General orders sent to the court of appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action needed be taken only with respect to issues specified in the grant of review. The court of appeals shall take action under this section only with respect to matters of law.

"(e) If the court of appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

"(f) After it has acted on a case, the court of appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, the convening authority may dismiss the charges.

"(g) The court of appeals shall report annually 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. The annual report shall include a survey of the operation of this chapter provided to the court of appeals by the Judge Advocates General."

(b) Sections 866(e), 869, 870(b), 870(c), 870(d), 871(c), and 873 are amended by striking out "the Court of Military Appeals" each time it appears and inserting in lieu thereof "the United States Court of Appeals for the District of Columbia Circuit".

(c) The analysis at the beginning of subchapter IX is amended by striking "Court of Military Appeals" and inserting in lieu thereof "Court of Appeals for the District of Columbia Circuit".

Sec. 2. Section 46 of title 28, United States Code, is amended as follows:

(a) By striking the period at the end of subsections (a) and (b) and inserting in lieu thereof in each subsection ", subject to subsection (e) of this section."; and

(b) By adding the following subsection at the end thereof:

"(e)(1) A division for military appeals is established in the United States Court of Appeals for the District of Columbia Circuit. The Chief Judge of the court of appeals shall designate five circuit judges of the court of appeals to sit on the division for military appeals. The terms of service on such division for the five judges first so designated shall be, as specified by the Chief Judge at the time of designation, two for a term of five years and three for a term of ten years. The terms of service of all successors on the division for military appeals shall expire ten years after the date of appointment to such service.

"(2) The Chief Judge of the Court of Appeals for the District of Columbia Circuit may establish temporary divisions for military appeals, each consisting of three judges, if required for the expeditious disposition of cases under section 867 of title 10, United States Code.

"(3) If a judge sitting on a division for military appeals is unable temporarily to perform his duties because of illness or other disability, or if there is a vacancy on a division for military appeals, a circuit judge may be designated by the Chief Judge to sit on the division for military appeals for the period of disability or vacancy.

"(4) Circuit judges serving on a division for military appeals of the United States Court of Appeals for the District of Columbia Circuit may be assigned by the Chief Judge to sit on the court and its other divisions in accordance with subsections (a) and (b)."

Sec. 3. Section 1294 of title 28, United States Code, is amended by adding a new sentence at the end thereof as follows:

> "The United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review final decisions of the Courts of Military Review under section 867 of title 10, United States Code."

Sec. 4(a). The President shall appoint, by and with the advice and consent of the Senate, five additional circuit judgeships for the United States Court of Appeals for the District of Columbia.

(b) The table contained in section 44(a) of title 28, United States Code, is amended by striking "District of Columbia . . . 11" and inserting in lieu thereof "District of Columbia . . . 16."

(c) Personnel of the United States Court of Military Appeals who the Director of the Office of Management and Budget determines are, as a substantial part of their duties, performing functions incident to jurisdiction transferred by this Act to the United States Court of Appeals for the District of Columbia Circuit shall be entitled to transfer to, and upon such transfer shall retain all of their rights, privileges, and benefits, and shall be considered as continuous employees of the United States Court of Appeals for the District of Columbia Circuit. Nothing in this Act shall affect the status of persons in the competitive civil service on the date of enactment of this Act, but such persons may be assigned within the United States court system without regard to such status.

(d) The files, records, property and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of the United States Court of Military Appeals shall be transferred to the United States Court of Appeals for the District of Columbia Circuit no later than forty-five days after the court takes jurisdiction pursuant to section 6 of this Act.

Sec. 5(a). Section 6001 of title 18, United States Code, is amended by striking out "Court of Military Appeals;" and

(b) Section 906 of title 44, United States Code, is amended by striking out "Court of Military Appeals."

Sec. 6. This Act takes effect on the first day of the seventh calendar month that begins after the date of enactment of this Act.

2. Section-by-Section Analysis

Section 1 amends Section the Uniform Code of Military Justice by replacing review in the Court of Military Appeals with review in a designated federal court of appeals. There are three subsections.

