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 January 1960

FOREWORD

As a result of my personal study of the developments in the interpretation of the Uniform Code of Military Justice and the observations of Army commanders on the subject, on 7 October 1959 I appointed the committee whose findings and recommendations were approved by the Chief of Staff on 30 September 1960 and thereafter submitted to me. I approve the attached report and recommendations of that committee.

Since the date of this report, there have been further interpretations of the Code which point up the necessity for the continuing study of appropriate statutory revision. I have directed such a study.

I have followed the studies of the committee with great interest. The objectives of the committee are laudable; the recommendations are sound, workable and modern in concept.

The proposals in this report emphasize the dignity of the individual and the responsibility of the commander for his men. This is fitting, because the officers and soldiers of today's Army represent the finest in the world. Adoption of the philosophy and recommendations herein will assure to the Army an incomparable system of justice, fitted to the ever-changing concepts of warfare, and capable of adjustment to the varied situations under which our troops must serve.

It is my desire that every officer in the Army become familiar with this forward-looking study, forthrightly presented in terms of goals and programs.

Wilber M. Brucker.

13 October 1960

Wilber M. Brucker
Secretary of the Army

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 for 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

STAFF

Lieutenant Colonel Harold E. Parker, JAGC, Recorder

Captain Dennis A. York, JAGC

First Lieutenant Thomas A. Higgins, JAGC

Miss Helen Farmer

OUTLINE OF REPORT

PART I. SUMMARY REPORT

STATEMENT OF THE PROBLEM

1. To study and report on the effectiveness of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army.

2. To analyze any inequities or injustices that accrue to the Government or to individuals from the application of the Code and judicial decisions stemming therefrom.

3. To inquire into improvements that should be made in the Code by legislation or otherwise.

FACTS BEARING ON THE PROBLEM

1. The Uniform Code of Military Justice became effective 31 May 1951 during the Korean War (June 1950 to July 1953) and has had no significant amendments.

2. The period 31 May 1951 to the present represents the only experience of the United States Army with a military code interpreted by a civilian appellate body.

3. During the fiscal years 1952 through 1959, inclusive, 915,369 persons were tried by Army courts-martial of all types. The highest court-martial rate of the period was 113.3 per thousand in fiscal year 1953; the lowest was 66.2 in fiscal year 1959.

4. The average strength of the Army decreased from 1,597,000 in fiscal year 1952 to 889,000 in fiscal year 1959 with progressive improvement in quality as standards for acquisition and retention of personnel were tightened.

5. As of 31 March 1959, 64.7% of *all* male enlisted personnel, 50.7% of Regular Army male enlisted personnel and 99.4% of non-Regular Army male enlisted personnel were less than 26 years old.

6. There are two proposals for substantial changes in the Uniform Code of Military Justice before the 86th Congress (Section I, Part II).

a. HR 3387 is a DOD bill which incorporates changes that have been requested by the Court of Military Appeals and the services since 1953.

b. HR 3455 is an American Legion bill substantially in conflict with the DOD bill.

STUDY PROCEDURES

At the outset the Committee decided on certain requisites for an effective military justice system. Failure to fulfill these requisites

in time of war will jeopardize our fighting ability. Against this standard, the Uniform Code of Military Justice and any proposed modification must be measured. In the Committee's view the requisites are:

1. An effective system of military justice must support the mission of the armed forces both in war and in peace, at home and abroad.

a. It must contribute to the maintenance of armed forces in instant readiness during periods of nominal peace and international tension.

b. It must operate efficiently in the event of rapid and large-scale mobilization.

c. It must operate efficiently under conditions of major conventional or nuclear warfare.

2. An effective system of military justice must provide for the rehabilitation of usable military manpower.

3. An effective system of military justice must foster good order and discipline at all times and places.

4. An effective system of military justice must protect the military community against offenses to persons and property at times and places where civilian courts are not available.

5. An effective system of military justice must provide a commander with the authority needed to discharge efficiently his responsibility in connection with the points above.

6. An effective system of military justice must provide practical checks and balances to assure protection of the rights of individuals and prevent abuse of punitive powers.

7. An effective system of military justice should promote the confidence of military personnel and the general public in the overall fairness of the system.

8. An effective system of military justice should set an example of efficient and enlightened disposition of criminal charges within the framework of American legal principles.

The Committee developed a series of questions to elicit facts and opinions bearing on these requisites. With the help of The Adjutant General and The Judge Advocate General a representative sampling of the opinions of enlisted persons, company, battalion and battle group commanders, and military lawyers has been obtained. We have had the benefit of the comments and recommendations of the heads of Department of Army agencies, of the Commandants of the National War College and the Army War College, and of all of the 96 senior commanders who are exercising general court-martial jurisdiction in the Army.

Professional personnel of the Office of The Judge Advocate General and the Judge Advocate General's School have been used to the fullest extent to analyze the interpretation of the Uniform Code of Military Justice by the United States Court of Military Appeals.

The findings and recommendations of the Committee have been reached after the most thorough exploration of sources of information possible within the available time—and after painstaking evaluation, applying collective experience and judgment. The proper administration of military justice is a keystone in the operation of any fighting force. Although our consideration has been limited to Army problems, we feel certain that all services must observe the principles underlying our recommendations—*fairness*, *decentralization*, *simplicity* and *stability*.

There follow the findings and recommendations of the Committee, which are discussed at length under topical headings in Part II.

COMMAND RESPONSIBILITY (Section A, Part II)

FINDINGS

1. Present legal prohibitions against activity which may have the effect of influencing the decisions of persons responsible in judicial affairs do not unduly interfere with the proper execution of command responsibility.

2. The dividing line between the proper execution of command responsibilities and illegal command influence is not understood by the service-at-large.

3. Failure to understand this distinction tends to inhibit instruction in disciplinary matters.

4. There is a need for additional instruction in the Army school system for officers who are potential commanders of battalion and higher units. This instruction should emphasize command responsibilities in the field of discipline and military justice.

5. The offense of conduct unbecoming an officer and gentleman has lost some of its meaning.

6. There is little evidence of any intentional effort to influence findings or sentences of Army courts-martial or to interfere with judicial functions.

RECOMMENDATIONS

1. That Article 37 be amended to enlarge the class of persons to whom it applies.

2. That Article 133 be amended to carry dismissal as a mandatory punishment.

3. That the Chief of Staff publish a directive to clarify for all commanders the distinction between proper exercise of command responsibility and improper command influence.

4. That The Judge Advocate General institute a procedure for the guidance of newly appointed general court-martial authorities.

COMMANDERS' CORRECTIVE POWERS (Section B, Part II)

FINDINGS

1. Restricted Article 15 powers encourage increased use of trial by courts-martial. More than 50,000 soldiers were convicted by summary and special courts-martial in 1959.

2. Recorded Article 15 actions against officers have after-effects which defeat correctional objectives.

3. Progressively higher technical standards must be met by summary and particularly special courts-martial.

4. Line officers do not receive sufficient training to conduct special courts-martial trials in full compliance with the Uniform Code of Military Justice.

5. Proposals to require that summary and special courts-martial be operated by lawyers are not practical.

6. Proposals in the DOD amendments (HR 3387) for increased Article 15 powers are inadequate.

7. It would improve discipline to increase commanders' corrective powers and to abolish summary and special courts-martial.

RECOMMENDATIONS

1. That the Uniform Code of Military Justice be amended to increase Article 15 powers so as to eliminate summary and special courts-martial.

2. That at the proper time an information plan be developed to present this proposal to the Army and to the general public in proper perspective.

3. That Department of the Army reconsider present regulations requiring permanent records of punishments administered to officers under Article 15.

MILITARY JUSTICE PROCEDURES BEFORE TRIAL
(Section C, Part II)

FINDINGS

1. Judicial interpretations of Article 31 have invalidated rules established in the Manual for Courts-Martial concerning the admissibility of evidence.

2. Judicial interpretations concerning commanders' authority to order searches are not clear and do not appear to satisfy the needs of the military service.

3. Maintenance of good order and discipline is impeded by the interpretation of the law in the above subjects.

4. Procedures for pretrial investigation under Article 32 lack flexibility and require excessive time.

5. In complicated cases better pretrial investigations and better trials will result if the investigation is conducted by a trial counsel and the accused is represented by a defense counsel.

RECOMMENDATIONS

1. That Article 31, Uniform Code of Military Justice, be amended to eliminate the restrictions caused by some judicial interpretations.

2. That the Uniform Code of Military Justice be amended by adding an article to define authority for searches in a military community.

3. That the Uniform Code of Military Justice be amended to permit pretrial investigations (Article 32) by a trial counsel.

PROCEDURES IN TRIALS BY COURTS-MARTIAL (Section D, Part II)

FINDINGS

1. Trials by general courts-martial are slow and cumbersome.

2. The interests of the government and the accused do not require trial of all cases by a court-martial consisting of a law officer and members.

3. In special situations provision for trials before a law officer only would increase the flexibility of the general court-martial.

4. The rule for mental responsibility (paragraph 120*b*, Manual for Courts-Martial, 1959) hampers medical experts in giving clear and definitive testimony.

5. Army procedures permitting agreed pleas of guilty operate to the mutual benefit of the accused and the government.

RECOMMENDATIONS

1. That the Uniform Code of Military Justice be amended to permit a general court-martial to be convened without the presence of members for the purpose of settling legal questions in special sessions.

2. That the Uniform Code of Military Justice be amended to make all identifiable problems of law matters for resolution by the law officer alone.

3. That the Uniform Code of Military Justice be amended to permit a law officer alone to sit as a general court-martial under conditions specified in the statute.

4. That paragraph 120*b*, Manual for Courts-Martial, 1951, be amended to incorporate a rule of mental responsibility conforming with Section 4.01 of the American Law Institute's Model Penal Code (Tentative Draft No. 4, dated 25 April 1955).

5. That no change be made in Army procedures allowing agreed pleas of guilty.

SENTENCES (Section E, Part II)

FINDINGS

1. Administration of confinement facilities and treatment of offenders have been complicated by judicial decisions invalidating portions of the Manual for Courts-Martial.

2. The prestige of honorable officers and noncommissioned officers is damaged by rules permitting confinement of officers without dismissal and confinement of noncommissioned officers without reduction.

3. The presence on a military post of an officer sentenced to dismissal without confinement pending completion of appellate review impairs morale and discipline.

4. Opportunities for offenders to be restored to duty without the issuance of punitive discharges have been decreased by the *Cecil* and *May* decisions.

5. The Army has a superior system for screening, rehabilitating and restoring prisoners in confinement.

6. Boards of review should review records of trial for legal correctness and a specialized agency should review the appropriateness of sentences.

7. Some advantages may be obtained by adjusting the law to clear the way for the Attorney General to treat selected military prisoners as youthful offenders.

