

REPORT

TO

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CHIEF OF STAFF, U. S. ARMY

BY

**THE COMMITTEE FOR
EVALUATION OF THE
EFFECTIVENESS OF THE ADMINISTRATION
OF MILITARY JUSTICE**

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I. INTRODUCTION

On 7 October 1959, the Honorable Wilber M. Brucker, Secretary of the Army, directed a study of the administration of military justice in the Army. He appointed a committee of senior officers under the chairmanship of LTG Herbert B. Powell, then Deputy Commanding General, United States Continental Army Command. The complete membership of that committee is contained at Appendix 1. The committee studied the effectiveness of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army, analyzed any inequities or injustices that accrue to the Government or to individuals from the application of the Code and judicial decisions stemming therefrom, and inquired into improvements that should be made in the Code by legislation or otherwise. The committee submitted a detailed and far-reaching report--commonly referred to as the Powell Report--which was approved by Secretary Brucker on 13 October 1960. Among the recommendations in the Powell Report which have subsequently been adopted are increased punishment authority under Article 15, Uniform Code of Military Justice; trial by military judge alone in general courts-martial (although not recommended by the Powell Report, this has been expanded to include special courts-martial as well); convening of court-martial without the presence of members to permit decisions on legal questions; empowering of the military judge to rule finally

on all questions of law and all interlocutory questions, other than the factual determination of the mental responsibility of the accused; restoration of the rule for automatic reduction in grade upon approval by the convening authority of a sentence including punitive discharge, confinement, or hard labor without confinement; preparation of summarized records of trial in cases resulting in acquittal; empowering of The Judge Advocate General to review court-martial cases which have not been reviewed by the Court of Military Review; and a specific punitive article proscribing bad checks.

The years following the Powell Report have seen many broad social and attitude changes both in our country in general and in the Army in particular. These include the war in Vietnam, with the concomitant increase in the size of the Army; substantial and vocal opposition to the war both in the civilian and to a lesser degree within the military community; increased reliance upon relatively inexperienced officers in command positions at the company and battalion level; demand for greater "rights" by a vocal minority of military personnel; the movement toward a "modern volunteer" Army; and, in the not too distant future, the ~~phase~~ phase-down of the Vietnam War, with a resulting decrease in the size of the Army. All of these changes have had a direct impact on discipline in the Army. Equally important is the effect that the administration of military justice has on the maintenance

of discipline.

Many officers, and especially junior officers, believe that the administration of military justice at the small unit level has been a contributing factor in an apparent loosening of discipline and corresponding comments to this effect have been made to the Chief of Staff as well as to senior commanders. In view of these attitudes and feelings, on 16 March 1971, the Chief of Staff established the Committee for Evaluation of the Effectiveness of the Administration of Military Justice (hereinafter referred to as the Committee) with MG S. H. Matheson as Chairman. The complete membership of the Committee is shown at Appendix 2. The overall mission of the Committee is to assess the role of the administration of the military justice system as it pertains to the maintenance of morale and discipline at the small unit level, identify problem areas encountered by the small unit commander, and suggest means of resolving or diminishing them. Specifically, the Committee has examined:

A. The role of the administration of military justice in the maintenance of morale and discipline at the small unit level.

B. Problem areas in the administration of military justice encountered by junior officers.

C. The adequacy of the military justice training provided junior Army officers.

D. Existing policies pertaining to pretrial and post-trial confinement.

E. Methods for resolving problems identified by the Committee.

II. METHOD OF ANALYSIS

The Committee first prepared a detailed questionnaire concerning the administration of military justice to elicit the views of commanders and senior noncommissioned officers. Three-man teams, which had been detailed to the Committee, visited several installations and service schools and submitted the questionnaire to selected commanders and noncommissioned officers. The composition of these teams, together with the installations visited by each, is also at Appendix 2. A sampling of selected significant responses is in Tables at Appendix 3. In addition to conducting the questionnaire, the team members also held informal discussions with the personnel being questioned, as well as with commanders, judge advocates, provost marshals, correctional officers, service school officials, and other interested personnel. Further, MG Matheson and members of the Committee visited The Judge Advocate General's School, where they were briefed by the commandant and members of the staff and faculty. They also visited Headquarters, Continental Army Command, Headquarters, First U.S. Army, Headquarters, Sixth U.S. Army and Headquarters, XVIII Airborne Corps, and were briefed by appropriate commanders and staff officers. The detailed discussion to follow is based on an analysis of the completed questionnaires, the informal discussions at the several installations, and the combined experience of the members of the Committee.

III. DISCUSSION

A. Maintenance of Morale and Discipline. As noted previously, many commanders feel that military justice, as presently administered, has had an adverse effect on morale and discipline in the Army. It is the purpose of this report to address that criticism. First, however, it is necessary to determine the precise role of military justice. Basically, the administration of military justice serves the same purpose and function as the administration of any system of justice, whether civilian or military--the preservation of good order in the community. To the extent that military justice differs from civilian justice, it is the result of different values and goals of the two communities. To talk in terms of morale and discipline in the civilian context is largely meaningless. The contrary is true in the military.

The mission of the Armed Forces is to maintain a state of readiness during periods of peace, and when the occasion arises, to engage in armed combat. In this milieu, the question of morale and discipline is crucial. To the extent that military justice is administered fairly and impartially--that is to say, to the extent that military justice works--morale and discipline will be maintained and enhanced. Military justice thus has an essential role in the maintenance of morale and discipline, just as civilian criminal justice has a role in maintaining good order

in the civilian community. This is not to say, however, as critics of military justice proclaim from time to time, that courts-martial are not instruments of justice but merely a "specialized part of the overall mechanism by which military discipline is maintained". (Douglas, J., speaking for the majority in O'Callahan v. Parker, 395 U.S. 258, 265 (1969)). Comments such as these indicate a lack of appreciation not only for the system of military justice but also for the true meaning of the term "discipline". In this regard the Powell Report, in its discussion of command responsibility made the following observations:

If we start with the truism, "discipline is a function of command", we are at once at the core of one of the chief reasons for misunderstanding between civilians and servicemen concerning the need and requirements of an effective system of military justice. To many civilians discipline is synonymous with punishment. To the military man discipline connotes something vastly different. It means an attitude of respect for authority developed by precept and by training. Discipline-- a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed--is not characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus it is a mistake to talk of balancing discipline and justice--the two are inseparable. An unfair or unjust correction never promotes the development of discipline. ... "All correction must be fair; both officers and soldiers must believe that it is fair".

* * * * *

Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.

To add to this would be a mere superfluity.

B. Problem Areas Encountered by Junior Officers. There is a genuine concern within the Army concerning the state of discipline. Certainly, even to the casual observer there has been a decline in discipline in the Army manifested by personal appearance, use of drugs, increased AWOL rates, and dissent and attitude toward proper authority in general. (See Tables 3D and 3E.) Many different reasons are advanced for this undesirable condition, e.g., the Vietnam War, inexperienced junior officers, the so-called generation gap, and the enlistment or induction of unqualified personnel. These factors, to the extent they exist, will affect discipline. However, since the mission of the Committee is to examine the administration of military justice, this discussion will be confined to that subject and the closely associated subject of administrative separations and discharges. Within this context, it can be said that, while there is apparently widespread dissatisfaction with some phases or other of military justice, there is no real outcry for fundamental change

in either the substantive or procedural law. The vast majority of those interviewed say, in effect, "It's basically a good and fair system, but it should be more efficient and more responsive to the needs of the commander." The complaints and suggestions encountered by the Committee can be divided into four general areas: (1) Dissatisfaction with the law itself; (2) Excessive administrative delays in processing disciplinary actions; (3) Leniency of court-martial sentences by some military judges; and (4) Lack of education and training in military justice. The question of training in military justice will be considered in a separate section, since it is considered basic to the solution of the problem. The remaining areas will be discussed in the following sections:

1. Dissatisfaction With the Law. There will be some people in any society who are unhappy with the underlying law itself and who would propose fundamental change towards either greater "severity" or greater "liberality". The Committee discovered very few persons in this category. A significant number of junior officers, however, expressed dissatisfaction in varying degrees in two basic areas--nonjudicial punishment and search and seizure. As to the former, many commanders feel that the provisions of Article 15 of the Uniform Code of Military Justice should be changed to provide for less paperwork--and thus hopefully more prompt punishment--and for an increase in the

punishment powers of commanders. Unquestionably, in recent years--and especially since Article 15 was amended in 1963--the imposition of nonjudicial punishment has become increasingly complex, thereby placing a greater burden on an already administratively overburdened commander. Although an adequate record of non-judicial punishment is required to permit a meaningful review upon appeal to superior authority, a continuing effort must nevertheless be maintained to insure that the paperwork does not become so voluminous and complex that it defeats the purpose of nonjudicial punishment, which essentially is to provide the commander with a simple, expeditious method of disposing of minor offenses without recourse to trial by court-martial. A possible method of relieving the commander of the administrative burden associated with the imposition of nonjudicial punishment would be to establish legal centers responsible, among other things, for the administrative preparation of the required Article 15 forms. This concept will be addressed in more detail later. As to the punishment authority under Article 15, the Committee concludes that commanders, in fact, have adequate power under existing law to punish for minor offenses. In this connection, however, it has been noted that one form of authorized punishment is not being used to any significant degree. Article 15 provides that commanders may impose correctional custody for

periods up to 30 days. Correctional custody is the physical restraint of a person in a facility designed for that purpose. A person undergoing this form of punishment generally performs his regular duties during normal duty hours and is restrained only during nonduty hours. Correctional custody is a useful tool for the commander that should receive more widespread use. The Department of the Army should encourage the use of correctional custody in appropriate cases as a matter of policy.