Section 1(a) amends Article 67 of the Uniform Code of Military Justice, 10 U.S.C. § 867. There are seven subsections to Article 67.

Article 67(a) provides references to the United States Court of Appeals for the District of Columbia in place of references to the Court of Military Appeals and repeals those provisions of Article 67 that established the Court of Military Appeals, and governed the status of its judges.

Article 67(b) provides for review of decisions of the Courts of Military Review in a division for military appeals of the Court of Appeals in the same three classes of cases as under present law; that is --

(1) All cases in which the sentence, as affirmed, extends to death;*/

(2) cases certified to the court of appeals by the Judge Advocates General; and

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*/ Under 10 U.S.C. § 867, review in the Court of Military Appeals also is mandatory in all cases affecting a general or flag officer. In a separate legislative proposal the Department of Defense has recommended deletion of this provision as part of a broader reform of the code.

(3) cases in which the Court of Appeals has granted a petition for review filed by the accused.

Article 67(c) provides a limitation on the time during which the accused may petition the court of appeals for review. Under present law, the accused is required to file a petition for review in the Court of Military Appeals within 30 days of receiving notice of the decision of a Court of Military Review. In accordance with 28 U.S.C. § 2107, which governs the time for filing a notice of appeal with the courts of appeal, the amendment provides sixty days for the filing a petition from the time the accused is notified of the decision of a Court of Military Review. The further requirement of Article 67(c) that the court act on the petition within 30 days has been deleted as unnecessary. Experience has demonstrated that expeditious action on a petition does not guarantee expeditious action in reaching decisions in cases in which petitions have been granted. It is expected, however, that the court of appeals will exercise its rulemaking power to insure that cases under this section will receive expeditious consideration.

Article 67(d) restates present law. The court of appeals is limited to acting on the findings and sentence approved by the convening authority and as affirmed or set aside by the Court of Military Review. Article 67(d) also permits the court of appeals, in its discretion, to limit its consideration to matters raised by the government in

cases certified by the Judge Advocates General and to limit its consideration in cases reviewed upon petition of the accused to issues specified in the grant of review. Article 67(d) further limits the court of appeals to taking action under this section only with respect to matters of law.

Article 67(e) restates present law governing the power of the court to order rehearings in certain cases.

Article 67(f) restates present law governing the power of the court to return the record of trial to the Court of Military Review for further proceedings.

Article 67(g) amends the provision that presently provides for an annual meeting of the judges of the Court of Military Appeals and the Judges Advocate General and a report on the operation of the Uniform Code of Military Justice. The amendment requires an annual report on the operation of the Uniform Code to be submitted by the Court of Appeals, and authorizes a survey of military justice matters to be submitted at the request of the court by the Judge Advocates General. The amendment is similar to 28 U.S.C. § 331, the statute establishing the Judicial Conference of the United States. Section 331 provides for the Chief Justice to make an annual report to Congress on operation of the conference, along with recommendations for legislation. Section 331 also provides for the Attorney General, upon request of the Chief Justice, to report to the Conference on appropriate matters. The amendment is

designed to preserve the reporting and consultation function of Article 67 without requiring joint action between the judges of the court and representatives of litigants before the court.

In addition to the survey mechanism authorized by the amendment to Article 67, the Court of Appeals also will have access to the facilities of the Administrative Office of the United States Courts, 28 U.S.C. § 601, and the Federal Judicial Center, 28 U.S.C. § 620. These bodies will provide important administrative support to the court in carrying out its duties under the Uniform Code of Military Justice.

Section 1(b) strikes references to the Court of Military Appeals and substitutes therefor "United States Court of Appeals for the District of Columbia Circuit" in Articles 66(c), 70(c), and 73 of the Uniform Code of Military Justice, 10 U.S.C. §§ 866(c), 869, 870(c), and 873.

Article 66(e) provides for implementation of Court of Military Review decisions by the convening authority, upon instructions of the Judge Advocate General concerned, unless there is to be further action by the President, the Secretary concerned, or the court of appeals.

Article 69 provides that cases not otherwise within the jurisdiction of a Court of Military Review that are submitted to such a court by a Judge Advocate General are not subject to further review unless certified to the court appeals by the Judge Advocate General.