RECOMMENDATIONS

That the Uniform Code of Military Justice be amended:

1. To clarify how and when sentences may be carried into execution;

2. To restate permissible sentences;

3. To restore Manual for Courts Martial rules for automatic reduction and limitations on the use of confinement except when dismissal or punitive discharge is adjudged;

4. To establish indeterminate sentences to confinement;

5. To establish a sentence control board for review of certain sentences and other clemency functions;

6. To remove the requirement that review for sentence appropriateness be a function of a board of review;

7. To permit the Secretary to order military persons to their homes pending appellate review of sentences to punitive separation when confinement is not authorized; and

8. To authorize the Secretary to transfer selected military prisoners to the Attorney General for further treatment as youthful offenders.

RECORDS OF TRIAL AND REVIEW OF FINDINGS (Section F, Part II)

FINDINGS

1. There is unnecessary duplication and wasted effort in the appellate review of general courts-martial proceedings.

2. Many of the past issues litigated on review had no direct bearing on the guilt or innocence of an accused or whether he had received a fair trial.

3. The tendency toward the multiplication of adversary procedures militates against the simplification of military justice.

4. The requirement for the general court-martial convening authority to approve findings delays the appellate process and is unnecessary to military justice as long as the convening authority has full powers of clemency with respect to the sentence.

5. Department of Defense amendments (HR 3387) will simplify appellate review to some extent, but will not fulfill all the requirements for needed improvement.

6. The key to important progress toward simplification is to provide for review of sentences apart from legal procedures.

RECOMMENDATIONS

That the Uniform Code of Military Justice be amended:

1. To remove any requirement for a convening authority to approve the findings of a general court-martial.

2. To incorporate authority to prepare summarized records of trial in certain general court-martial cases.

3. To permit the law officer to hear motions for revision and rehearing based on the record of trial and authorize revision proceedings or rehearings to be held.

4. To remove the requirement for a staff judge advocate review.

5. To limit boards of review to consideration of correctness in law and fact.

6. To authorize initial appellate review in OTJAG rather than by a board of review when the accused has pleaded guilty to all specifications and charges of which he was found guilty.

7. To give TJAG additional powers in the disposition of (1) cases initially reviewed in OTJAG, (2) cases in which a board of review or the Court of Military Appeals has ordered a rehearing, and (3) petitions for new trial.

JURISDICTION AND SUBSTANTIVE OFFENSES (Section G, Part II)

FINDINGS

1. Court-martial jurisdiction over retired members not on active duty does not contribute to maintenance of good order and discipline and can be eliminated.

2. The United States Court of Military Appeals has interpreted the Uniform Code of Military Justice to invalidate traditional modes of proof approved by the President as Commander in Chief.

3. The Uniform Code of Military Justice is inadequate to support good order and discipline under present conditions because constant

changes in definitions of offenses and modes of proof make court-martial results uncertain.

4. The punishment presently imposable for missing movement of a ship, aircraft or unit through design provides an inadequate deterrent for such offenses.

RECOMMENDATIONS

1. That the Uniform Code of Military Justice be amended as follows (by Articles):

a. *Article 2.*—To eliminate jurisdiction over retired members not on active duty.

b. *Article 83.*—To provide for punishing a person who procures or permits his entry in the armed forces by any knowingly false representation or deliberate concealment of his qualifications.

c. *Article 85.*—(1) To provide that absence without proper authority for more than six (6) months in peacetime and thirty (30) days in wartime creates a presumption of desertion unless the contrary is proven.

(2) To provide that enlistment in another armed force shall constitute desertion.

d. *Article 92.*—(1) To define the commands authorized to issue general orders.

(2) To define "general order".

(3) To establish the mode of proof of knowledge of general orders.

e. *Article 95.*—To abolish the distinction between custody and confinement.

f. *Article 107.*—To provide that statements made in line of duty including statements made to investigators are official statements.

g. *Article 118(3).*—To proscribe an act inherently dangerous to *another.*

h. *Article 121.*—To add the offense of embezzlement.

i. *Article 123a.*—To add a specific bad check statute.

j. *Article 131.*—To add the offense of false swearing when it occurs in a judicial proceeding.

2. That the Table of Maximum Punishments be amended by Executive Order to increase the confinement imposable for missing movement of ship, aircraft or unit through design to one (1) year.

IMPROVEMENTS FOR STABILITY (Section H, Part II)

FINDINGS

1. The standing of the President's regulations for military justice has been diminished.

2. Some cases are reversed because of errors of law that do not materially prejudice the substantial rights of the accused.

3. Current and future requirements demand increased stability in the administration of military justice.

4. Less fluctuation in military justice would occur if the Court of Military Appeals were increased to five members.

5. It is desirable that one or more judges of the Court of Military Appeals have reasonably current backgrounds in military-legal service.

RECOMMENDATIONS

1. That Article 36 be amended to make the President's regulations final and binding on appellate bodies after having been laid before the Congress for ninety days.

2. That Article 59 be amended to define material prejudice to the substantial rights of an accused.

3. That Article 67 be amended to authorize a five-judge Court of Military Appeals with members who have had recent military-legal experience.

PENDING LEGISLATION (Section I, Part II)

FINDINGS

1. The American Legion Bill (HR 3455):

a. Will create a requirement for more than twice the number of military lawyers now on active duty as judge advocates.

b. Will create a separate line of command for military lawyers.

c. Will require the use of lawyers in all courts-martial—summary, special and general.

d. Will severely limit military jurisdiction over officers and soldiers who commit civilian type offenses in the United States in peacetime.

e. Will not fulfill the need of the service for an effective military justice system either in peacetime or wartime.

2. The DOD Amendments (HR 3387):

a. Will increase Article 15 powers of battalion and higher commanders.

b. Will reduce the number of trials by summary court-martial.

c. Will achieve some economy in preparation of general court-martial records of trial.

d. Will simplify to some extent appellate review of general courts-martial cases.

e. Will give The Judge Advocate General desirable flexibility in dealing with orders for rehearings, petitions for new trial, and cases reviewed in OTJAG.

f. Will not fulfill the need of the service for an effective system of military justice in wartime.

RECOMMENDATIONS

1. That the Department of the Army continue to oppose HR 3455.
2. That the Department of the Army support legislation substantially as set forth in this report.

RELATED PROBLEMS (Section J, Part II)

FINDINGS

1. The Judge Advocate General's Corps is losing experienced officers faster than they can be replaced.
2. Judge Advocates with a background of line experience are needed.
3. The active duty strength of the Judge Advocate General's Corps is marginal for the performance of military justice functions under the Uniform Code of Military Justice.
4. There is a need for study of the military justice problems that might face isolated or detached units.
5. Young line officers would benefit from acting as assistants to trial counsel or defense counsel of a general court-martial.

RECOMMENDATIONS

1. That Department of the Army urge resumption of a program for sending selected Regular Army officers to law school with a view to later transfer to the Judge Advocate General's Corps.
2. That Department of the Army study ways of making a career in Judge Advocate General's Corps more attractive.
3. That The Judge Advocate General study and prepare emergency legislation to assure military justice support in the event of hostilities.
4. That the practice of having young line officers act as assistants to a trial or defense counsel of a general court-martial be encouraged if our plan for eliminating summary and special courts-martial is implemented.

PART II. DISCUSSION, FINDINGS AND RECOMMENDATIONS

A. Command Responsibility

DISCUSSION

General. It is apparent that analysis and discussion of the effectiveness and equity of our military justice system must start with an examination of the relationship of the system to the operation of an armed force. Unless there is agreement on terms such as "command responsibility", "discipline", and "justice", there can be no common ground for agreement on a solution.

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 needs 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 or dangerous 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. As stated in our preliminary report, "All correction must be fair; both officers and soldiers must believe that it is fair."

Correction and discipline are command responsibilities in the broadest sense, but some types of corrective action are so severe that under time honored principles they are not entrusted solely to the discretion of a commander. At some point, he must bring into play judicial processes. It is his responsibility to select the cases which he thinks deserve sterner corrective action than he is permitted to impose by himself. When he has done this, it is not intended that he be able to influence judicial decisions, for this would be nothing more than action by the commander himself. When the judicial process has concluded, however, a further opportunity is given the commander to

exert his influence and leadership toward the establishment of discipline. He is permitted to lessen the sentence if he thinks it is greater than needed for disciplinary purposes.

It is important to note that, since discipline is a function of command, at each level of command there must be appropriate correctional powers. If the corrective measures permitted for use by the commander standing alone are insufficient for his needs, then he must have access to greater powers, either by referring the case to a superior officer or by referring it to a court-martial for trial. Decentralization of corrective powers is important to military administration and operation because it results in self-sufficiency of units.

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.

What then should the role of the commander be with respect to a military justice system? He should have adequate corrective powers to deal with the widest possible number of transgressions against law, regulations and orders without resort to the processes of criminal law. The interests of discipline do not require that he have any power to interfere with the independent judgment of persons who are by law responsible for judicial actions.

Unlawful Influence—Art. 37. It is our opinion that there is nothing in Article 37 of the Uniform Code of Military Justice, which is the Congressional mandate against unlawfully influencing judicial action, that is at all inconsistent with proper military administration and operation. We have reviewed, with professional assistance, the decisions of the Court of Military Appeals dealing with the problem of so-called "command influence". It is not proper for us to say whether we agree or disagree with factual determinations or inferences drawn in those cases. We can say that the principles expressed in those cases are entirely consistent with the maintenance of good order and discipline. The Committee, therefore, supports the slight extension to Article 37 which is contained in the DOD omnibus bill (HR 3387). The Committee believes that no person should be allowed to attempt to coerce or improperly influence judicial action in the armed forces and recommends an additional clarifying amendment to Article 37.

There is a great deal of confusion throughout the Army concerning the meaning of "command influence". This is apparent in responses received by the Committee from commanders at all levels. Part of the difficulty comes from the term used, that is, "command influence". Congress and the courts have never condemned command influence of

the proper kind. All of the prohibitions are directed toward what is known as *illegal* command influence. There has never been a denial that discipline is a matter of command responsibility and there are a great many actions that must be taken in the field of military justice which are outright matters of command. Our review of the problem leads us to believe that only the following things are, or have been to date, considered to be illegal command influence:

a. To direct or suggest that all offenses of a specified type be tried by courts-martial.

b. To direct or suggest that a specified minimum or maximum punishment be imposed or approved for offenses of a specified type.

c. To direct or suggest that a subordinate commander who is required to dispose of a case or recommend disposition perform such duties in a manner which restricts the subordinate's exercise of discretion under the Uniform Code of Military Justice.

d. To advise court members that a person brought to trial has probably committed an offense.

e. To take any other action tending to predetermine the disposition of a case or to prejudge the findings or sentence in a case.

f. To refer critically to any action of a particular court-martial member, law officer or counsel in his capacity as such in any past or current case.

g. To direct intemperate language to members of his command with respect to military justice matters.

These principles are relatively easy to understand, even though unexpected factual circumstances may bring them into play. There seems to be no reason why they should be regarded as preventing proper guidance toward required standards of conduct or as preventing the development of proper discipline. However, responses from commanders of companies, battalions, and battle groups, frequently carry an undertone that education and instruction are somehow outlawed. Even some of our senior commanders have formed the opinion that rules against illegal command influence prevent proper training, particularly of the officers of their command. The danger of this belief is that it can lead to failure on the part of a commander to carry out his responsibilities to develop the highest possible standards of conduct among officers and enlisted men. It can lead to a feeling that disciplinary matters are purely a judicial problem rather than a command problem.