With respect to the question of search and seizure, it is significant that an overwhelming majority of the commanders interviewed felt that their authority to order a search has been unduly restricted. (See Table 3F, Appendix 3) Upon closer examination, however, it becomes clear that the commander's real frustration was a lack of knowledge of the law. Essentially, a commander may authorize a search of a person or of property under his control only on the basis of probable cause to believe that an offense has been committed and that certain contraband or evidence will be discovered on the person or in the place to be searched. The requirement for probable cause is constitutional in origin, and it is simply not realistic to conclude that the requirement can be relaxed or eliminated. The crucial point in this regard is that with a proper understanding of the full import of probable cause, commanders may properly and legally conduct searches that

will survive judicial scrutiny. Many of the commanders interviewed in connection with this study related situations where they believed they would be precluded from authorizing a search because of the probable cause requirement, when in reality probable cause existed. Commanders must understand their authority in the area of search and seizure and the necessity for coordinating questions concerning searches with the appropriate staff judge advocate.

Some of the commands visited by Committee personnel employed, in effect, a written search warrant for all searches authorized by commanders. This document, when completed, sets forth in detail the basis for the search, the place to be searched, and the items to be seized. In effect, it provides the commander with a check list which enables him to make an informed judgment on the existence--or lack thereof--of probable cause. The Committee believes the increased use of such a standardized search warrant should be encouraged.

Before leaving the subject of search and seizure, it should be noted that the authority of the commander to conduct a search must be distinguished from his authority to conduct an inspection. The distinction is more than one of semantics. Unfortunately, the distinction is not understood by commanders and especially not by junior commanders. A search necessarily involves a quest

for items related to the commission of a criminal offense, and, of course, requires a determination of probable cause. An inspection, on the other hand, does not presuppose a criminal offense, but rather is designed to further the readiness, health, and security of the command. An inspection is not concerned with probable cause. It is an inherent attribute of command. The practical significance of an inspection is that it may result in the discovery of items related to an offense. These items may properly be used as evidence against an accused so long as the inspection was properly conducted. An "inspection", of course, cannot be used as a subterfuge for conducting what would otherwise be an illegal search. But the good faith employment of routine, periodic inspections provides the commanders with a valuable tool in meeting his responsibility for safeguarding the health and security of the command, as well as preserving good order and discipline in the command.

2. Excessive Administrative Delays. One area that received virtually universal condemnation concerned delays in processing court-martial cases and administrative separations. (See Table 3G, Appendix 3) There is an unfortunate tendency in some commands, as a case is transmitted through various levels of command, to return it for minor administrative deficiencies. Junior commanders are frustrated by the lack of good administrative clerks

who are knowledgeable in the legal field and by the lack of guidance from higher command. It goes without saying that justice, to be effective, must be administered in a timely fashion. This applies equally to administrative separations as well as to actions under the Uniform Code of Military Justice. The need for improvement can be found at almost every level of responsibility--from the initial investigation of an offense to the appellate review of a conviction by court-martial. The matter of excessive delays has been considered by the Committee from several different vantage points, each of which will now be addressed.

a. Chemical Analysis of Drugs. An essential prerequisite to the expeditious processing of suspected drug offenses is the timely chemical analysis of the discovered substance. The limiting factor is the availability of military police crime laboratories. There are only four crime laboratories world-wide where suspected drugs can be analyzed in connection with court-martial charges--Vietnam, Japan, Germany, and Fort Gordon, Georgia. The lack of available facilities and trained personnel results in delay in the processing of charges. Trials are likewise delayed by the requirement that the chemical analyst personally testify in contested cases. This unacceptable situation can be remedied by providing personnel at the installation level who are adequately trained in the chemical analysis of drugs. The analysis of marihuana is relatively simple. Consideration should also be

given to use of properly trained personnel at Army medical facilities, and at least, in large metropolitan areas, local civilian chemists or police agencies.

b. Unauthorized Absences. The offense which best exemplifies the typical military accused is absence without leave (AWOL). This offense pervades almost every aspect of the administration of military justice as the most frequently committed offense. It also provides the bulk of the pretrial confinement population. It has caused the establishment of a separate military structure, the Personnel Control Facility, until recently known as the Special Processing Detachment. It is also the most frequent basis for a discharge under Chapter 10, AR 635-200 (discharge for the good of the service). Because of the sheer magnitude of the AWOL rate and the difficulty in obtaining extracts of morning report entries, AWOL contributes significantly to delays in processing court-martial charges. The problem must be viewed from two perspectives--the present and the future. As to the former, all available means must be used to expedite the processing of cases involving AWOL charges. Paramount to this end is the prompt retrieval of personnel records of those absentees who have been dropped from rolls as deserters. Likewise essential is compliance with AR 630-10 requiring the preparation and inclusion of charge sheets and extracts of morning reports in the personnel file when

it is forwarded to The Adjutant General. Although both of these factors--prompt retrieval and preparation of documentary evidence--continue to cause problems, it is apparent that continuing emphasis is resulting in significant improvements. Consideration should be given to development of a simplified morning report extract adaptable to automatic data processing storage and retrieval. Under the present rules of evidence the resulting extract record would be admissible in evidence at a trial by court-martial. One particularly useful method of disposing of AWOL cases is through increased reliance on discharges for the good of the service under Chapter 10, AR 635-200. Once it becomes apparent that a person is an unredeemed absentee, no useful purpose is served by sentencing him to confinement at hard labor.

Discharge of such a person under AR 635-200, upon his request, is, in most cases, decidedly "for the good of the service" in every sense of the term. In fact, turning now to the long-term perspective, it would be appropriate, once the Vietnam War phases down, to return to the policy of discharging long-term absentees in absentia with an undesirable discharge authorized. The Committee understands that the Department of Defense is supporting a legislative proposal which will codify this practice and recommends its adoption. With the movement toward a volunteer Army, in the absence of other controlling factors, it would be

to the distinct advantage of the Army to discharge these long-term absentees administratively without returning them to military control for trial or other disposition, with their terms of service appropriately characterized. Exceptions could be made in individual cases where it appears that the person absented himself to avoid service in Vietnam, where there is evidence of the commission of other serious offenses, and for those who desire to return to military control and, after serving honorably, receive an appropriate discharge.

c. Legal Centers. Traditionally, the responsibility for initiating and processing court-martial charges has reposed in the unit commander--at the company, battery, and troop level. This practice so far as it relates to initiating charges is considered valid as a function of command. The Committee does not propose to change this responsibility. It appears, however, that it would prove advantageous, both to the commander and to the administration of military justice, if the administrative burden of processing court-martial charges were removed from the unit level. Delays in the administrative processing of court-martial charges are caused in large part by the substantial amount of required paperwork and the ever-increasing complexity involved in the drafting of court-martial charges and, to a somewhat lesser extent, in the preparation of actions under Article 15. Essentially, there are two problems in this regard; one education

and training, and efficient utilization of available manpower resources. The former will be addressed in that portion of the discussion concerned specifically with education and training.

With regard to effective use of manpower, the Committee concluded that the processing of court-martial charges and administrative separation actions as well should be more centralized in operation. Consideration should be given to the use of legal centers to be located at least at the brigade level and perhaps at the installation level. (See Table 3H) Several commands have established legal centers with the responsibility to a greater or lesser extent for processing of court-martial and separation actions. United States Army, Europe, for example, has established several legal centers in Germany on a geographical basis. These centers are responsible only for the trial of court-martial cases and not for the administrative processing leading up to the trial. The 4th Infantry Division, when in Vietnam, established a legal center--designated as a Judicial Support Facility--at division level. This activity was responsible for the processing of all court-martial and separation actions, to include the actual trial of the case.