Article 70 provides for the appointment by the Judge Advocates General of military appellate counsel to represent the accused and the Government in appeals before the Court of Military Review and the court of appeals.

Article 71(c) provides for petition by the accused for a new trial within two years of the covening authority's approval of a court-martial sentence and for referral of such petition to a Court of Military Review or the court of appeals if at the time the petition is filed the case is pending before either of these appellate tribunals.

Section 2 amends section 46 of title 28, United States Code, which authorizes the Courts of Appeals to sit in divisions of three members and hear cases as the court directs. The amendment creates a new section 46(e), which contains four parts.

Part (1) establishes a division for military appeals on the United States Court of Appeals for the District of Columbia. This provision authorizes the Chief Judge, of the court of appeals to appoint five circuit judges to sit on the division for military appeals. Two of the initial appointees would have terms on the division for military appeals of five years, and three would have terms of ten years. Thereafter each appointee would have a term of ten years from the date of appointment. At the expiration of the term on the division for military appeals,

the judge could be redesignated for continued service on the division for military appeals or would continue as a circuit judge without special designation. The amendment would not affect the life tenure of judges on the court of appeals.

Part (2) authorizes the creation of temporary divisions for military appeals on the United States Court of Appeals for the District of Columbia. The temporary divisions could be created of the Chief Judge if required for the expeditious disposition of military cases. This flexibility will assist the court of appeals in handling an expanded caseload in the event of mobilization or other circumstances affecting the docket. The apointments would be made from circuit judges on the court, and would not affect the life tenure of members designated for service on the temporary divisions for military appeals.

Part (3) provides authority to fill temporary vacancies on a division for military appeals. The vacancies would be filled by circuit judges designated for such service by the Chief Judge of the United States Court of Appeals for the District of Columbia.

Part (4) makes it clear that the amendment does not preclude the Chief Judge from assigning judges sitting on a division for military appeals to other service on the United States Court of Appeals for the District of Columbia and its divisions.

The concept of a division for military appeals retains the aspect of present law that provides for military justice matters to be reviewed by a specialized tribunal. At the same time, it avoids the problem of undue specialization by providing for terms of reasonable duration and the opportunity to participate in cases involving other areas of law as circumstances permit. The amendment will enhance the quality of judges attracted to the position of providing court of appeals status, including the life tenure and retirement program that is part of the federal judiciary. By establishing a ten year period of designation, the amendment provides a reasonable period for specialization with the opportunity for rotation to other duties.

In all other respects, the disposition of cases will be similar to matters otherwise before the Court of Appeals. For example, there will be an opportunity for en banc hearings under the provisions of 28 U.S.C. § 46(c). The Court would be able to exercise its rulemaking power under 28 U.S.C. § 2071 with respect to appeal of military justice matters within the court's jurisdiction. In addition, the Chief Judge could submit a request to the Chief Justice of the United States for a judge from another circuit to sit on a division for military appeals in accordance with the provisions for temporary designation contained in chapter 13 of title 28, United States Code. The other powers of the Chief Judge and the court would be exercised in the same

fashion as under present law. Military cases, like all other cases decided by the Court of Appeals, would be subject to review by the Supreme Court under the provisions of 28 U.S.C. § 1254.

Section 3 amends 28 U.S.C. § 1294,**/ with respect to the jurisdiction of the courts of appeal, to provide that the United States Court of Appeals for the District of Columbia has exclusive jurisdiction to review final decisions of the Courts of Military Review arising under 10 U.S.C. § 867.

Section 4 provides for appointment of five new judges and for the disposition of the current personnel and property of the Court of Military Appeals.