A program should be begun at once to counteract the confusion and frustration that is becoming evident. This program should emphasize the importance and value of command influence of the right type. It should emphasize the responsibility of command for the proper handling of disciplinary problems and clear up in the mind of commanders any idea that the courts have condemned this kind of command activity. Commanders also should be told as clearly

and accurately as possible those things that are forbidden by law, and the tests that are applied when judicial bodies examine the propriety of command instruction or action. In most of the command influence cases appellate bodies have recognized that the officer responsible was trying to improve his unit. In his concern for the whole he infringed the rights of an individual. Responses of officers surveyed showed also that even when influence was thought to exist it was frequently inadvertent. A substantial number of enlisted men believe commanders influence findings and sentences at least occasionally.

Officer Conduct. The Committee's surveys of commanders at all levels indicate that standards of officer conduct throughout the Army are probably higher than at any time since World War II. These standards, as might be expected, are having a beneficial effect upon good order and discipline. However, commanders feel that much more could be accomplished along these lines.

In connection with the question of officer standards, there is one specific amendment to the Uniform Code which the Committee believes would be of some benefit. Under the Code, a paradox exists. An officer may be tried and found guilty ot conduct unbecoming to an officer and gentleman and yet be continued on duty. It seems to us that there is virtue in the older rule that when an officer is found guilty of this particular offense, a dismissal should follow. The Committee is not under any misapprehension that there were ever a great number of convictions and dismissals of officers under this provision. In fact, the existence of the mandatory penalty sometimes encouraged court members to vote for an acquittal rather than a conviction. Nevertheless, when a conviction under this article did occur it determined the convicted person to be unfit for further association with honorable officers. This had a salutary affect and we are recommending an amendment to Article 133, Uniform Code of Military Justice, to provide that a person convicted of this article shall be dismissed from the service.

Education and Guidance. One of the results of our study and consideration of the problem of command responsibility toward military justice is that we are not entirely satisfied with the objective of our training of officers in military justice. A great deal of effort is being expended in training in the technicalities of military law—training line officers to act to some extent in the capacity of lawyers. This training has become more and more necessary as the influence of interpretation of the Code has been felt in special courts-martial. There is a tendency to regard military justice as a technical or legal problem, and these aspects are absorbing an undue amount of the training time devoted to the subject. With the change in promotion and command patterns, instruction received in schools is generally received a long time before the officer can expect to assume command

of a battalion or larger unit. Yet it is in these command positions that an understanding of how to use the Uniform Code of Military Justice in a proper and legal way is most needed. At this level of command, under any system, the commander has substantially larger powers to correct individuals. He has the responsibility of supervising his subordinate commanders in their administration of justice. At the suggestion of the Committee, USCONARC has explored the possibility of incorporating military justice instruction designed to assist potential commanders in our senior schools. The Commandant of the Army War College and the Commandant of the Command and General Staff College agree that such instruction is desirable and are taking the necessary steps to incorporate it. The Commandant of the Army War College is making available to The Judge Advocate General a period of two or three hours on the 13th or 14th of June 1960 for military justice instruction after the regular curriculum has been completed.

Special effort should be made to give to general courts-martial convening authorities as much instruction and assistance as possible. It is desirable that officers newly assigned to positions carrying general court-martial authority have some common basic guidance, which, among other things, will assist them in making proper use of their staff judge advocates and will refresh their understanding of the responsibilities and functions of command in the administration of military justice. The Judge Advocate General has furnished the Committee with a sample letter of guidance. It is the recommendation of the Committee that The Judge Advocate General institute the practice of sending a letter of this type to each officer newly appointed to a position carrying the responsibility for convening general courts-martial.

FINDINGS

1. Present legal prohibitions against activity which may have the effect of influencing the decisions of persons responsible in judicial affairs do not unduly interfere with the proper execution of command responsibility.

2. The dividing line between the proper execution of command responsibilities and illegal command influence is not understood by the service-at-large.

3. Failure to understand this distinction tends to inhibit instruction in disciplinary matters.

4. There is a need for additional instruction in the Army school system for officers who are potential commanders of battalion and higher units. This instruction should emphasize command responsibilities in the field of discipline and military justice.

5. The offense of conduct unbecoming an officer and gentleman has lost some of its meaning.

6. There is little evidence of any intentional effort to influence findings or sentences of Army courts-martial or to interfere with judicial functions.

RECOMMENDATIONS

1. That Article 37 be amended to enlarge the class of persons to whom it applies (Tab B).

2. That Article 133 be amended to carry dismissal as a mandatory punishment.

3. That the Chief of Staff publish a directive to clarify for all commanders the distinction between proper exercise of command responsibility and improper command influence.

4. That The Judge Advocate General institute a procedure for the guidance of newly appointed general court-martial authorities (Tab A).

Tab A—Sample TJAG letter
Tab B—Legislative proposals

SAMPLE LETTER TO NEWLY APPOINTED GENERAL COURT-MARTIAL CONVENING AUTHORITIES

Dear :

Because it is of the utmost importance that commanders maintain the confidence of the military and the public alike in the Army military justice system, the following suggestions are offered you as a commander who has recently become a general court-martial convening authority, in the hope that they will aid you in the successful accomplishment of your military justice functions and your over-all command mission.

Experience has demonstrated that a commander needs the professional advice and services of an officer trained in the interpretation of the Uniform Code of Military Justice and the Manual for Courts-Martial. Your staff judge advocate has been selected because of his qualifications in this and other military legal fields. He is the counterpart in your command of the general counsel in the civilian business community and he occupies fully as important a relative position. For him to serve you best, it is essential that you maintain close personal liaison with him. In most cases, legal advice can be effectively transmitted only through personal contact with legally trained counsel. In this connection, the Uniform Code of Military Justice requires that a convening authority deal directly with his staff judge advocate in matters pertaining to military justice.

Your staff judge advocate is authorized to communicate with senior judge advocates or with me concerning professional and technical matters, and he will be glad to do so in any case at your suggestion. In this way you are assured of highly necessary competent professional advice and guidance in the solution or avoidance of numerous difficulties, and your views may assist me in recommending policies and procedures designed to maintain discipline and morale consistent with the highest standards of the Army.

TAB A

It is, of course, essential that all persons concerned with the administration of military justice perform their duties as prescribed by statute and the Manual for Courts-Martial. Officers who are selected to serve as members of courts-martial should be well informed officers of conscience, courage, judicial temperament, common sense, and mature judgment. The mission or orienting personnel selected as prospective members of general and special courts-martial (particularly presidents of the latter) is yours, with the professional and expert aid and advice of your staff judge advocate. This orientation should include advice as to their duties and responsibilities under paragraphs 74 (Findings) and 76 (Sentence) of the Manual for Courts-Martial. It would be well in such advice to emphasize the following points:

a. The purpose of a court-martial trial is to determine the true facts regarding the charges against the accused.

b. Court members should assiduously refrain from assuming the role of advocates for either side, and from interfering with the law officer (in the case of a general court-martial) or trial or defense counsel, who are performing functions entrusted to them by the Uniform Code and the Manual.

c. The guilt or innocence of the accused is to be determined by the court members on the basis of their own consciences. An accused can be convicted only if proven guilty beyond a reasonable doubt.

d. Defense counsel may function without fear of any reprisal arising out of the vigorous and ethical discharge of his professional duties.

e. During recesses in a court-martial trial, court members must not communicate with counsel, the law officer, staff judge advocate, or convening authority with respect to the case in progress. Except in certain limited instances (e.g., subpars 67f, 122b, Manual for Courts-Martial, 1951), the convening authority should refrain from any communications with the court or counsel.

A serious danger in the administration of military justice is illegal command influence. Congress,

in enacting the Uniform Code of Military Justice, sought to comply with what it regarded as a public mandate, growing out of World War II, to prevent undue command influence, and that idea pervades the entire legislation. It is an easy matter for a convening authority to exceed the bounds of his legitimate command functions and to fall into the practice of exercising undue command influence. In the event that you should consider it necessary to issue a directive designed to control the disposition of cases at lower echelons, it should be directed to officers of the command generally and should provide for exceptions and individual consideration of every case on the basis of its own circumstances or merits. For example, directives which could be interpreted as requiring that all cases of a certain type, such as larceny or prolonged absence without leave, or all cases involving a certain category of offenders, such as repeated offenders or offenses involving officers, be recommended or referred for trial by general court-martial, must be avoided. This type of directive has been condemned as illegal by the United States Court of Military Appeals because it is calculated to interfere with the exercise of the independent personal discretion of commanders subordinate to you in recommending such disposition of each individual case as they conclude is appropriate, based upon all the circumstances of the particular case. The accused's right to the exercise of that unbiased discretion is a valuable pretrial right which must be protected. All pretrial directives, orientations, and instructions should be in writing and, if not initiated or conducted by the staff judge advocate, should be approved and monitored by him.

Your function in acting upon the findings of guilty and sentence in cases tried before courts-martial appointed by you is an important judicial action in the military justice process. You are empowered to exercise broad discretion in your disposition of these cases. Your staff judge advocate reviews each case thoroughly and carefully, in accordance with the Uniform Code of Military Justice and the Manual for Courts-Martial. Although his

recommendations with respect to your action on findings and sentence are not legally binding upon you, they should be accorded great weight, in view of his specialized learning and training in law and military justice. As a general rule you should accept his advice on questions of law.

In determining what findings of guilty should be approved, you are required to rely solely upon the competent, admissible evidence of record considered by the court-martial. Like the members of the court, you are empowered to weigh the evidence, judge the credibility of witnesses, and determine disputed questions of fact. This power enables you to reassess the validity of the findings in the light of your own analysis of the evidence. The fact that the court's findings of guilty are supported by substantial evidence in the record will not justify your approving such findings unless you too are convinced that the guilt of the accused has been established beyond a reasonable doubt.

In determining what sentence, or part thereof, should be approved or approved and suspended, you should be guided by the circumstances of the offense and the previous record of the accused. You should not hesitate to approve a less severe sentence than that adjudged by the court, when you consider the court's sentence too severe. Other pertinent factors to be considered are the possibility of rehabilitation of the individual accused, as well as the deterrent effect of your action.

The results of court-martial trials may not always be pleasing, particularly when it may appear that an acquittal is unjustified or a sentence inadequate. Results like these, however, are to be expected on occasion. Courts-martial, like other human institutions, are not infallible and they make mistakes. In any event, the Uniform Code prohibits censuring or admonishing court members, counsel, or the law officer with respect to the exercise of their judicial functions. My suggestion is that, like the balls and strikes of an umpire, a court's findings or sentence which may not be to your liking be taken as "one of those things." Courts have the legal right

and duty to make their findings and sentences unfettered by prior improper instruction or later coercion or censure.

Rehabilitation of offenders should be a matter of primary interest to all commanders. If there is no probationary system in effect in your command, I suggest that you consider establishing one. If commanders display active and constructive interest in the status and progress of members of their commands who are in confinement, with the continuing objective of rehabilitating them for useful duty, this program will be more effective.