The establishment of legal centers could go far toward reducing the processing time of court-martial and administrative separation cases. These centers might be modeled on the 4th

Division concept, i.e., to assign responsibility for all administrative aspects of court-martial and separation cases, to include, in the case of courts-martial, the trial of the case. Judge advocate officers could be detailed to the centers, together with trained legal clerks and other clerical personnel. Each judge advocate would be responsible for advising one or more commanders on military justice problems. The Department of the Army could initiate pilot programs at selected installations to determine the feasibility of establishing legal centers, the precise nature of the center, the level at which it should be established, the personnel who should be detailed thereto, and other such pertinent considerations.

d. Court Reporters. One essential link in the expeditious processing of those court-martial cases requiring a verbatim record of trial--general court-martial and BCD special court-martial convictions--is the court reporter. There has been a steady increase over the past few years in the elapsed time between completion of trial and the convening authority's action. See Appendix 4 in this regard. This unacceptable delay in the transcription of records of trial is caused in large part by a shortage of qualified reporters. The Combat Developments Command (CDC) recently conducted a study to determine the most effective means to develop a viable court-martial reporting system for the

Army and concluded that it is essential that military court reporters be warrant officers, that they be trained in the stenotype system of court reporting, and that they be assigned to the U. S. Army Judiciary. The Committee accepts in principle the conclusions expressed in the CDC study to the effect that prompt, decisive action is required to insure a sufficient quantity of well-trained court reporters who will be available when and where needed. The Committee is unable, without further study, to comment in detail how best to implement such a program. Careful consideration should be given to the CDC proposals. The problem is critical and must be thoroughly examined by all interested staff agencies.

e. Verbatim Records of Trial. As noted in the previous section, a limiting factor in the expeditious processing of court-martial cases is the requirement that all general court-martial and BCD special court-martial cases resulting in convictions be transcribed verbatim. It goes without saying that the processing time for court-martial cases could be reduced in direct proportion to the extent that the volume of verbatim records is reduced. One step in this direction could be accomplished through the elimination of the excess verbiage that has crept into the formal portion of the court-martial proceeding. Historically, this matter had special significance; today, it is

no more than an anachronism. For example, the trial procedure guide in the Manual for Courts-Martial, United States, 1969 (Revised edition), contains such unnecessary requirements as an announcement that the court was convened by a certain specified order, a reading into the record of the names of all members who are present or absent and an announcement as to the person preferring the charges, the person forwarding the charges, the investigating officer, and the convening authority. The elimination of this and similar matter, admittedly, would have but scant effect on the processing of the court-martial case, but it would have one decidedly beneficial result in that it would tend to remove the aura of stereotyped procedure from the trial. Too often, the uninitiated laymen, including the accused, gains the mistaken impression, because of the "script" that all the members are following, that the trial is no more than a play, the lines of which the actors are mouthing, with completely foreordained results. An effort should be made to rid the court-martial trial of such stereotyped rituals, proceeding to the essential portions of the trial as quickly and as judicially as possible.

A significant saving of time would be realized by eliminating the requirement for a complete verbatim transcript in those general and BCD special court-martial convictions which are based on pleas of guilty. There is no reason why the record of

trial in a guilty-plea case should not contain only formal statements that certain significant events occurred, such as the assembling of the court, the action by the military judge on certain motions, the arraignment and pleas of the accused, and the precise findings of guilty and the sentence. Because the convening authority and the Court of Military Review must determine the appropriateness of the sentence, that portion of the trial relating to extenuation and mitigation should continue to be transcribed verbatim.

It is recognized that the Court of Military Appeals in United States v. Care, 18 USCMA 535, 40 CMR 247 (1969) and United States v. Donohew, 18 USCMA 149, 39 CMR 149 (1969) held that the military judge must determine, and the record must so reflect, that the accused understands the meaning and effect of his plea of guilty (Care) and his rights to counsel (Donohew). These rules, especially the one announced in Donohew, are largely relics of an age of paternalistic concern for an accused who was not in every case represented by legally qualified counsel. Notwithstanding, the Committee does not propose to excise the requirement that the accused be so instructed. Rather, the Committee would recommend that the record of trial--in the absence of a defense request for a verbatim transcript because of a purported error--merely contain a statement, signed by the military judge, that

he instructed the accused of his right to counsel and determined the providency of his guilty plea in accordance with Donohew and Care. In this area, as well as in other areas of the trial, if the accused, through his defense counsel, believes that an error has been committed, he may, during trial or immediately thereafter, specify or note the error and request that the affected portion of the record be transcribed verbatim. This suggestion would align military practice more closely with civilian practice, would remove the stigma necessarily attached to the defense counsel by the paternalistic procedure, and would, in view of the decreased size of the record, reduce the processing time immediately following the completion of trial as well as that during appellate review. One effect of this proposal, which the Committee realizes would require changes to the Uniform Code of Military Justice and implementing directives and regulations, would be that the accused would waive all errors, except those involving jurisdiction and those involving a deprivation of due process, not assigned or specified by the defense counsel at the trial or immediately thereafter. The administrative burden of the Court of Military Review in guilty plea cases would be significantly lessened, thereby affording it more time to devote to contested cases. In this connection, it is noted that in the vast majority of guilty plea cases, the Court of Military Review takes no action either

on the finding or the sentence. Inclosed at Appendix 5 is a statistical breakdown of the action taken on court-martial convictions reviewed by the Court of Military Review during fiscal year 1970. The court under the proposed change, would still, of course, review the case for legality and appropriateness of the sentence. It is also considered that a significant increase in the use of BCD special courts-martial will result when the requirement for verbatim records is removed.

3. Leniency of Military Judges. It is apparent from the interviews conducted by the Committee that many commanders erroneously feel that the military judge--especially the more junior judge--is too lenient in adjudging an appropriate sentence in a court-martial case. This question of "adequate" sentences is difficult to address. It is virtually impossible, in all but the most extreme cases, for any two people, including legally-trained personnel, to agree on whether a sentence is adequate or inadequate for the offense concerned. There are too many variables involved that may or may not be apparent to the casual observer--previous convictions or lack thereof, attitude of the accused, mitigating or extenuating circumstances surrounding the commission of the offense, effectiveness of counsel, and subjective considerations by the military judge or court members.

Furthermore, it must be borne in mind that the question of

"adequacy" of a court-martial sentence is one that is generally beyond comment, at least in the individual case. In this connection, Article 37(a) of the Uniform Code of Military Justice provides pertinently:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to The Code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

The Committee does not intend or purport to act contrary to the letter or the spirit of Article 37. This is a practice which all persons subject to the Code would be wise to emulate.

As noted above, commanders do in fact feel that military judges are too lenient. In order to have the benefit of more empirical data, statistical information was obtained from some of the commands visited by Committee personnel and from other sources. The results are contained at Appendix 6.

It is interesting to note that many of the officers queried were attending service school and had not been confronted with the actual administration of military justice for several months.

The Committee has received information from senior commanders and judge advocates to the effect that allegations of excessive leniency hurled at military judges have been drastically reduced. To the extent that this was a problem at all, it seems to have been one six months ago and not at the present time. It should be noted that the authority of military judges to impose sentences at courts-martial has been in effect only since October 1969. It is to be expected, as with any innovation, that complaints will be received for a relatively short period of time until the system is better understood and accepted by those concerned.

This is not to say that military judges should not be educated and trained; on the contrary. The Committee notes in this connection that The Judge Advocate General's School is operating a well-conceived and well-executed course for military judges. This course, which is three weeks in duration, covers all aspects of the judge's responsibilities, including the difficult and complex task of imposing a just and appropriate sentence.

C. Military Justice Training. Supreme Court Justice Oliver Wendell Holmes once remarked, "We need education in the obvious rather than investigation of the obscure". This aphorism is particularly apropos to the question of military justice training. Perhaps the most obvious quality of a good commander is that of leadership. This is as important a command attribute in the

area of military justice as it is in any other aspect of command responsibility. Unfortunately, leadership is one basic attribute of a commander that is not acquired by formal education. The principles and traits of leadership may be taught, but the attribute of leadership itself must be acquired in the day-to-day activities of the commander, not in the classroom.

There are other aspects of command responsibility, vis-a-vis the administration of military justice, that are susceptible to formal training. Commanders need to be educated in military justice, not to become lawyers but to assist them in the practical, day-to-day administration of military justice. Although it may be included in the category of "nice-to-know" information, it does not particularly help a commander to become an expert in the more esoteric, if not obscure, areas of the law, such as the hearsay rule with its myriad of exceptions, the difference between a presumption and a justifiable inference, or the procedural aspects of the doctrine of res judicata. It should be apparent to even the most casual observer that junior commanders need more formal training in military justice--training, however, that is clearly suited to their particular needs. The leadership aspects must be included. (See Table 3I and 3J) Presently, training in military justice among the service schools ranges from as many as 26 hours in one of the career courses to as few

as one hour in one of the basic courses. Although military justice is a common subject, there is no requirement that a minimum number of hours will be taught in any service school. AR 350-212 provides that courses in military justice may be presented in service schools, service academies, officer candidate schools, ROTC programs, and USAR training programs. Annex Q to CONARC Regulation 350-1 does prescribe that military justice subjects will be taught in service schools, but establishes no minimum number of hours to be taught. Interestingly enough, CONARC Pamphlet 145-14 provides a minimum of four hours of military justice instruction to ROTC cadets.