Section 4(a) provides for five new judgeships on the Court that will be receiving the jurisdiction previously held by the Court of Military Appeals. With these five new positions, the transfer of jurisdiction should create no new burden on the Court to which jurisdiction is transferred. These positions could be filled by the judges currently

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**/ If an alternative were selected that placed the division for military appeals in a different court, section (3) of the bill might use the following references, depending on the court selected: Court of Claims (add a new section 1507 at the end of chapter 91 of title 28); Court of Customs and Patent Appeals (add a new section 1546 at the end of chapter 93 of title 28); Tax Court amend section 7442 in chapter 76 of title 26); the proposed Court of Appeals for the Federal Circuit (amend the proposed new section 1295 at the end of chapter 83 of title 28).

serving on the Court of Military Appeals in order to facilitate transition. Selection and confirmation would bedependent upon the normal Presidential appointment process, including onfirmation by the Senate.***/

Section 4(b) amends section 44 of title 28 to reflect accurately the additional judgeships in the Court of Appeals.

Section 4(c) provides for the transfer of the professional and clerical support staff of the Court of Military Appeals to the Court receiving jurisdiction over military cases. The status of these personnel would be unchanged with respect to tenure, length of service, pay and benefits. The court to which they were assigned could assign them within its own system or they could be assigned elsewhere in the court of appeals system. This procedure is similar to the personnel transfer provision of the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 192, 84 Stat. 473.

Section 4(d) provides for the transfer of the files records, personal and real property, and funds of the Court of Military Appeals to the Court receiving jurisdiction over military cases. This transfer is expected to take place gradually over the six month period of transfer, but must be

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***/ For legislation using language similar to section 4(a), see Act of Oct. 20, 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629

completed within 45 days after the receiving Court takes jurisdiction under this Act. This procedure is similar to the provision for transfer of files and records in the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 191, 84 Stat. 473 and in section 10(a) of the Military Selective Service Act, 50 U.S.C. App. § 460(a) (1970).

Section 5 makes conforming amendments where references to the Court of Military Appeals appear in the United States Code.

Section 5(a) strikes the reference to the Court of Military Appeals in section 6001 of title 18, United States Code, which defines the term "court of the United States" as including *inter alia* the Court of Military Appeals in connection with immunity of witnesses.

Section 5(b) strikes the reference to the Court of Military Appeals in section 907 of title 44, United States Code, providing for delivery of copies of the Congressional Record by the Public Printer to the judges and library of the Court of Military Appeals.

Section 6 establishes the effective date of the Act as six months after the date of enactment. This section provides a reasonable period of time to begin the transfer of cases from the docket of the Court of Military Appeals to the docket of the Court of Appeals. The six month delay between enactment and the effective date is the same period

provided under the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 901, 84 Stat. 473.

3. Statuory Provisions Affected by Proposal for Direct Review of Decisions of the Courts of Military Review in a United States Court Appeals

There are a number of statutory references to the Court of Military Appeals that would require amendment if an alternative were selected to provide for direct review of the decisions of the Courts of Military Review in a United States Court of Appeals. Subsection (a) lists the references found in the Uniform Code of Military Justice. Subsection (b) lists references located elsewhere in the United States Code.

a. The Uniform Code of Military Justice

10 U.S.C. § 866(e) (1976) (the Court of Military Review).

10 U.S.C. § 867 (1976) (establishment of the Court of Military Appeals and scope of the court's powers).

10 U.S.C. § 869 (1976) (cases submitted to a Court of Military Review under Article may not be reviewed by the Court of Military Appeals unless certified to that Court by the Judge Advocate General concerned).

10 U.S.C. § 870 (1976) (appointment of military appellate counsel to represent the accused and the government before the Courts of Military Review and the Court of Military Appeals).

10 U.S.C. § 871(c) (an unsuspended sentence that includes a dishonorable discharge, bad-conduct discharge, or confinement for one year or more may not be executed until affirmed by a court of Military Review and in cases reviewed by it, the Court of Military appeals).

10 U.S.C. § 873 (1976) referral of petitions for new trial to a Court of Military Review or the Court of Military Appeals if, at the time the petition is filed, the case is pending before either tribunal).

b. Other Provisions of the United States Code

18 U.S.C. § 6001 (1976) (inclusion of the Court of Military Appeals within the definition of "court of the United States" in connection with immunity of witnesses).

44 U.S.C. § 906 (1970) (delivery of copies of the Congressional Record to the judges and library of the Court of Military Appeals.)