The Uniform Code and the Manual provide for a thorough appellate review of the proceedings, findings, and sentences of general courts-martial. Sentences approved by you which include dishonorable or bad conduct discharges, or confinement for one year or more, are reviewed by a board of review. The board may affirm only such approved findings of guilty, and the approved sentence or part thereof, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In reviewing a record, the board is empowered to weigh the evidence, judge the credibility of witnesses, and determine disputed questions of fact, recognizing that the court saw and heard the witnesses. In view of its greater accessibility to legal authorities and the fact that a board of review has occasion to review a large number of records of trial, and thus to make significant comparisons, it may not always agree with you or your staff judge advocate on the law or the facts or the propriety of the sentence. The fact that the board modifies or sets aside the findings or sentence should not, in the usual case, be construed as a reflection on the court-martial, your staff judge advocate, or you.

General court-martial cases, involving neither punitive discharges nor confinement for one year or more, in which the sentences have been approved and ordered executed by you, are examined in the Military Justice Division in my office. If any part of the findings or sentence is found unsupported in law, or

if I so direct, the record is then reviewed by a board of review as above indicated.

The Court of Military Appeals reviews cases in which the sentence affects a general officer or extends to death, cases reviewed by the board of review which The Judge Advocate General orders forwarded to the Court, and cases reviewed by the board in which, upon the accused's petition, the Court has granted a review. Most cases reviewed by the Court of Military Appeals are from the last category. The Court's review is limited to matters of law and does not extend to factual matters, except to a very limited extent. As the highest appellate body in the services, the Court frequently announces new principles of law applicable to courts-martial, and its results often cannot be predicted with certainty.

The Army court-martial rate and the number and type of punitive discharges adjudged is a matter of continual concern to the Secretary of the Army. I hope that you will emphasize to your command the importance of the exercise by officers of good judgment and common sense in the maintenance of discipline, without undue resort to trial by courts-martial. For example, the mishandling of a drunk soldier frequently aggravates his misconduct and may lead to unnecessary court-martial charges.

Finally, I extend my best wishes to you in your new and challenging assignment. I hope that you will avail yourself fully of the services of , who has been assigned as your staff judge advocate. I assure you that my staff and I stand ready to assist you in any way that may be helpful.

Sincerely yours,

The Judge Advocate General

TAB A

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *837. Article 37. Unlawfully influencing action of court* 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, law officer, 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 this chapter 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.	§ *837. Article 37. Unlawfully influencing action of court* No authority convening court-martial, *or any other commanding officer, or any officer serving on the staffs thereof,* may censure, reprimand, or admonish the court or any member, law officer, 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 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 finding or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.	The Committee adopts the DOD Amendment with the exception that the reference therein to special or summary court-martial is deleted. The Committee would delete the words "subject to this chapter" in the second sentence to make it clear that all persons are forbidden to attempt to coerce or improperly influence judicial functions in the armed forces.
§ *933. Article 133. Conduct unbecoming an officer and a gentleman* Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.	§ *933. Article 133. Conduct unbecoming an officer and a gentleman* Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.	The Committee Amendment would establish a mandatory punishment upon conviction of conduct unbecoming an officer and a gentleman. Article of War 95 required dismissal from the service upon conviction of this offense.

(TENTATIVE DRAFT)

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

B. Commanders' Corrective Powers

DISCUSSION

General. Under the Uniform Code of Military Justice a unit commander primarily concerned with correcting a member of his unit who has committed an offense has a choice of using non-judicial punishment (Art. 15) or referring the case for trial by a summary or special court-martial. These are the courts-martial which may be appointed by separate battalion and battle group commanders and, as used in the Army at this time, neither of these courts is able to adjudge a punitive discharge. Thus, referral of a case for trial by summary or special court-martial is ordinarily a sign that the unit commander has not stopped trying to bring this offender up to the necessary standards for continued service in his unit. It is reasonably clear, on the other hand, that a man whose case is referred to a general court-martial is regarded as a likely candidate for a bad conduct or dishonorable discharge. This is a signal that the offender is thought to be beyond the rehabilitation resources and ability of local unit commanders. Relatively few men who are convicted by general court-martial are restored to duty by the local commander unless unusual extenuating or mitigating factors come to light at the trial. By and large, the offenders coming before general courts-martial represent punitive or criminal problems; those before summary and special courts-martial represent, so far, only disciplinary problems.

Deficiencies of Present System. In our present system there is a great difference between the impact of non-judicial punishment, under Article 15, Uniform Code of Military Justice, and the disciplinary impact of sentences by court-martial. There is, for example, no graduation or increase in corrective power over enlisted men from the company commander to the commander at the highest echelon, except with respect to power to give a one grade reduction to a noncommissioned officer. With respect to officer offenders, there is a distinction between the commanding officer below general court-martial level who can give no forfeiture and the commander with general court-martial convening authority who may impose upon an officer of his command a forfeiture of one-half of one month's pay.

It is desirable to analyze the existing situation with respect to commanders' powers both from the aspect of equity for the individual and effectiveness in operation. Enlisted men have little to fear from the application of present Article 15 powers. The company commander is particularly ineffective, since he is usually excluded from the class of commanders who may reduce a noncommissioned officer one grade. Aside from reduction possibilities, senior commanders have no greater authority.

The relatively innocuous nature of punishment available under Article 15 may be harmful rather than beneficial. There is evidence that it leads frequently to use of courts-martial for offenses that the commanding officer would have preferred to handle himself. Conviction by a court-martial creates a criminal record which will color consideration of any subsequent misconduct by the soldier. For example, a noncommissioned officer may survive one summary courts-martial but it is extremely unlikely that, with one conviction on his record, he will survive a second trial and retain his status. For any man, of course, the fact of a criminal conviction on his record is a serious handicap in civilian life. It may interfere with his job opportunities; it may be counted against him if he has a brush with a civilian law enforcement agency; and in general he tends to be a marked man. In 1959 more than 50,000 soldiers were convicted by summary and special courts-martial.

The problem of the light punishment that can be given under Article 15 understandably causes a mixed reaction among enlisted men. Judging from a survey of approximately 2,000 enlisted men, soldiers feel that they can expect fairer punishment for minor offenses from their commanding officers than from a summary court-martial. (Perhaps, the concept of "fairer punishment" means lighter punishment.) There is substantial sentiment against any idea of abolishing company punishment. On the other hand, there is no substantial interest, except in the noncommissioned officer group, in increasing the maximum power of the commanding officer. Linked with this, though, is the feeling by 75% of the sample that a summary court-martial should not result in a criminal record. Sixty-two percent of the sample felt that a special court-martial conviction should not be a criminal record. Another fact of interest in this survey is that while summary, special and general courts-martial are regarded by a preponderance of the surveyed personnel as being fair most of the time, there tends to be a latent suspicion about the summary and special courts which are closer in command relationship to the immediate unit commander. For example, over 60% of the enlisted personnel feel that they would like to have lawyer defense counsel before these courts where, in fact, lawyers are not now supplied. It is to the summary courts-martial under our present system that the enlisted man offered Article 15 can go if he demands trial. It is probably fair to say that, while there is some appreciation of the gravity of a possible courts-martial conviction, most men do not visualize themselves in the role of being convicted by court-martial, and, hence, think only of the immediate benefits of severely restricting the commander's non-judicial power.

For the officer offender who is guilty of a minor offense the real problem is the devastating after-effect from what appears on the surface as a minor corrective punishment by his superior. Written

reprimands given an officer under Article 15 are forwarded for inclusion in his departmental 201 file. Thus, Article 15 actions will be considered whenever his file is examined for favorable or unfavorable personnel action. More and more the attitude is that an officer who has one record of an Article 15 imposed upon him might just as well make his plans to get out of the service. This, of course, defeats the theory of punishment as a corrective measure. Knowledge of the lasting effect of written Article 15 actions tends to restrict use of the Article by commanding officers. Administrative reprimands or oral reprimands are used frequently to avoid after-effects, even though more severe treatment might have a better immediate effect. As so often happens when the only available correction seems too severe, some offenders will not be corrected and will feel that they have gotten away with something; others, who are corrected, will feel that they have been unduly and unjustly treated. The undesirability of such a situation is felt keenly by many senior commanders who furnished advice and information to the Committee.

Reliance upon courts-martial to dispose of all disciplinary cases of any size is slow and inefficient. It creates a problem of national scope because of the number of persons stained with criminal convictions. Quoting a soldier, ". . . conviction by summary is the first step of a downhill fall for an EM's whole Army career and entire life can be ruined . . ." Regardless of these deficiencies, can the system still be made to serve the disciplinary needs of the service?

Predicted Difficulty. Before the Elston Act of 1948, the court-martial system did not rely upon the use of lawyers for its operation. With the adoption of the Elston Act, participation of lawyers became a necessity in a general court-martial. General administration of military justice, however, continued to depend on the Manual for Courts-Martial rather than the result of decided cases. The establishment of the Court of Military Appeals by the Uniform Code of Military Justice changed this.

Continuously and progressively, the Court of Military Appeals has asserted its authority to develop military law through its decisions and to hold these decisions paramount to any contrary rules expressed in the Manual for Courts-Martial. At first, the effect of this was not felt in summary and special courts-martial, although the Code makes no distinction between the three classes of courts-martial as far as the standards and rules to be applied are concerned. Gradually, pressure has been mounting to exact from the special court-martial, with its facsimile of general court-martial procedure, full compliance with the standards established by the Code. In 1957 the Court of Military Appeals ruled that the Manual for Courts-Martial could no longer be used by court members during general or special courts-martial trials. Only the law officer or the president of a special court-martial may use the Manual for Courts-Martial during a trial. *United States* v.

Rinehart, 24 CMR 212 (1957). From this pressure have come certain side effects. Non-lawyer personnel are forced to try to act the part of lawyers. In doing this they have become more and more dependent upon legal personnel at division, post, or higher headquarters to coach them and assist them every step of the way. Decentralized operation has become dangerous.

Sixty-one percent of the senior commanders consulted believe that line officers receive insufficient training to administer and conduct special courts-martial in full compliance with the Code. Among company and battery commanders, 80% do not think their training sufficient; at the intermediate command levels opinion as to the sufficiency of training is divided. Because of the legal requirement placed on special courts-martial some commanders believe that this court should be staffed with lawyers.

In the Committee's opinion, if the present trend continues, each special court-martial will need at least one lawyer and probably three for operation that will meet required standards. It does not appear that the requisite number of judge advocate officers can be obtained in peacetime, nor that the solution is desirable in terms of military operation.