AR 250-212 should be changed to provide that military justice shall be taught in the regular curriculum of service schools, as well as the other schools listed. The regulation should also specify the minimum number of hours to be taught in each course. Seven hours should be the minimum required for OCS and basic courses and 10 hours should be the minimum required for advanced classes. Also, the courses presented at the various schools should, to the extent practicable, be uniform in scope and content. To this end, The Judge Advocate General's School is presently preparing a detailed lesson plan to be used by OCS and service schools. This is certainly desirable. The Committee would add only that in planning the military justice course,

consideration be given to the practical, rather than the purely theoretical, approach. In this connection, the Committee has been informed that The Infantry School offers a 40-hour elective course on military justice, in addition to its regular course. This course, which has received an enthusiastic response from the students, avoids the sterile lecture method and is problem-oriented, with active student participation. Such a course, which could well serve as a model for other service schools, could be used to supplement the fundamentals that every commander should know, such as the authority of a commander under the Uniform Code of Military Justice, elements of offenses under the Code, Article 15 procedures, search and seizure, and pretrial confinement. An additional week of instruction is certainly not excessive in view of the criticality of the problem.

Service school instruction, however, is not enough. There should be some "continuing legal education" on a periodic basis. If conducted in an interesting, problem-oriented way, it would be invaluable in helping commanders better understand the legal problems of command. In this connection, AR 350-212 establishes Military Justice Courses C and D for officers and warrant officers. These courses, however, are optional and not required. The Committee believes that the C and D courses should be required courses for all officers on an annual basis. A particularly

useful vehicle for continuing education would be a handbook for junior officers which would set forth clearly and concisely those legal matters of direct concern to the junior commander at the company level. A practical guide on the law of search and seizure and a detailed, step-by-step explanation of the processing of court-martial charges are but two examples of what the handbook could contain. The Committee understands that The Judge Advocate General's School can produce such a handbook.

One traditional method of self-education in military justice was accomplished by the requirement that commanders read and explain specified provisions of the Articles of War every six months to the enlisted members of their command. To prepare for these periodic "classes" in military law, the commander first had to familiarize himself on the subject. Thus, the requirement for keeping the soldier informed in military justice had the bonus effect of informing the commander as well. Today, the required reading and explanation of certain articles of the Uniform Code of Military Justice is accomplished through Military Justice Courses A and B. In accordance with Article 137 of the Uniform Code of Military Justice, the military justice instruction is given to enlisted persons upon their entering active duty, six months thereafter, and upon re-enlistment. The Committee has concluded that AR 350-212 should be changed to provide that

instruction to the soldier be given on an annual basis or as originally required by the Articles of War. Other command policies might well be presented concurrently, such as standards of dress, appearance and conduct.

Through an effective presentation of Military Justice Courses A, B, C, and D, enlisted men will be kept informed as to military law and officers will be better prepared to administer military justice fairly and effectively.

The Committee has noted that military justice courses are not provided at the drill sergeants schools. The middle-grade noncommissioned officer is the person who deals most directly with the individual soldier. Yet, it appears in many cases that the sergeant and the platoon sergeant are unaware of the basic principles of military justice and, in fact, in many instances, do not feel that there is any need for them to have this information. To them, disciplinary action is not their problem but rather that of the company commander and, perhaps, the first sergeant. A course in fundamental military justice principles decidedly should be taught at all drill sergeants schools.

One interesting sidelight that was noted by the Committee is the feeling of senior noncommissioned officers that they are being left behind in the quest for a modern volunteer Army. They feel that their advice is not being sought, or if sought, is

being ignored. Policy changes are announced in the news media and sometimes reach the soldier prior to an official announcement through command channels. An example is the recent announcement of the latest policy on haircuts, sideburns and mustaches. In addition, the noncommissioned officer is often confronted with the problem of junior officers not adhering to established standards of appearance which the noncommissioned officer is trying to enforce among the soldiers. If standards are to be enforced, they must be applicable to all. Every effort must be made to insure that noncommissioned officers are kept abreast of all new developments in today's Army, are made aware of precisely what is expected of them, and are provided with the requisite authority and responsibility to perform their assigned duties.

Finally, a commander's formal education and training in the field of military justice must be implemented on a day-to-day basis through advice sought and received from the judge advocate. All too often, as became apparent from the interviews conducted by Committee team members, the advice of the judge advocate was not sought until after the event, when it was usually too late. Commanders must be encouraged to seek the advice of judge advocates to assist them in meeting their military justice responsibilities. The concept of the legal center, discussed previously, will facilitate this action. Another possibility,

if the legal center concept is not adopted, is the detailing of judge advocates to the brigade or battalion levels.

Just as line officers need extensive training as to their legal responsibilities, so also do judge advocates require special training so that they will be more effective in advising their military clients. A judge advocate, upon being commissioned and reporting to active duty for the first time, should attend a course conducted by one of the service schools, designed to acquaint him with the problems faced by commanders. Likewise, The Judge Advocate General's School should invite commanders and senior noncommissioned officers to personally present their views to the students concerning the administration of military justice. All judge advocates, including military judges, must understand that the needs of the Army, as well as the rights of the accused, must be taken into account before any system of military justice can be considered effective.

D. Pretrial and Post-Trial Confinement. Commanders--especially junior commanders--have singled out pretrial and post-trial confinement as major problem areas in the administration of military justice. The most common criticism of pretrial confinement is that applicable regulations, local directives, and other criteria governing pretrial confinement are too strict and that the level at which the decision is made to impose pretrial confinement is

too high. Many commanders interviewed by the Committee believe they should be able to place a member of their command in pre-trial confinement without first obtaining permission from higher headquarters and without the necessity of making the often strained conclusion that the confinement is required to insure the presence of the individual at any future trial. These commanders feel, rightly or wrongly, that they should be able to confine any person who is a "trouble-maker", even though his alleged offense is not a serious transgression and even though there is no question of his being available for trial. This feeling, though understandable in some cases, betrays a certain lack of appreciation for the underlying rationale for pretrial confinement. To understand the proper use of pretrial confinement, it is necessary to start with the concept that, in view of the presumption of innocence that clothes every accused, a person ideally should not be incarcerated unless and until he has been found guilty of a criminal offense and duly sentenced to a period of confinement in accordance with established judicial procedures. Exceptions are made to permit confinement if this action is considered necessary to insure the presence of the accused at his trial, because of the seriousness of the offense, or to prevent the accused from committing acts of violence against himself or to others.

Stated bluntly, a commander simply cannot lock up a soldier merely because he is considered a "trouble-maker". Pre-trial confinement cannot be used as a substitute for effective leadership. This principle, unfortunately, is not completely understood by all commanders. The basic problem in this regard is not, as some commanders feel, one of derogating from the authority of the commander, but rather one of education and training. Accordingly, the principles underlying the proper use of pretrial confinement should be included in the military justice courses presented at the various service schools.

The Committee does not wish to minimize the problems facing unit commanders today with respect to those soldiers who cannot or will not perform satisfactorily. It must be recognized, however, that the problems presented by the "trouble-maker"--who in many, if not most, cases is just that and not a criminal--cannot be solved by pretrial confinement as such. To screen out as many "trouble-makers" as possible, higher standards of selection and enlistment should be imposed when we end our major participation in Vietnam.

Another possible solution to the "trouble-maker" might well be found in the establishment of regional training facilities which would be the administrative analog of the Correctional Training Facility. These facilities would not be used for the

purpose of punishment but rather would provide motivational training and treatment for soldiers who are being considered for administrative separation with a view toward making them useful and productive members of the Army.

Concerning the question of who should be authorized to order a person into pretrial confinement, in the opinion of the Committee this is an issue that cannot be resolved by a single uniform policy. The considerations inherent in any decision to confine differ from case-to-case and from place-to-place. Certain comments, however, are in order.

There are several different, if not conflicting, policy considerations that must be taken into account. The company commander should know the accused best and as such should have a voice in the matter of pretrial confinement. The company commander, however, does not generally exercise court-martial authority. There is much to be said for having the decision on pretrial confinement rest with the officer who is responsible for bringing the accused to trial, especially with the emphasis accorded to the requirement for a speedy trial. This has the virtue of reposing authority and responsibility in the same person. Except in the case of the most serious offenses, the responsibility for bringing an accused to trial lies with the officer exercising special court-martial jurisdiction, generally the battalion or the brigade commander, or his equivalent.

Viewed from another perspective, the general court-martial convening authority has a vital interest in pretrial confinement policies and practices. In the first place, he is the one person with overall responsibility for the administration of military justice in his command. Also, the Department of the Army has tasked him with the personal responsibility for determining whether a person should remain in pretrial confinement for more than 30 days. (AR 190-4, Para 1-3d(3)). For this reason alone, he has a decided interest in the decision to place a person in pretrial confinement. Also, the command staff judge advocate, as the legal advisor to the commander, has more than a passing interest in this area. In many commands, the concurrence of the staff judge advocate is a condition precedent to pretrial confinement.

For these reasons, the Committee concludes that it is neither feasible nor desirable to promulgate a single Department of the Army policy governing pretrial confinement. Appropriate policies can best be established and implemented by the officer exercising general court-martial jurisdiction for his command, consistent with the principles of good leadership, and as set forth in the Uniform Code of Military Justice, the Manual for Courts-Martial, and applicable Army regulations.