Summary Punishment Generally. Our evaluation of the status of summary and special courts-martial has caused us to make a rather extensive survey of the use of summary punishment in the armies of other civilized countries, particularly our NATO allies. (Tab A) From this survey it appears that our Army is the only one in which a field grade commander does not have authorization to take corrective action to the level of at least 21 days physical restraint. Our survey has led us to examine with particular care the system used in the Canadian Armed Forces which appears to have had outstanding success since it went into operation in 1952. Although it would be a mistake to over-emphasize the similarities, there is no doubt that the Canadian soldier has much in common with his American counterpart. Authority conferred upon commanding officers in the Canadian Army has greatly reduced the need for court-martial trials and has enhanced discipline. (Tab B)

There is before Congress now an amendment to the Code sponsored by the DOD, which would give a commander of field grade authority to impose a forfeiture of one-half of one month's pay upon an enlisted man or to confine him for not more than seven days. Upon officers of his command, a commander with general court-martial jurisdiction could impose a forfeiture of one-half of two month's pay, or double the amount of forfeiture presently permitted. The Committee considers that this proposal, while in the right direction, is wholly inadequate. It is inadequate, first, because it does not assist the company commander in any way, and, second, because it would require the

continuance of summary and special courts-martial under the unsatisfactory condition noted above.

An overwhelming majority of commanders at all levels have indicated to the Committee that Article 15 must be increased to achieve effective utilization of the Uniform Code of Military Justice. Ninety-two percent of the senior commanders felt that Article 15 should be increased; 43% of them regarded this as the single change most necessary in the Code. The amount of the increase recommended depended in each case upon the objectives of the officer making the recommendation. Recommendations ranged all the way from something approaching the DOD bill to the equivalent of the Canadian system.

Committee's Plan. The Committee believes that the correctional function now accomplished by summary and special courts-martial more appropriately could be accomplished by corrective action of a commander without resort to court-martial. Our recommendation is founded on these premises: officers who command units in our Army are fair; they are more interested in the welfare of members of their command than anyone else; they have the integrity and the discrimination to apply corrective measures justly; and they should have the widest possible authority and bear complete responsibility for their decisions.

Cases which normally go to the inferior courts are those in which the commander still is trying to effect rehabilitation at the local level. Very often they involve good soldiers who have made a mistake and must be corrected for their own good and as an example to others, but in all probability will never become true disciplinary problems. Commanders at all levels should have appropriate authority to correct an officer or soldier for transgression of laws, regulations or orders, when under all circumstances it appears that the offender has continued usefulness to his unit and his continued service will not damage the reputation of the Army. At least among enlisted personnel, such offenders are identifiable as those who are presently being subjected to trial by summary or special courts-martial. It would be no more difficult to identify them for the application of commander's corrective powers. It is the Committee's view that only a person who commits an offense for which the death penalty would be possible either in peace or war need be ineligible for correction under Article 15.

The range of powers which the Committee recommends is set forth on the attached chart. (Tab C) Any substantial reduction from this proposal would require reevaluation of the distribution of disciplinary functions which is intended.

Operation of the Plan. As recommended by the Committee, a form of physical restraint is permitted for a period of seven days by a company commander or ninety days by a commander of the level now

authorized to convene special courts-martial. This restraint is called "correctional custody" to distinguish it from confinement. It is important to keep in mind the distinction that corrective measures under our concept are not sentences and are not the result of a conviction for crime. Confinement is a sentence by court-martial after conviction for crime and should be restricted to that connotation. Persons in correctional custody should, to the maximum extent possible, be segregated from persons who are awaiting trial or are in confinement as the result of trial for crime. It should be possible, without materially increasing facilities or overhead, to keep persons undergoing corrective custody from immediate or regular association with any other group. Our recommended statute provides simply that they should not be in "immediate" association. Further details on segregation and treatment of persons in correctional custody are a matter for regulation. It is visualized, for example, that when the opportunity existed to give a person in this status meaningful training, preferably with his own unit, he would undergo such training outside the confinement facility and would be returned after duty hours for such work and activities as were specified for his group. It is contemplated, also, that a period of correctional custody would be the occasion for a complete evaluation of the individual—making full use of mental health unit facilities and all the techniques and procedures which have been developed so successfully in connection with the operation of Army stockades.

Permissible corrective measures set forth in the Committee's proposal represent the maximum of each type permitted by statute, but corrective measures of different types may be combined. The President or Secretary concerned could further restrict the use of powers by restricting classes of persons subject to correction or by restricting the corrective measures in amount or type. In addition, superior commanders could limit or suspend the powers of their subordinates, thus effecting proper command supervison. Commanding officers with the full range of corrective powers would also be authorized to delegate their powers to a field grade officer. This provision is regarded by the Committee as important in connection with the area responsibility which must be assumed by certain commanders in a theater of operation. Since the commander's powers take the place of the summary and special courts-martial, area responsibility for discipline of military personnel must be fulfilled through the use of Article 15. It is not believed that commanders will delegate authority to act in disciplinary matters except when absolutely necessary, because the responsibility will remain with the commanding officer who made the delegation.

Under the Committee's proposal, any person who is informed that a commanding officer intends to impose corrective measures upon him can elect to be tried by a general court-martial. An offender who is

informed of an intended corrective action at company level has an option to request that his offense be referred to his battalion or battle group commander for disposition. When he reaches that level of command, he may then request trial by court-martial. The right to trial by court-martial in lieu of action under Article 15 is even more substantial than it has been in the past, for in place of the right to trade the justice of the commanding officer for the justice of a one-man court-martial appointed by the commander, there is now the right to have a trial before a law officer with a legally trained defense counsel to safeguard the rights of the accused. For the purpose of hearing such a case, a general court-martial consisting of a law officer only, with jurisdiction limited to six months' confinement and six months' forfeiture of two-thirds pay is proposed. The record of trial by this court-martial is a summarized record and appellate review is completed by review of the record by a judge advocate at the headquarters of the officer exercising general court-martial jurisdiction. In addition to the right to require trial in lieu of Article 15, the person who accepts Article 15 has a right to appeal to the next higher commander concerning the extent of the corrective measures taken and the merits of his case. A superior commander has the power to reduce or wipe out the action taken by the lower commander, although the person making the appeal must undergo the corrective measures while the appeal is being processed. A superior commander has no authority to increase the corrective measures. Corrective action accepted under Article 15 is not a criminal conviction for any purpose. Further action under this article by another commander or a subsequent trial by court-martial for the same offense is barred.

Some records of the nature and extent of correction must be kept, but these can be restricted to use in connection with military service with a specified time for destruction. Records of the more serious corrections should, however, be admissible for sentencing purposes if the person is tried by court-martial. This could be done in the Manual for Courts-Martial when preparing to implement the plan.

Acceptability of Plan. While the Committee has not had time to circularize field commanders concerning the specific proposals recommended, there is nothing in the proposal which is inconsistent with the known views of commanders other than those who said that in their opinion Article 15 could never replace the special court-martial. The Committee has explained in some detail why it feels that the special court-martial must eventually be replaced by Article 15 or so fundamentally changed in composition that it could no longer serve its present purpose. The proposal of the Committee has a marked similarity to the Canadian system which has proven successful both in wartime and in peace.

The Committee's proposal has been studied for feasibility by personnel of a battle group of the 101st Airborne Division. (Tab D)

The battle group commander and his company commanders are enthusiastic about the plan except for use of corrective powers by the company commander against his company officers. The plan is flexible enough to allow officer problems to be referred to the battalion or battle group commander for action. As far as the statute is concerned, the Committee believes that the power of the company commander over his officers should be retained. Company officers are adequately protected from abuse of these powers by the right to require remand to the next higher commander or to appeal an action of a company commander.

Adoption of the Committee's proposal would have a profound effect upon the Army. Among other things, it would require a reorientation of much of our military justice training so that commanders, potential commanders and all enlisted persons would understand the proper use of the commanders' corrective powers. From our brief discussion of the present attitude of enlisted men toward Article 15 and inferior courts-martial, it is apparent a definite educational program would be necessary before such a new system were put into effect. The system has many features which would tend to make it acceptable to enlisted men. Foremost is its orientation toward correction rather than penalty. The plan does away with a criminal conviction—the ineradicable penalty. There is no "bad time" to be made good. And whenever detention of pay is applied it should be obvious that there is no intent to penalize.

Finally, new regulations would be required. Many of the procedures mentioned in this discussion are properly matters for implementation by regulation. They do not appear in the statute.

Delegation of commanders' corrective powers to platoon leaders and senior noncommissioned officers was considered by the Committee, but, at this time, it is not recommended.

The Committee has considered, also, the applicability of this proposal to the other Armed Services. No handicap is foreseen in the use of such a system by the Air Force, and, in fact, no reason is known why it would not be entirely acceptable to them. It is apparent that the Navy might conclude that the particular type of court-martial provided as an alternate to action under Article 15 could not be made available to Navy personnel on ships at sea. There is always the possibility that an exception could be made in the statute so that a line-officer court could be utilized in this special situation.

FINDINGS

1. Restricted Article 15 powers encourage increased use of trial by courts-martial. More than 50,000 soldiers were convicted by summary and special courts-martial in 1959.

2. Recorded Article 15 actions against officers have after-effects which defeat correctional objectives.

3. Progressively higher technical standards must be met by summary and particularly special courts-martial.

4. Line officers do not receive sufficient training to conduct special courts-martial trials in full compliance with the Uniform Code of Military Justice.

5. Proposals to require that summary and special courts-martial be operated by lawyers are not practical.

6. Proposals in the DOD amendments (HR 3387) for increased Article 15 powers are inadequate.

7. It would improve discipline to increase commanders' corrective powers and to abolish summary and special courts-martial.

RECOMMENDATIONS

1. That the Uniform Code of Military Justice be amended to increase Article 15 powers so as to eliminate summary and special courts-martial. (Tab E)

2. That at the proper time an information plan be developed to present this proposal to the Army and to the general public in proper perspective.

3. That Department of the Army reconsider present regulations requiring permanent records of punishments administered to officers under Article 15.

Tab A—Non-Judicial Punishment Discussion
Tab B—Report by General Decker
Tab C—Proposed Corrective Powers
Tab D—Report by General Westmoreland
Tab E—Proposed Legislation

NON-JUDICIAL PUNISHMENT DISCUSSION

Index to Inclosures

TAB A

ARTICLE 15. Commanding officer's non-judicial punishment.

(a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu or admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers and warrant officers of his command—

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not to exceed one-half of his pay per month for a period not exceeding one month;

(2) upon other military personnel of his command—

(A) withholding of privileges for a period not to exceed two consecutive weeks; or

(B) restriction to certain specified limits, with or without suspension from duty, for a period not to exceed two consecutive weeks; or

(C) extra duties for a period not to exceed two consecutive weeks, and not to exceed two hours per day, holidays included; or

(D) reduction to next inferior grade if the grade from which demoted was established by the command or an equivalent or lower command; or

(E) if imposed upon a person attached to or embarked in a vessel, confinement for a period not to exceed seven consecutive days; or

(F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for a period not to exceed three consecutive days.

(b) The Secretary of a Department may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise such powers, and the applicability of this article to an accused who demands trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted persons assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary of the Department may by regulation specifically prescribe, as provided in subdivisions (a) and (b).

ARTICLE 15—UNIFORM CODE OF MILITARY JUSTICE— Continued

(d) A person punished under authority of this article who deems his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority shall have power to suspend, set aside, or remit any part or amount of the punishment and to restore all rights, privileges, and property affected.

(e) The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

UNITED STATES

	1917 [1]	1921 [1]	1928 [1]	1949 [1]	ART NAVY [2]	UCMJ [3]	OMNIBUS [3]
OFFICER & WO							
Confinement					10 days		
HL w/o Conf		1 week	1 week (No—MCM)	1 week (No—MCM)			
Extra Duties	Yes	1 week	1 week	1 week (No—MCM)			
Privileges	Yes	1 week	1 week	1 week	Suspension from duty	2 weeks	2 weeks.
Restriction	Yes	1 week	1 week	1 week	Arrest 10 days	2 weeks	2 weeks.
Forfeitures		½ Pay, 1 Mo. by BG upon MAJ, in war or grave public emergency.	½ Pay, 1 Mo. by BG upon Major in war or grave emergency.	½ Pay, 3 Mos. by GCM upon COL.		½ Pay, 1 Mo. by GCM.	½ Pay, 2 Mos. by GCM.
Reduction							
Repr or Adm	Yes	Yes	Yes	Yes	Yes	Yes	Yes.
ENLISTED							
Confinement					10 days: Solitary 7d. Sol Br & Water 5d.	ON SHIP 7d or 3d dim rations (MCM—Ex NCO).	7 days by MAJ or higher on ship 3d dim rations.
HL w/o Conf		1 week	1 week (MCM—Ex NCO).	1 week (MCM—Ex NCO).			
Extra Duties	Yes	1 week	1 week	1 week (MCM—Ex NCO).	Yes	2 weeks 2 hrs per day	2 weeks 2 hrs per day.
Privileges	Yes	1 week	1 week	1 week	Deprivation of Shore Leave.	2 weeks	2 weeks.
Restriction	Yes	1 week	1 week	1 week		2 weeks	2 weeks.
Forfeitures							½ Pay, 1 Mo. by MAJ or higher.
Reduction					Of any rating est by CO.	1 gr (MCM—NCO by Maj w/prom auth).	No change.
Repr or Adm	Yes	Yes	Yes	Yes		Yes	Yes.
Right to CM	Stat	Stat	Stat	Stat	No	Secy of Dept	Secy of Dept.

[1] Punishments may be cumulative to run concurrently.
[2] Punishments in the alternative.
[3] Punishments in the alternative, except Repr & Adm.

GREAT BRITAIN [1]

PUNISHMENTS [2]	Imposed Upon	Amount	Imposed by
Confinement [3]	S	28 days	Bn.[11]
Field Punishment [4]	NCO, S	28 days	Bn.
Forfeiture of Pay [5]	S	28 days	Bn.
Forfeiture of Seniority	O [10]		BG-GCM.
Reprimand and Severe Reprimand	O		BG-GCM.
	NCO		Bn.
Fine [6]	S	£2	Bn.
Stoppage of Pay [7]	O		BG-GCM.
	NCO, S		Bn.
Reduction from Acting Grade [8]	NCO, S		Bn.

MINOR PUNISHMENTS	Imposed Upon	Amount	Imposed by
Admonition	NCO, S		Co.
Restriction to Barracks	S	14 days	Co.
Extra Guard or Duty [9]	S	3 days	Co.

O—Officer & WO; NCO—Noncommissioned Officer; S—Private.

[1] A formal investigation similar to the Art 32, Uniform Code of Military Justice, precedes the disposition of every charge. This is usually conducted by the unit commander of the accused. If the CO determines that the offense is one with which he is authorized to deal summarily, and if he decides that adequate punishment is within his jurisdiction, he may enter a finding of guilty and impose punishment (subject to right to refuse, fn. 2). The unit CO may also forward the case to a superior CO having greater summary powers with a recommendation for summary disposition or trial by CM.

[2] Punishments are cumulative, except: no forfeiture of pay or minor punishment may be given in addition to confinement; also, no other punishment may be given in addition to reduction from acting grade. The accused has the right to refuse punishment and elect trial by CM in all cases except reprimand, severe reprimand, and minor punishment (also where a finding of guilty would involve a forfeiture of pay).

[3] This includes an automatic forfeiture of pay while in confinement.

[4] This punishment is applicable only while on *active service* (operations against an enemy, in a foreign country for the protection of life or property, or military occupation of a foreign country). Field punishment may consist of confinement, extra duties, and loss of privileges. It is considered severe and would ordinarily not be imposed where normal punishments would suffice.

[5] Applicable only when offense is committed while on *active service*.

[6] Applicable only where offense involves being drunk.

[7] May be imposed only where offense has occasioned expense, loss, or damage to Government property. It is a deduction from pay in the amount of the damage.

[8] The NCO may be an acting WO; the S may be an acting NCO. These are temporary grades and reductions may be from these temporary grades only.

[9] May be imposed only where offense relates to performance of guard or duty.

[10] Summary punishment in case of officers applies only to Major and below and WO, and can be meted out only by General Officers with GCM jurisdiction. Although a CO may not deal summarily with subordinate officers of the rank of Lt Col and above, he does have the power to dismiss charges with respect to them.

[11] In the case of separate detachments, especially in time of *active service*, the CO may be authorized the summary powers of a Bn CO. It should be noted that the Army Act speaks of the commanding officer as defined in the Queen's Regulations. It is by regulation, therefore, that the level was set at Bn CO for the imposition of the more severe punishments.

PUNISHMENT	Imposed by	Imposed upon
Reprimand	Co, Bn, Regt [4]	O, NCO, S.
Restriction to Barracks [1] (21 days)	Co, Bn, Regt	NCO, S.
Arrest in Quarters [1] (14 days)	Co, Bn, Regt	O.
Solitary Confinement [1] (14 days)	Co, Bn, Regt	NCO, S.
Arrest in Quarters [2] (14 days)	Regt	O.
Confinement [2 3] (14 days)	Co, Bn, Regt	NCO, S.
Reduction	Regt	NCO, S.
Disciplinary Barracks (3–12 mo)	Regt	S.

O—Officer; NCO—Noncommissioned Officer; S—Soldier.

[1] During non-duty hours.

[2] Day and night.

[3] Certain day and night confinement may be accompanied by partial forfeitures for NCO and S, and restriction to bread and water for S.

[4] Indicates commanding officers of Regiments and above, and General Officers.

IMPOSING AUTHORITY	MAXIMUM PUNISHMENTS [1] (expressed in days)							
	Corporals and Soldiers			NCO's		Officers		
	R	PR	C	AQ	SA	AQ	SA	C
Corporal	2	----	----------	----	----	----	----	----
Sergeant	4	----	----------	2	----	----	----	----
Adjutant [2]	4	2	----------	2	----	----	----	----
Lieutenant	8	4	----------	4	----	2	----	----
Captain (other than unit)	8	8	----------	8	----	4	----	----
Captain (his unit)	15	15	8	15	8	4	----	----
Field Grade officer, or any officer when acting as CO of Regiment or Post	15	15	10	15	10	8	----	----
Field Grade officer when CO of Regiment or Post	30	30	[5] 15/8	30	15	30	15	----
CO of Subdivision [3]	----	----	20/10	----	20	30	30	8
CG of Brigade	----	----	20/10	----	20	30	30	8
CG of Division	----	----	25/12	----	25	30	30	15
CG of Region, [4] a Corps, a Division in Algeria, or member Sup. Council of War	----	----	60/15	----	60	30	30	30
CG of 10th Region (Algeria)	----	----	60/15	----	60	40	40	40
Minister	----	----	60/15	----	60	60	60	60

Abbreviations:

R—Restriction to barracks during non-duty hours.

PR—Police Room. Every barracks contains a room adjacent the orderly room where offenders may be kept under close guard. Offenders placed here are in uniform, but may be deprived of minor privileges (e.g., wine or cigarettes).

C—Confinement; EM in Regimental Stockade; Officers in a separate prison.

AQ—Arrest in Quarters during non-duty hours.

SA—Strict Arrest in Quarters, all hours.

[1] In addition to those listed, Admonition or Reprimand may be given; also, the CO of a Regiment may reduce an NCO or lower 1 grade after appointing and consulting a Regimental Council of Inquiry.

[2] Adjutant is a rank roughly similar to Warrant Officer.

[3] Subdivision is an area command consisting of 2 or 3 Departments. There are 92 Departments in France proper and 8 in Algeria.

[4] Region is an area command larger than and superior to the Subdivision. There are 9 Regions in France proper, and Algeria constitutes the 10th.

[5] This figure, for example, indicates 15 days confinement, 8 of which may be in solitary.

Punishment	Upon Off and WO			Upon Sergeant			Upon Cpl and Pvt		
	Imposes [6]	Determines [7]	Days [8]	Imposes	Determines	Days	Imposes	Determines	Days
Admonition	Any [6]			Any			Any		
Reprimand	Any			Any					
Restriction [1]				Any	Bn	1–20	Any	Co [10]	1–30
Arr in Qtrs.[2]	Any	Reg	1–15						
Strict Arr in Qtrs.[3]	Any	Reg	1–10						
Police Room [2]				Any	Reg	1–20	Any	Reg	1–30
Strict Pol Room [3]				Any	Reg	2–15	Any	Reg	2–30
Solemn Reprimand	LtGen			BGen			Reg [11]		
Confinement	LtGen		[9] 10–60						
Reduction in Rank [4]				Reg			Reg		
Disciplinary Co.[5]				Reg			Reg		

[1] During non-duty hours; may also include extra duties.

[2] During non-duty hours.

[3] During all hours.

[4] When imposed, must be to lowest grade. Reg CO must appoint a commission of 3 officers (except for Pvt) but is not bound by its recommendation.

[5] Includes reduction to lowest grade. Reg CO must appoint a commission in every case. Not final until approved by Lt Gen. Similar to stockade but less severe; e.g., although usually under guard, passes may be granted. Once assigned to Disciplinary Company, offender serves remainder of tour of duty there.

[6] "Any" indicates any superior person.

[7] In cases involving a sentence, although any superior person may impose the type of sentence a higher authority determines the duration of the punishment within the minimum and maximum limits.

[8] Sentences are expressed in minimum and maximum days.

[9] Rarely imposed; historically the punishment for dueling.

[10] If imposed by a person of another company, then Bn CO determines; if of another Bn, then Reg CO determines; if of another service, then area CO determines.

[11] Not imposed on Privates.

GERMANY

15 March 1957

PUNISHMENT	Company CO	Bn CO	Regt CO & Up
Reprimand	O, NCO, S	O, NCO, S	O, NCO, S.
Severe Reprimand	NCO, S	O, NCO, S	O, NCO, S.
Administration of Pay [1] (3 mo)	NCO, S	O, NCO, S	O, NCO, S.
Fine (1 mo pay)	NCO, S	O, NCO, S	O, NCO, S.
Restriction [2] (3 weeks)	NCO, S	O, NCO, S	O, NCO, S.
Arrest Room [3] (3 das to 3 wks)		NCO, S	O, NCO, S.

O—Officer; NCO—Noncommissioned Officer; S—Soldier.

[1] This is the handling of the offender's pay by paying it in small installments at the discretion of the CO. Usually imposed when offense includes elements of unwise and excessive spending, bad debts, gambling, drunk and disorderly, etc. May *not* in any event be imposed if offender is married, over 25 years old, or has over 5 years service.