As to the issue of post-trial confinement, reference has

already been made to the criticism leveled at military judges by some commanders for the former's purported leniency in adjudging sentences. As noted previously, the Committee has concluded that this "problem" no longer exists and at this juncture needs only to reiterate the necessity for careful selection and adequate training of military judges.

In regard to post-trial confinement policies, maximum authorized sentences for various offenses are established by the President in the Table of Maximum Punishments (Para. 127c, MCM, 1969, (Rev)). The question of an appropriate sentence in a given case is determined initially by either the military judge or the members of the court-martial, next by the convening authority, and ultimately, in some cases, by the United States Army Court of Military Review. This is the system that has been established by the Congress of the United States and the Committee has noted nothing that would justify any changes.

One area, however, that is worthy of comment concerns confinement at "hard labor" in the post stockades. It is apparent that the "hard labor" portion of the sentence is archaic and meaningless as far as stockade prisoners are concerned. This is true for several reasons. In the first place, the overwhelming majority of the persons in the stockade--upwards of 85%--are in pretrial confinement. Most of the remainder eventu-

ally are transferred either to the Disciplinary Barracks at Fort Leavenworth or the Correctional Training Facility at Fort Riley. Only a small number of persons serve their confinement in the post stockade, and they do not perform "hard labor". There is simply not much opportunity for "hard labor" at the average Army stockade. The prevailing philosophy in penology today is directed more toward correction and rehabilitation than punishment. While the Committee cannot quarrel with this philosophy, it still believes that the performance of meaningful "hard labor"--which perforce must be more rigorous than the work performed by the soldier in the unit--would have the distinctly desirable effect of making the prisoner remember his time spent in the stockade and instilling in him a strong desire never to return. The overall effect could well be to "correct" him and deter others.

Before leaving the subject of confinement, even though, strictly speaking, the subject is beyond the precise purview of the Committee, it is apropos to discuss the problem of the absentee who has been returned to military control. Any absentee who has been dropped from the rolls of his organization as a deserter will, upon his return, be assigned to the nearest personnel control facility. The magnitude of this problem is recognized by all. One facility, for example, processes 800 -

1,000 absentees a month. Because of the number involved and because of limited space in the local stockade, it is not possible to confine more than a few of these returnees while they are awaiting trial. It is reasonable to assume that as the Vietnam War phases out, the high number of absentees returning to military control could continue for an appreciable period of time. The Committee has no particular comment on the practical aspects of processing returned absentees except to note that the problem exists and that continuing effort is being directed to improving the processing. As noted previously, we should return to the practice of administratively discharging absentees in absentia after they have been AWOL for a specified period of time.

E. Military Justice and Race. Both the racial and leadership aspects of the military justice problem are very broad. A detailed examination of these subjects was considered beyond the scope of this study. However, by personal interview and use of questionnaires, the Committee did obtain some opinions on three questions related to race and military discipline. First, respondents were asked for their interpretation of the term "Black Power". While there were wide variations in their interpretation of the term and the reasons for its use by black soldiers, they were almost unanimous in their belief that the

"Black Power" concept, and particularly, the accouterments and ritual that are commonly associated with it, has a negative affect on unit discipline and morale. This opinion was shared equally by both black and white respondents, many of whom expressed sympathetic understanding of the Negro soldiers' need to display "black awareness".

In response to the question, "Which of the following ethnic groups do you consider more likely to cause disciplinary problems?", 55% indicated that there was no difference by ethnic group, 35% felt that black soldiers are more likely to cause disciplinary problems, and about 10% believed that white soldiers are more likely to cause disciplinary problems. Less than 1% indicated that other ethnic groups would be more likely to cause disciplinary problems. Although a significant minority thought that Negro soldiers are more likely to cause disciplinary problems, many qualified their opinion by indicating that the environmental, social, and cultural disadvantages experienced by black soldiers, prior to their service in the Army, was a primary cause of their behavior. They believe that in cases where blacks and whites enjoy the same childhood advantages, the blacks are no more likely to cause disciplinary problems than whites.

As to the question of whether blacks are treated more

harshly than whites by the military justice system, 73% believed that punishment was awarded fairly regardless of race, 18% believed that black soldiers were treated more harshly than whites, and about 9% felt that white soldiers were treated more harshly by the military justice system. (See Table 3K)

Many of the junior leaders interviewed by the Committee expressed their awareness of the charge by some black soldiers that blacks are discriminated against by the military justice system. They seemed perplexed because of their inability to convince the blacks that the military justice system is administered in an impartial manner. The ability to establish empathy with subordinates and the knowledge of when to apply a given disciplinary technique are both products of experience and leadership training. In this regard the actions currently being taken by CONARC to revise the leadership curricula in the service schools should result in junior leaders being better prepared to meet the contemporary leadership challenges.

IV. CONCLUSIONS

A. Maintenance of Morale and Discipline. Military justice plays a major role in the maintenance of morale and discipline in the Army. To the extent that a court-martial is an instrument of justice and that our system of military justice is administered fairly and impartially, morale and discipline will be maintained and enhanced.

B. Problem Areas Encountered by Junior Officers. Although there is no widespread concern with the military legal system per se, there is some discontent with certain aspects of military justice. The complaints in this area can be divided into four general categories: (1) Dissatisfaction with the law itself; (2) Excessive administrative delays in processing disciplinary and administrative actions; (3) Apparent leniency by some military judges; and (4) Lack of education and training in military justice.

1. Dissatisfaction With the Law. Although few commanders expressed dissatisfaction with the law itself, a significant number of junior officers indicated their concern with two specific areas of the law--nonjudicial punishment and search and seizure. These commanders felt that Article 15 of the Code should be changed to provide for less paperwork and for an increase in the authorized punishment. A continuing effort must

be made to insure that the administration of Article 15 does not become so complex that it defeats the essential purpose of non-judicial punishment, which is to provide a simple, expeditious method of disposing of minor offenses. In the opinion of the Committee, commanders have adequate punishment authority under Article 15. Consideration should be given, however, to a policy statement recommending more widespread use of the correctional custody form of punishment authorized under Article 15.

As to search and seizure, commanders must understand that the requirement for probable cause, rooted as it is in the Constitution, is here to stay. Probable cause, admittedly a difficult concept to grasp, is not impossible to achieve in individual cases. Written search warrants provide a particularly significant aid to this end. Furthermore, commanders should routinely coordinate questions concerning searches with appropriate staff judge advocates. Finally, commanders must be aware of their authority to conduct administrative inspections, which are clearly distinguishable from searches. The solution to the problem of search and seizure, as with many other areas of concern, is to be found in education and training.

2. Excessive Administrative Delays. The problem of excessive administrative delays in processing court-martial cases and administrative separations was cited by virtually

every commander interviewed by the Committee. The need for improvement in this area can be found at almost every level of responsibility--from the initial investigation of an offense to the appellate review of a conviction by court-martial. The matter of excessive delays has been considered by the Committee from several different vantage points, each of which will be addressed.

a. Chemical Analysis of Drugs. Delays in the disposition of drug abuse cases as a result of the unavailability of personnel trained in chemical analysis of drugs are unacceptable. There is no discernible reason why personnel, adequately trained to conduct such analyses, cannot be provided at the installation level, especially with respect to the analysis of marihuana which is rather simple to determine and is the major drug involved in most cases. Consideration should also be given to the use of properly trained personnel at Army medical facilities, specifically pharmacists, and, at least in large metropolitan areas, local civilian chemists or police agencies.

b. Unauthorized Absences. Because of the sheer magnitude of the AWOL rate and particularly because of the difficulty in obtaining extract copies of morning report entries, AWOL cases contribute significantly to delays in

processing court-martial charges and administrative separations. Paramount to the end of expeditious processing of AWOL cases is the prompt retrieval of personnel records of those absentees who have been dropped from rolls of their organization. A simplified morning report extract adaptable to automatic data processing storage and retrieval and admissible as evidence in court is needed. The magnitude of this problem of returned absentees indicates that the most feasible approach to the problem is renewed reliance on administrative discharges in absentia. A pending legislative proposal to this end should continue to be supported.

c. Legal Centers. Delays in the administrative processing of court-martial charges are caused in large part by the substantial volume of paperwork and the ever-increasing complexity involved in the drafting of court-martial charges and Article 15 actions. The processing of court-martial charges, and administrative actions as well, could be expedited by a more centralized operation. Consideration should be given to the use of legal centers, to be located at least at the brigade or comparable level. Pilot programs should be established at selected installations to determine the feasibility of establishing legal centers on a permanent basis, the precise nature of the center, the personnel who should be detailed to the

center, and such other practical considerations.

d. Court Reporters. There has been a steady increase over the past few years in the elapsed time between completion of trial and the convening authority's action. The delay in those cases requiring a verbatim record of trial is caused to a significant degree by a shortage of qualified court reporters. Careful consideration should be given to a CDC proposal that all military court reporters be warrant officers, that they be trained in the stenotype system of court reporting, and that they be assigned to the U.S. Army Judiciary.

e. Verbatim Records of Trial. Excess verbiage in the trial procedure guide of the Manual for Courts-Martial could be eliminated. This would reduce somewhat the length of the record, but, more importantly, it would assist in removing the aura of stereotyped procedures from the trial. A significant savings of time could be realized through the elimination of the requirement for a complete verbatim transcript in those general and BCD special court-martial convictions which are based on pleas of guilty. The effect of such a proposal, which will require changes in the Uniform Code of Military Justice and implementing directives, would be that unless the defense counsel specifies certain errors and requests that the affected portion of the record be transcribed verbatim, the record of

trial in any guilty plea case would contain only formal statements that certain significant events occurred. Matters in extenuation and mitigation would continue to be transcribed verbatim.