[2] During all or portion of non-duty hours.

[3] Offender may be required to participate in all or part of his duties. This punishment must be reviewed by a judge of a standing military court and declared fair as to imposition and duration.

6 June 1942

PUNISHMENT	Co. CO	Amount	Bn CO	Amount	Regt Co	Amount
Reprimand	O, NCO, S.		O, NCO, S.			
Severe Reprimand	NCO, S		O, NCO, S.			
Administration of Pay.	S	2 wks	S	2 wks		
Withdrawal of Pass.	S	3 wks	S	4 wks		
Restriction to Barracks.	S	2 wks	S	4 wks		
Arrest in Quarters	NCO	1 wk	O	1 wk	O	2 wks.
			NCO	2 wks	NCO	4 wks.
Strict Arrest in Quarters.	NCO	1 wk	O to Capt	5 das	O to Capt	10 das.
			NCO	2 wks	NCO	3 wks.
Arrest Room	NCO	1 wk	NCO	2 wks	NCO	4 wks.
	S	2 wks	S	3 wks	S	4 wks.
Strict Arrest Room	S	1 wk	S	2 wks	S	3 wks.
Reduction in Rank					(Soldier only.)	

O—Officer; NCO—Higher Noncommissioned Officers; S—Lower NCO's and Soldiers.

Brigade Commanders have certain additional powers, such as Arrest in Quarters for *Officers*, 3 weeks; Strict Arrest in Quarters for *Officers* up to Capt, 2 weeks; and reduction in rank of *lower NCO's*. Division and Corps Commanders have maximum powers.

Incl. 7

TABLE "A" TO ARTICLE 108.27

Summary Powers of Punishment When Commanding Officer Is of or Above the Rank of Major

A	B	C	D	E	F	G	H	I	J
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Right to Elect Trial by Court Martial (See art. 108.31.)	Approval Required (See art. 108.33.)	Obligatory Accompanying Punishments	Optional Accompanying Punishments	Consequential Penalties	QR (Army) References
1	Dentention	90 days	All men below WO2.	NCO's only	Yes, except when 30 days or less imposed upon a man below rank of corporal.	Punishment 2, NCO's only.	When 14 days or less imposed: $50 fine for NCO's; $25 fine for men below rank of corporal.	(a) Forfeiture of pay for period of detention. (b) Possible loss for pension purposes of time in detention. See regulation 23 made under Part V of The Defence Services Pension Act (App. XXI). (c) Possible effect upon trade grouping as prescribed in art. 11.115.	104.08
2	Reduction in rank.	See art. 104.09	NCO's only	Yes	Yes	Nil	Nil	Possible effect upon trade grouping as prescribed in art. 11.115.	104.09
3	Forfeiture of seniority.	3 months	Subordinate officers only.	No	No	Nil	Nil	Nil	104.10
4	Severe reprimand		Subordinate officers and NCO's.	No	No	Nil	Punishment 6	Nil	
5	Reprimand		Subordinate officers and NCO's.	No	No	Nil	Punishment 6	Nil	

6	Fine	$125	Subordinate officers.	No	No	Nil	Punishment 7 or 8 (all men below corporal).	Nil		104.12
		$100	NCO's							
		$75	All men below corporal.							(9 Jan 55)
7	Confinement to barracks.	21 days	All men below corporal.	No	No	Punishment 8	Nil	Nil		108.50
8	Extra work and drill.	14 days	All men below corporal.	No	No	Nil	Nil	Nil		108.51
9	Caution		Subordinate officers, and all men below WO2.	No	No	Nil	Nil	Nil		108.52

(G) (C) (14 Jan 53)

108.25—POWER OF COMMANDING OFFICER TO TRY ACCUSED

Section 136 of *The National Defence Act* provides in part:

"136. (1) A commanding officer may in his discretion try an accused person by summary trial, but only if all of the following conditions are satisfied:

(*a*) the accused person is either a subordinate officer or a man below the rank of warrant officer;

(*b*) having regard to the gravity of the offence, the commanding officer considers that his powers of punishment are adequate;

(*c*) the commanding officer is not precluded from trying the accused person by reason of his election, under regulations made by the Governor in Council, to be tried by court martial; and (*See article 108.31—"Election to be Tried by Court Martial".*)

(*d*) the offence is not one that in regulations made by the Governor in Council the commanding officer is precluded from trying." (*See article 108.31—"Election to be Tried by Court Martial".*)

(2) No commanding officer below the rank of major shall try a subordinate officer.

(M) **(1 Jul 59)**

NOTES

(A) A commanding officer cannot try a civilian subject to the Code of Service Discipline. The only service tribunal that can try such a civilian is a court martial.

(M) **(1 Jul 59)**

108.26—OFFICER TO ASSIST ACCUSED

(1) When an accused is to be tried by a commanding officer, an officer shall be detailed by or under the authority of the commanding officer to assist the accused, if:

(*a*) the accused requests that an assisting officer be detailed; and

(*b*) the exigencies of the service permit his request to be complied with.

(2) The assisting officer shall attend when the commanding officer tries the accused.

(M)

NOTES

(A) Except as provided in article 108.29(1)(h), the assisting officer is not normally permitted to take part in a summary trial. He may, however, assist the accused in the preparation of his defence and advise him regarding witnesses and evidence.

(M) **(1 Mar 59)**

AL 45

108.27—POWERS OF PUNISHMENT OF A COMMANDING OFFICER

The powers of punishment of a commanding officer shall be limited to the punishments and subject to the conditions prescribed:

(*a*) in Table "A" to this article, when the commanding officer is of or above the rank of major; and

(*b*) in Table "B" to this article, when the commanding officer is below the rank of major.

(G) **(14 Jan 53)**

NOTES

(A) The tables to this article include the restrictions on punishments contained in *The National Defence Act*, together with additional restrictions, and are a complete statement of the powers of punishment exercisable by commanding officers.

(B) A commanding officer who is below the rank of major has no powers of trial or punishment when the accused is a subordinate officer.

(C) A L/Cpl or L/Bdr is not a non-commissioned officer and is included in the phrase "all men below corporal".

(D) (*Reserved-Navy*).

(M) **(1 Mar 59)**

TABLE TO ARTICLE 108.11

SUMMARY PUNISHMENT POWERS OF DELEGATED COMMANDING OFFICERS

A	B	C	D	E	F	G	H	I	J
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Right to Elect Trial by Court Martial (See art. 108.31.)	Approval Required (See art. 108.33.)	Obligatory Accompanying Punishments	Optional Accompanying Punishments	Consequential Penalties	QR(Army) References
1	Detention	14 days	All men below corporal.	No	No	Nil	$15 fine	Forfeiture of pay for period of detention.	104.08
2	Reduction in rank.	No delegated officer shall impose this punishment							104.09
3	Forfeiture of seniority.	No delegated officer shall impose this punishment							104.10
4	Severe reprimand.		NCO's only	No	No	Nil	Punishment 6	Nil.	
5	Reprimand		NCO's only	No	No	Nil	Punishment 6	Nil.	
6	Fine	$50	NCO's	No	No	Nil	Punishment 7 or 8 (all men below corporal).	Nil	104.12
		$25	All men below corporal.						
7	Confinement to barracks.	14 days	All men below corporal.	No	No	Punishment 8	Nil	Nil	108.50
8	Extra work and drill.	7 days	All men below corporal.	No	No	Nil	Nil	Nil	108.51
9	Caution		All men below WO2.	No	No	Nil	Nil	Nil	108.52

108.12—COMMENCEMENT OF SUMMARY TRIAL BY DELEGATED OFFICER

(1) Before a delegated officer commences a summary trial, he shall peruse the charge report to determine whether he is precluded from trying the accused:

(*a*) by reason of the accused's rank or status;

(*b*) because the offence is one which he is pursuant to article 108.10 (Delegation of a Commanding Officer's Powers) not empowered to try;

(*c*) because the delegated officer considers his powers of punishment to be inadequate having regard to the gravity of the alleged offence.

(2) When the delegated officer has determined that he is not precluded from trying the accused, he shall have the accused brought before him and shall proceed with the trial as prescribed in this section.

(3) When the delegated officer has determined that he is precluded from trying the accused he shall:

(*a*) if he is precluded for a reason set out in paragraph (1) (*a*) or (*b*), refer the case to the commanding officer; or

(*b*) if he is precluded for the reason set out in paragraph (1)(*c*), refer the case to the commanding officer or to a delegated officer having greater powers of punishment than he himself holds.

(M) **(1 Jul 59)**

NOTES

(A) A delegated officer has jurisdiction in respect of a man who is not a member of, but who is present at, the unit to which the delegated officer belongs. Where the trial of a man of another unit can be held just as conveniently by the accused's own commanding officer or by the commanding officer of the unit at which the accused is present when proceedings are taken, a delegated officer should not exercise his jurisdiction.

(M) **(1 Jul 59)**

108.13—GENERAL RULES FOR CONDUCT OF TRIAL BY DELEGATED OFFICER

(1) When a delegated officer tries an accused summarily, he shall conduct the trial in the presence of the accused and:

(*a*) cause Part I of the charge report to be read to the accused;

(*b*) either direct that the evidence be taken on oath or inform the accused that he has the right to require that the evidence be taken on oath;

108.13—GENERAL RULES FOR CONDUCT OF TRIAL BY DELEGATED OFFICER—Continued

(*c*) receive such evidence as he considers will assist him in determining whether

(i) the charge should be dismissed or the accused found not guilty, or

(ii) the accused should be found guilty, or

(iii) the accused should be remanded to the commanding officer;

(*d*) hear the accused, if he desires to be heard;

(*e*) call such witnesses as the accused may request to be called and whose attendance can, having regard to the exigencies of the service, reasonably be procured, but nothing in this subparagraph shall require the procurement of the attendance of any witnesses the request for whose attendance is deemed by the delegated officer to be frivolous or vexatious;

(*f*) permit the accused to put to any witness such questions as are relevant to the charge or to the conduct and character of the accused; and

(*g*) if he considers that the interests of justice so require, adjourn the trial to enable further information to be obtained.

(2) A delegated officer may dismiss a charge at any stage of a trial.