3. Leniency of Military Judges. Many of the commanders interviewed by the Committee believe that the military judge--and especially the more junior judge--is too lenient in adjudging an appropriate sentence in a court-martial case. Based on statistical data obtained in the course of the study, the Committee concludes that at the present time the allegations of excessive leniency are unfounded. The Committee notes that The Judge Advocate General's School is operating a well-conceived and well-executed course for military judges which covers all aspects of the judge's responsibilities, including the difficult and complex task of imposing a just and appropriate sentence.

4. Military Justice Training. The one action that could contribute to a viable system of military justice and, as a result, improve discipline and morale is a massive, concerted effort on education and training in military justice. This would not be a question of force feeding commanders. Indeed, as revealed by interviews, the commanders would welcome it.

a. Formal Training. Junior commanders need more

formal training in military justice--training that is clearly suited to their needs. The Department of the Army should promulgate a policy providing for a prescribed minimum number of hours to be taught at each service school. The formal course of instruction, which should to the extent practicable be uniform in scope and content, should include a minimum of seven hours for OCS and basic courses and ten hours for advanced. The formal course, which would cover fundamentals which every commander should know, should be supplemented by a course devoted to the more practical aspects of military justice. Such a course is presently being offered as a 40-hour elective at The Infantry School and has received an enthusiastic response from the students. An additional week of instruction in the leadership aspects of military justice is not considered excessive in view of the criticality of the problem.

b. Continuing Legal Education. Service school instruction, however, is not enough. There should be some "continuing legal education" on a periodic basis. To this end, Military Justice Courses C and D, established by AR 350-212, should be required to be taught on an annual basis. At the present time, these courses are optional only. Furthermore, the military justice instruction to enlisted personnel required by the Uniform Code of Military Justice and AR 350-212 should

be given every year. The regulation currently provides only that they receive instruction upon entering active duty, upon completion of six months active duty, and upon reenlistment.

c. Noncommissioned Officer Training. One person who cannot be overlooked in any consideration of the administration of military justice is the noncommissioned officer-- the one person who deals most directly with the individual soldier. Yet, no courses in military justice are currently provided at the drill sergeants schools. The Committee strongly feels that a course in fundamental military justice principles should be taught at all drill sergeants schools and all other noncommissioned officers schools.

d. Effective Utilization of Noncommissioned Officers. Many senior noncommissioned officers feel that their advice is not being sought, or, if sought, is being ignored, in the move toward a modern volunteer Army. Every effort must be made to insure that noncommissioned officers are kept abreast of all new developments in today's Army, are made aware of precisely what is expected of them, and are provided with the requisite authority and responsibility to perform their assigned duties. A particularly vexing problem in this area, as far as noncommissioned officers are concerned, concerns the promulgation and enforcement of Army policy on standards of appearance.

Noncommissioned officers are not always given clearly defined standards and are often confronted with junior officers who do not adhere to the standards the noncommissioned officer is attempting to enforce among the enlisted personnel. Standards of appearance, as promulgated by applicable Army regulations, should be precisely defined, uniformly interpreted within the established definitions, and strictly adhered to by all personnel, officers and enlisted men alike.

e. Role of the Judge Advocate. Continuing with the subject of education, it must be realized that a commander's formal training in military justice must be implemented through advice sought and received from the judge advocate. All too often the judge advocate's advice is not sought until after the event, when it is usually too late. The concept of the legal center, where each commander should have a particular judge advocate to advise him, would facilitate the receipt of legal advice. Another useful device is the detailing of judge advocates to brigade or battalion level.

f. Training of the Judge Advocate. Judge advocates, to be more effective, must receive special training so that they will be more effective in advising their military clients. A judge advocate, upon being commissioned and reporting to active duty for the first time, should attend a course con-

ducted by one of the service schools designed to acquaint him with the problems faced by commanders. Likewise, The Judge Advocate General's School should invite commanders and senior noncommissioned officers to personally present their views to the students concerning the administration of military justice.

C. Pretrial and Post-Trial Confinement.

1. Pretrial Confinement. Junior officers believe that applicable regulations are too strict, both as to the criteria governing pretrial confinement and the level at which the decision to impose pretrial confinement rests.

a. Criteria Governing Pretrial Confinement.

Junior officers must understand that pretrial confinement may be imposed only to insure the presence of the accused at his trial, because of the seriousness of the alleged offense, or to prevent the accused from committing acts of violence to himself or others. A soldier may not be placed in pretrial confinement merely because he is considered to be a "trouble-maker". The problems presented by the "trouble-maker" cannot be solved by pretrial confinement. Higher standards for enlistment and induction should be imposed with the end of our major participation in Vietnam. Another possible solution to the problem of the "trouble-maker" is through the establishment of regional training facilities which would provide motivational training

and treatment for soldiers who are being considered for administrative separation, with a view toward making them useful and productive members of the Army.

b. Authority to Impose Pretrial Confinement. The question of who should be authorized to impose pretrial confinement is not susceptible to a single, uniform policy. Appropriate policies can best be established and implemented by the officer exercising general court-martial jurisdiction for his command, consistent with the principles of good leadership and as set forth in the Uniform Code of Military Justice, the Manual for Courts-Martial, and applicable Army regulations.

2. Post-Trial Confinement.

a. General. Maximum authorized sentences for various offenses are set forth in the Table of Maximum Punishments. The question of an appropriate sentence in a given case is determined initially by either the military judge or the court members, next by the convening authority, and ultimately, in some cases, by the United States Army Court of Military Review. This is the system established by Congress and the Committee has noted nothing that would justify any changes.

b. Hard Labor. The "hard labor" portion of the sentence to confinement at hard labor is meaningless as far as

stockade prisoners are concerned. The performance of meaningful hard labor in post stockades would have the distinctly desirable effect of making the prisoner remember his time spent in the stockade and instilling in him a strong desire never to return.

3. Returned Absentees. The magnitude of the problem of the absentee who has been returned to military control is recognized by all. Because of the sheer numbers involved and because of limited space in the local stockade, it is not possible to confine more than a few of these returnees while they are awaiting trial. Continuing efforts are being made to improve the processing of these absentees. The best solution to the problem is to return to the practice of administratively separating long-term absentees in absentia.

Throughout the course of this study, it has been noted that many commanders feel that military justice, as presently administered, has a deleterious effect on morale and discipline in the Army. If military justice is administered fairly and impartially, morale and discipline in general will be enhanced. Many junior commanders, however, feel a sense of frustration because of what they conceive to be shortcomings in the administration of military justice. The Committee believes that the problem is largely one of education and training. With an increased emphasis on military justice training, both in the

classroom and on a continuing basis in the field, commanders will better understand the fundamental concepts of military justice and the particular role they must play in its administration. With understanding will come acceptance, which in turn will lead to a truly effective system of military justice.

Finally, as a counterpoint to the views expressed by Justice Douglas in O'Callahan v. Parker, supra, the Committee can best sum up its views of military justice by citing with approval the words of Chief Judge Robert Quinn of the United States Court of Military Justice:

I am confident, however that [the court-martial system] can survive any point-by-point comparison of the substantive and procedural provisions of the military criminal laws delineated by Congress in the Uniform Code of Military Justice and the actual administration of the law as reflected in the cases with the criminal law and its administration in the civilian community. In my opinion, the American people can take just pride in the system of government of the armed forces provided by Congress and in the administration of that system by their fellow civilians in uniform. (United States v. Borys, 18 USCMA 547, 560, 40 CMR 259, 272 (1969))

V. RECOMMENDATIONS

In view of the foregoing, the Committee recommends that:

A. A continuing effort be made to simplify the administration of nonjudicial punishment so that it becomes an uncomplicated means of disposing of minor offenses.

B. The Department of the Army provide the required resources and encourage the increased use of correctional custody as authorized under Article 15 of the Uniform Code of Military Justice.

C. The Department of the Army devise a search warrant form for use by commanders when ordering searches of persons or property under their control.

D. Continuing efforts be made at all levels of command to eliminate excessive delays in the administrative processing of court-martial and elimination cases. To this end, the Committee specifically recommends that:

1. The Department of the Army establish programs designed to provide the capability for the chemical analysis of marihuana and other drugs at the installation level.

2. A continuing effort be made to assure that the personnel records of absentees are readily available to the appropriate authorities when the absentee is returned to military control.

3. The Department of the Army return as soon as practicable to the practice of discharging long term absentees in absentia with an undesirable discharge authorized.

4. Pilot programs be established at selected installations to determine the feasibility of establishing legal centers on a permanent basis.

5. Careful consideration be given to the Combat Development Command proposal that court reporters be warrant officers trained in the stenotype system of court reporting, and that they be assigned to the U.S. Army Judiciary.

6. Excess verbiage be eliminated from the Trial Procedure Guide to reduce the record of trial and to remove the aura of stereotyped procedures from the trial.

7. The Department of the Army propose legislation to eliminate the requirement for a verbatim transcript in general and BCD special court-martial convictions which are based on pleas of guilty.

E. The Department of the Army begin a massive concerted effort on education and training in military justice, to include its leadership aspects. In this regard, the Committee specifically recommends that:

1. The Department of the Army provide the necessary resources for a prescribed minimum of 7 hours of classroom

instruction for OCS and basic course students and 10 hours for career course students, supplemented by approximately 40 hours of instruction devoted to the practical aspects of the administration of military justice.

2. Military Justice Courses C and D, established by AR 350-212, be required to be taught on an annual basis to provide "continuing legal education" for commanders.

3. The required military justice instruction for enlisted persons be given annually.

4. The Judge Advocate General prepare a handbook for junior officers setting forth clearly and concisely legal matters of direct concern to junior commanders.

5. A course on military justice fundamentals be taught at all drill sergeants schools.

6. The Department of the Army make every effort to insure that noncommissioned officers are kept abreast of all new developments in the Army, are made aware of precisely what is expected of them, and are provided with the requisite authority and responsibility to perform their assigned duties.

7. Standards of appearance, as promulgated by applicable Army regulations, should be precisely defined, uniformly interpreted within the established definitions, and strictly adhered to by all members, officers and enlisted men alike.

8. As a matter of policy The Judge Advocate General's School invite selected troop commanders and senior noncommissioned officers to give the judge advocate students their viewpoints on the administration of military justice.

9. A system be devised whereby each battalion or higher level commander would have a designated judge advocate readily available to advise him in legal matters.

10. All newly commissioned judge advocates, without previous experience with troops, attend an orientation course especially designed to acquaint them with the problems faced by the commander, as well as with the judge advocate's responsibilities in assisting the commander to accomplish his mission.

F. Consideration be given to the establishment of regional training facilities which would provide motivational training and treatment for soldiers who are being considered for administrative elimination, with a view toward making them useful and productive members of the Army.

G. Consideration be given to requiring meaningful hard labor in Army stockades for those persons sentenced to confinement at hard labor.

APPENDICES

APPENDIX 1

THE AD HOC COMMITTEE TO STUDY THE UNIFORM CODE OF MILITARY JUSTICE

Lieutenant General Herbert B. Powell, USA, Deputy Commanding General, United States Continental Army Command Reserve Forces

Major General George E. Bush, USA, Commanding General, VI Corps (Reserve)

Major General Hugh P. Harris, USA, Deputy Chief of Staff for Operations, Plans, and Training, United States Continental Army Command

Major General George W. Hickman, Jr., USA, The Judge Advocate General

Major General Rush B. Lincoln, Jr., USA, Deputy Chief of Transportation

Major General William C. Westmoreland, USA, Commanding General, 101st Airborne Division

Major General Bruce Easley, USA, Deputy The Adjutant General

Brigadier General Howard M. Hobson, USA, Commanding General, The Provost Marshal Center

Brigadier General Charles L. Decker, USA, Assistant Judge Advocate General for Military Justice

Lieutenant Colonel Harold E. Parker, JAGC, Recorder

Extract from the Report to Honorable Wilber M. Brucker, Secretary of the Army, by The Committee on The Uniform Code of Military Justice, Good Order, and Discipline in the Army, 18 Jan 60.

APPENDIX 2

COMMITTEE MEMBERSHIP

<u>RANK</u>	<u>NAME</u>	<u>BR</u>	<u>UNIT</u>
<u>FULL-TIME MEMBERS:</u>			
MG	S. H. Matheson	USA	Inter-American Defense Board
LTC	Roscoe Black	INF	Army Council of Review Boards
LTC	Matthew B. O'Donnell	JAGC	Office of The Judge Advocate General
LTC	Frank D. Turner, Jr.	MPC	Office of The Provost Marshal General
MAJ	James L. Meidl	AGC	The Institute of Heraldry

PART-TIME MEMBERS:

LTC	Ronald M. Holdaway	JAGC	U. S. Army Judiciary
MAJ	Donald M. MacWillie, Jr	AR	Army Materiel Command
CPT	Arnold Daxe, Jr.	MPC	USACDCMPA, Ft. Gordon, Ga

Note: Visited Ft. Benning, Ga; Ft. Bragg, NC; and Ft. Jackson, SC

LTC	Charles Schiesser	JAGC	U. S. Army Judiciary
MAJ	Donald L. State	MPC	USAADCEN, Ft. Bliss, Tx

Note: Visited Ft. Knox, Ky and Ft. Leavenworth, Ks

LTC	Robert H. Kellar, Jr.	ADA	44th Avn Det, HQ, ARADCOM, ENT AFB, Col
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Note: Visited Ft. Sill, Ok

LTC	Charles W. Sanders	INF	4th CST Bde, USATC, INF, Ft. Polk, La
MAJ	Charles K. Eden	MPC	USAMPS, Ft. Gordon, Ga
MAJ	Phillip M. Suarez	JAGC	TJAGSA, Charlottesville, Va

Note: Visited APG, Md; Ft. Eustis, Va; and Ft. Lee, Va

FULL-TIME ADMINISTRATIVE SUPPORT MEMBERS:

SSG	William R. Keyes		573d PSC, Ft. Bragg, NC
SP4	Ronald B. Butts		573d PSC, Ft. Bragg, NC
SP4	Sherman M. Carter		15th USAAVNS Bde, Ft. Rucker, Al
SP4	Jose L. Ruiz		Svc Btry, 1/7 Arty, 1st Inf Div, Ft. Riley, Ks

APPENDIX 3

QUESTIONNAIRE RESPONSES

TABLE 3A

QUESTIONNAIRES COMPLETED

Aberdeen Proving Grounds, Md....	92	Ft. Jackson, S.C.....	83
Ft. Benning, Ga.....	93	Ft. Knox, Ky.....	78
Ft. Bragg, N.C.....	35	Ft. Leavenworth, Ks.....	192
Ft. Dix, N.J.....	67	Ft. Lee, Va.....	57
Ft. Eustis, Va.....	129	Ft. Sill, Ok.....	155
<u>Total.....</u>		<u>981</u>	

TABLE 3B

PERSONAL DATA--OFFICERS

Total Years Active Service:

Under 4 years.....20%

Over 4 years.....80%

Component:

RA.....48%

USAR...49%

ARNGUS..3%

Source of Commission:

ROTC.....32%

OCS.....61%

USMA.....6%

Direct.....1%

Duty Preference:

Command.....89%

Staff.....11%

Civilian Education Completed:

High School.....43%

College.....57%

Military Education Completed:

Basic.....43%

Career.....45%

CGSC.....12%

Level of Command:

Platoon.....47%

Company.....53%

Served in RVN: 86%

TABLE 3C

ATTITUDE TOWARDS COMMAND ASSIGNMENT

"Considering our present military society, if given the option for a command assignment, what would be your choice?"

Accept.....91%
 (Of the 91%, 40% would actively seek & volunteer for command assignment)
 Decline.....9%

TABLE 3D

PRIMARY PROBLEMS OF UNIT COMMANDERS

Discipline (minor).....24%	Unqualified personnel.....15%
Drugs.....20%	Personal.....11%
AWOL.....18%	Personnel shortage.....6%
Race.....6%	

TABLE 3E

PRIMARY DISCIPLINARY PROBLEMS

Drugs.....28%	Poor attitude & lack of motivation.....14%
Lack of enforced discipline..22%	Race.....9%
AWOL.....20%	Lack of NCO authority.....5%
Anti-War sentiment.....2%	

TABLE 3F

THE SEARCH POLICY

"Have you ever conducted or ordered a search of a person or property under your control?"

Yes.....89% No.....11%

"Do you feel that you understand your authority and lack thereof in this area (search)?"

Yes.....72% No.....28%

"Have you ever sought advice from the staff judge advocate concerning your authority to order a search?"

Yes.....77% No.....23%

"Do you routinely obtain guidance from the staff judge advocate before authorizing a search?"

Yes.....53% No.....47%

"What, in your opinion, is required before you may authorize a search of a person or property under your control?"

Just cause.....95% Direct evidence.....5%

"Do you feel that, as a commander you should be permitted to authorize a search of a person or property under your control whenever such action is necessary to safeguard the health or security of the command or to preserve good order and discipline in the command?"

Yes.....96% No.....4%

TABLE 3G

PROCESSING AND CONDUCTING COURT-MARTIAL CASES

Major reasons for delay:

Awaiting receipt of CID report.....30%	Complex cases.....24%
Inadequately trained personnel.....27%	Other (returned for errors, military judge unavailable, backlog of cases to be tried, too many other responsibilities, etc.).....19%

"How can the processing be expedited?"

Increase training.....33%
More personnel.....33%
Simplify procedures.....34%

"At what level should the legal clerk be assigned?"

Brigade.....13%
Battalion.....62%
Company.....25%

TABLE 3H

ESTABLISHMENT OF LEGAL CENTERS

"What is your opinion of a system whereby legal centers would be established so that all courts-martial would be convened at these centers instead of at various units?"

Yes.....76% No.....24%

"Should all court-martial processing be done at these centers?"

Yes.....68% No.....32%

TABLE 3I

OVERALL FEELING ABOUT MILITARY JUSTICE

"Do you feel that military justice is as fair as civilian law?"

Yes.....88% No.....12%

"How would you improve it (military justice)?"

Reduce command interference..42%

General overall improvement..33%

More stringent sentences.....25%

TABLE 3J

MILITARY JUSTICE TRAINING

"Did the instruction (service school) help you to meet your responsibilities in administration of military justice?"

Yes.....61% No.....39%

"How would you improve the training of commanders in the field?"

Periodic training by SJA.....67%

Other (SJA conferences & visits, more coordination & liaison with SJA, etc.).....33%

TABLE 3K

ATTITUDE TOWARD DISCIPLINARY PROBLEMS

"Which of the following ethnic groups do you consider more likely to cause disciplinary problems?"

Caucasians.....	10%	Negroes.....	35%
No difference.....		55%	

"In taking disciplinary actions, do you think commanders tend to be more strict toward which of the following?"

Caucasians.....	9%	Negroes.....	18%
No difference.....		73%	

APPENDIX 4

AVERAGE NUMBER OF DAYS ELAPSED FROM DATE OF TRIAL
TO ACTION BY CONVENING AUTHORITY

	<u>Guilty Plea by Accused</u>	<u>Not Guilty Plea by Accused</u>
FY 1967	38.3	54.3
FY 1968	39.6	62.1
FY 1969	42.7	73.5
FY 1970	48.2	71.9

APPENDIX 5

GENERAL COURTS-MARTIAL AND BCD SPECIAL COURTS-MARTIAL REVIEWED BY
US ARMY COURT OF MILITARY REVIEW FISCAL YEAR 1970

	<u>GUILTY PLEA</u>		<u>NOT GUILTY PLEA</u>	
	GCM	SPCM	GCM	SPCM
Findings and sentence affirmed	958	252	316	87
Findings affirmed, sentence modified	355	20	190	6
Findings affirmed, sentenced reassessed or rehearing ordered as to sentence only	19	1	11	0
Findings affirmed, sentence disapproved and set aside	0	0	5	0
Findings partially disapproved, sentence affirmed	5	1	5	2
Findings partially disapproved and re- hearing ordered	1	0	4	0
Findings and sentence affirmed in part, disapproved in part	33	3	60	1
Findings and sentence disapproved, re- hearing ordered	6	4	16	1
Findings and sentence disapproved, charged dismissed	8	1	37	0
Returned to field for new SJA review and/or convening authority's action	7	0	3	1
Motion for appropriate relief, denied	<u>1</u>	<u>0</u>	<u>0</u>	<u>0</u>
TOTAL	1393	282	647	98

APPENDIX 6

GENERAL AND SPECIAL COURT-MARTIAL DATA

TABLE 6A

NON-BCD SPECIAL COURT-MARTIAL DATA FROM SELECTED COMMANDS *
1 January 1971 - 31 March 1971

	Court Members	Military Judge Alone
Persons tried	13	1690
Persons convicted	11 (85%)	1633 (97%)
Confinement adjudged**	10 (91%)	1280 (78%)
0-2 Months***	2 (20%)	319 (25%)
2-4 Months***	3 (30%)	582 (45%)
4-6 Months***	5 (50%)	379 (30%)

*This data is based on records maintained in the offices of the Staff Judge Advocates, Fort Dix, XVIII Corps & Fort Bragg, Fort Knox, Fort Jackson, Fort Benning, Fort Lee, and Fort Sill.

**Percentages based on number convicted.

***Percentages based on number of cases in which confinement adjudged.

TABLE 6B

ARMY-WIDE BCD SPECIAL COURT-MARTIAL DATA
1 January 1970 - 31 December 1970

	Court Members	Military Judge Alone
Persons tried*	--	--
Persons convicted	33	1048
BCD's adjudged	33	1048
Confinement adjudged**	25 (76%)	983 (94%)
0-2 Months***	0	15 (2%)
2-4 Months***	6 (24%)	221 (22%)
4-6 Months***	19 (76%)	747 (76%)

*Data based on records received in US Army Judiciary during period.
Data not available on number of special courts-martial that were tried under circumstances in which BCD could be adjudged as only those in which a BCD was approved by convening authority must be forwarded to US Army Judiciary.

**Percentages based on number convicted.

***Percentages based on number of cases in which confinement adjudged

TABLE 6C

ARMY-WIDE BCD SPECIAL COURT-MARTIAL DATA
1 January 1971 - 31 March 1971

	Court Members	Military Judge Alone
Persons tried*	--	--
Persons convicted	10	289
BCD's adjudged	10	289
Confinement adjudged**	8 (80%)	262 (91%)
0-2 Months***	1 (12.5%)	7 (3%)
2-4 Months***	3 (37.5%)	71 (27%)
4-6 Months***	4 (50%)	184 (70%)

*Data based on records received in US Army Judiciary during period. Data not available on number of special court-martial that were tried under circumstances in which BCD could be adjudged as only those in which a BCD was approved by convening authority must be forwarded to US Army Judiciary.

**Percentages based on number convicted.

***Percentages based on number of cases in which confinement adjudged.

TABLE 6D

ARMY-WIDE GENERAL COURT-MARTIAL DATA
1 January 1969 - 30 June 1969

	Court Members*
Persons tried	1272
Persons convicted	1181 (93%)
Punitive Discharge adjudged**	942 (80%)
Confinement adjudged**	1115 (94%)
1-12 Months***	619 (56%)
13-24 Months***	206 (18%)
25-60 Months***	214 (19%)
61-120 Months***	41 (4%)
Over 120 Months***	28 (2.5%)
Life***	7 (0.5%)

*Trial by military judge alone not authorized during period.

**Percentages based on number convicted.

***Percentages based on number of cases in which confinement adjudged.

TABLE 6E

ARMY-WIDE GENERAL COURT-MARTIAL DATA*
1 January 1970 - 30 June 1970

	Court Members	Military Judge Alone
Persons tried	178	1085
Persons convicted	148 (83%)	1038 (96%)
Punitive discharge adjudged**	97 (65%)	958 (92%)
Confinement adjudged**	119 (74%)	990 (95%)
1-12 Months***	62 (52%)	677 (68%)
13-24 Months***	19 (16%)	187 (19%)
25-60 Months***	29 (24%)	111 (11%)
61-120 Months***	3 (3%)	9 (1%)
Over 120 Months***	2 (2%)	6 (0.5%)
Life***	4 (3%)	0

*Data based on all GCM records received in the US Army Judiciary during period indicated. Figures do not include any cases that were tried prior to 1 August 1969, the effective date of the Military Justice Act of 1968.

**Percentages based on number convicted.

***Percentages based on number of cases in which confinement adjudged.

TABLE 6F

ARMY-WIDE GENERAL COURT-MARTIAL DATA*
1 July 1970 - 31 December 1970

	Court Members	Military Judge Alone
Persons tried	193	1271
Persons convicted	151 (78%)	1219 (96%)
Punitive discharge adjudged**	95 (63%)	1114 (91%)
Confinement adjudged**	122 (81%)	1158 (95%)
1-12 Months***	68 (56%)	821 (71%)
13-24 Months***	15 (12%)	228 (20%)
25-60 Months***	27 (22%)	86 (7%)
61-120 Months***	3 (2%)	15 (1%)
Over 120 Months***	7 (6%)	6 (0.5%)
Life***	2 (2%)	2 (0.1%)

*Data based on all GCM records received in the US Army Judiciary during period indicated. Figures do not include any cases that were tried prior to 1 August 1969, the effective date of the Military Justice Act of 1968.

**Percentages based on number convicted.

***Percentages based on number of cases in which confinement adjudged.

TABLE 6G

ARMY-WIDE GENERAL COURT-MARTIAL DATA
1 January 1971 - 31 March 1971

	Court Members	Military Judge Alone
Persons tried	93	589
Persons convicted	79 (85%)	561 (95%)
Punitive discharge adjudged*	54 (68%)	509 (91%)
Confinement adjudged*	65 (82%)	518 (92%)
1-12 Months**	34 (52%)	371 (72%)
13-24 Months**	17 (27%)	88 (17%)
25-60 Months**	8 (12%)	44 (8%)
61-120 Months**	0	6 (1%)
Over 120 Months**	6 (9%)	9 (2%)

*Percentages based on number convicted.

**Percentages based on number of cases in which confinement adjudged.