TABLE TO ARTICLE 108.325

TABLE OF GUIDES FOR PUNISHMENT

Serial	Offence	Suggested Punishment	Remarks
1	Disobedience of lawful command.	Detention	Serials 1 to 5 are most serious offences striking at the roots of discipline, and should be treated accordingly. If the offence has been repeated, or is attended by circumstances that increase its gravity, the sentence should be increased accordingly.
2	Striking or offering violence	Detention	
3	Insubordination	Detention	
4	Disorders	Detention	
5	Abuse of inferiors	Reduction in rank or if offence is gross, detention.	
6	Desertion (*a*) Within first six months of service; (*b*) After six months' service (*c*) If second offence	 30 days' detention 45 days' detention 90 days' detention	See QR (Army) 103.21(3). Consideration should be given to the circumstances under which the accused was placed in custody, but it is unsound to assume that an accused who was arrested should necessarily be treated more severely than the man who surrendered. Where the accused surrendered the duration of his absence is a factor, but the application of any arbitrary rule such as "a day's detention for each day's absence" is not justified. It is especially unjust when applied to men who were arrested and returned in custody, since a man arrested after one week may be just as guilty as a man arrested after a year

TABLE TO ARTICLE 108.325—Continued

TABLE OF GUIDES FOR PUNISHMENT—Continued

Serial	Offense	Suggested Punishment	Remarks
7	Absence without leave (*a*) First offence (*b*) Second offence (i) if absent under 10 days. (ii) absent 11–30 days (iii) absent 31–60 days (iv) absent over 60 days	Minor Punishment or Fine. Fine 5 days' detention 14 days' detention Up to 60 days' detention	If the absence was long and there are no extenuating circumstances, detention may be warranted even for a first offence. If the absence is short (unless under orders to embark) corrective counselling, a minor punishment, or a fine should usually suffice.
8	Drunkenness	Fine	For second offence maximum fine may be warranted. If repeated third time detention may be warranted.
9	Escape from custody	Detention	
10	Negligent or wilful interference with lawful custody.	Detention	
11	Offences relating to enrolment	Maximum Fine	Where there is connivance the instigator may be awarded more severe punishment.
12	Offences in relation to vehicles (*a*) driving offences (*b*) unauthorized use	 Fine Detention	

13	Theft	Detention	If nature of offence indicates that accused should not be retained in the service, imprisonment may be appropriate. Theft from a comrade should be treated as a more serious offence than ordinary theft.

(C) (12 Apr 52)

108.33—PRONOUNCEMENT OF FINDING AND SENTENCE BY COMMANDING OFFICER

(1) Except in the case of an accused who under article 108.31 elects to be tried by court martial, as soon as practical after the evidence has been received, a commanding officer shall, in the presence of the accused, pronounce the finding and, if the accused is found guilty, the commanding officer shall, subject to (3) and (4) of this article, pass sentence.

(2) If the commanding officer makes, under article 108.32, a special finding of guilty or a finding of guilty of a related or less serious offence than that charged, he shall inform the accused of that finding.

(3) If the commanding officer considers that an offender who is a non-commissioned officer should be sentenced to the punishment of detention or reduction in rank he shall:

(*a*) not pass sentence;

(*b*) inform the accused that the sentence proposed requires the approval of higher authority;

(*c*) seek the approval of higher authority in the manner prescribed in section 4 of this Chapter; and

(*d*) when the decision of higher authority has been received recall the accused and pass sentence in accordance with that decision.

4 January 1960

SUBJECT: Authority of Canadian Forces Commanders to Impose Disciplinary Measures

TO: Lieutenant General Herbert B. Powell
President, Committee to Study the Operation of the Uniform Code

1. Pursuant to your instructions, I proceeded to Ottawa on 13 December to study the effectiveness of the authority of the Canadian Commanding Officer to conduct summary trials. I conferred with The Judge Advocate General of the Canadian Forces, with other members of his department (including Navy and Air Force members), and with line officers who had commanded units from regimental to company size in World War II, Korea, and in peacetime.

2. a. In general, a Canadian commanding officer above the rank of major may call a soldier of his command before him, hear the evidence of an offense, permit the soldier to make a statement and present other relevant evidence, inform the soldier that he intends to impose punishment, and thereafter, if the offense is of a civilian nature or he determines the offense will require the reduction or detention of a noncommissioned officer, give the soldier 24 hours in which to decide whether he desires to accept the commander's punishment or demand a court-martial. When other purely military offenses are alleged, the soldier has no right to demand trial. The commanding officer (either on the spot or after 24 hours) then imposes punishment.

b. (1) A commanding officer above the rank of major may impose up to 90 days detention, reduction in rank, severe reprimand, fine ($75 below corporal, $100 NCO's), confinement to barracks up to 21 days, extra work and drill, and caution.

(2) A commanding officer may authorize officers of his command not below the rank of captain to impose detention up to 14 days, fines ($25 below corporal, $50 NCO's) as well as confinement to barracks, extra work and drill, and caution.

(3) All pay is forfeited while a soldier is detained. He is allowed 25 cents per day in detention. The marriage allowance of detainees is continued during detention.

3. The safeguards against abuse of the commanding officer's authority to impose summary punishment are:

a. Each commanding officer is responsible for the legality and appropriateness of all punishments imposed in his command. Each receives a weekly report of all punishments imposed in his command.

TAB B

b. The soldier has a right to elect trial by court-martial as to certain offenses.

c. Certain sentences must be approved by the officer to whom the commanding officer is responsible in disciplinary matters.

d. Any commander may limit the punitive authority of an officer to whom he delegates authority to conduct summary trials.

e. An officer or soldier who considers that he has suffered any personal oppression, injustice, ill treatment, or that he has other cause for grievance, may seek redress from such authorities as are prescribed by the Governor in Council.

4. a. Detention is served in detention barracks or in a unit detention room. The detention room may be used when the sentence is for less than 30 days.

b. The routine and training require "maximum effort and strictest discipline." The training is in two stages, the first stage lasting for a minimum of 14 days or longer depending on the detainee's conduct. During this period he is kept "on the go" from 0600 reveille to 2100 lights out. During the first stage no inmate is permitted to smoke, to have visitors, to have a "communication period." During the second stage he may have an aggregate of 30 minutes "smoking time," "communicate" with other inmates for a maximum period of 30 minutes, have visitors, use the library, and earn marks for remission of sentence.

5. a. All of the Canadian officers with whom I talked were strongly in favor of the Canadian system of summary trial by the commanding officer. They pointed out that the delegated commanders are able to take action in nearly all cases, because it generally takes only two weeks detention to effect a greatly improved attitude on the part of a recalcitrant soldier. They regarded the stern features of detention as necessary to effect this improvement—one officer said that a "lounge type" of stockade was ineffective.

b. Under circumstances which make the exercise of the powers of the field grade commanding officer too burdensome, additional commanding officers may be appointed by higher authority.

c. The Canadian officers believe that the authority vested in commanding officers from captain up impresses on commanders the responsibility for quick firm action to correct offenses, and, further, that it brings home to the commander his personal responsibility in the disciplinary field. They feel that under the Canadian system there is little likelihood that junior officers will develop the attitude of regarding trial and punishment as a matter for superior authority.

d. By way of comparison, I note that under the National Defence Act of 1952 (the Canadian Uniform Code) the power of a commanding officer in the Army to impose punishment was tripled as far as confinement goes. The Canadian law had theretofore permitted only

28 days detention. Under our Uniform Code the power of the commanding officer was reduced to two hours of extra fatigue per day for two weeks or to two weeks of restriction. Subsequent to the Canadian enactment, their court-martial rate dropped 46 percent. Subsequent to the enactment of the Uniform Code, our general court-martial rate rose about 20 percent. Put in another way, in 1957 and 1958 the Canadian Army, with a strength of over 50,000 averaged about 32 courts-martial per year and a little under 1,000 summary sentences to detention of over 30 days. In fiscal 1958 and 1959, the United States Army, with an average strength of almost 900,000, averaged about 3,000 general courts-martial per year and about 24,200 special courts-martial. The Canadian court-martial rate was 64/100 per 1,000 while our general court-martial rate was 3.3 per 1,000. The Canadian rate of "over 30 day detentions" was 20 per 1,000; the American rate for special courts-martial was 27 per 1,000. It was a one officer court, the commanding officer, that tried the detention cases in the Canadian Army. It required the presence of five or more officers to try each American case.

6. The Canadian and United States soldiers are much alike in character and background. Both countries have drawn on England for their basic beliefs and military traditions.

7. I recommend that the board indorse the adoption of the Canadian Army system of summary trial by commanding officer with the following modification: that in lieu of summary trial the procedure to be used be termed "commanders' correction" and that determinations of guilt by commanders shall not be convictions, that records thereof be kept for the purposes of military personnel administration but, by law, be prohibited from release outside the military establishment.

[s] Charles L. Decker
CHARLES L. DECKER
Brigadier General, USA
Assistant Judge Advocate General
for Military Justice
Member of Committee

3 Incl
w/d

COMMITTEE RECOMMENDATION FOR COMMANDERS' CORRECTIVE POWERS (ARTICLE 15)

Corrective powers of commander over	Company and detachment		Separate battalion, battle group & higher	
	Officer & WO	EM	Officer & WO	EM
1. Reprimand	Yes	Yes	Yes	Yes.
2. Loss of privileges	1 month	1 month	3 months	3 months.
3. Restriction*	1 month	1 month	3 months	3 months.
4. Extra duties including fatigue duties	N/A	1 month	N/A	3 months.
5. Forfeiture*	Not to exceed 1/4 of 1 month's pay.	Not to exceed 1/4 of 1 month's pay.	Not to exceed 1/2 pay per month for 3 months.	Not to exceed 1/2 pay per month for 3 months.
6. Detention of pay*	N/A	Not to exceed 1/2 pay per month for 2 months.	N/A	Not to exceed 1/2 pay per month for 4 months.
7. Reduction	N/A	To lowest or any intermediate grade from any grade w/in CO's promotion auth.	N/A	To lowest or any intermediate grade from any grade w/in CO's promotion auth.
8. Correctional custody** (may include extra duty, including fatigue duties or hard labor).	N/A	Not to exceed 7 consecutive days.	N/A	3 months.
9. Confinement if attached to or embarked on a vessel.	N/A	Not to exceed 7 consecutive days.	N/A	Not to exceed 7 consecutive days.
10. Confinement on bread and water or diminished rations if attached to or embarked on a vessel.	N/A	Not to exceed 3 consecutive days.	N/A	Not to exceed 3 consecutive days.
11. Arrest in quarters	N/A	N/A	1 month	N/A.

*Three (3) may *not* be combined with 8; 5 may *not* be combined with 6.

**Correctional custody is physical restraint but not in immediate association with persons awaiting trial or held in confinement pursuant to trial by general court-martial, and it may or may not include periods of normal duty.

HEADQUARTERS

101ST AIRBORNE DIVISION AND FORT CAMPBELL

Fort Campbell, Kentucky

1 January 1960

SUBJECT: Proposed Changes to the Uniform Code of Military Justice Made by the Ad Hoc Committee to Study the Uniform Code of Military Justice and Preliminary Report of 9 December 1959

TO: Lt. Gen. Herbert B. Powell, USA
President, Ad Hoc Committee to
Study the Uniform Code of Military
Justice

1. Upon my return from Washington in the latter part of November, 1959, I directed the commanding officer of the 1st Airborne Battle Group, 506th Infantry, to conduct a two months study covering November and December, 1959, within his battle group in regard to the changes proposed by the Ad Hoc Committee in Tab C of the Preliminary Report, subject, Commanders' Corrective Power. The report of the commanding officer of the 1st Airborne Battle Group, 506th Infantry, is attached (Tab A). After careful study and consideration, both myself and my Staff Judge Advocate concur fully in this report. It is my considered opinion that this study fully supports the recommendations of the Ad Hoc Committee and proves that substantial saving in time and reduction of administrative work load could be accomplished at the company and battle group level without impairment of the time-honored principles of justice if the proposals of the committee were put into effect. In this connection it is noted in the reports of the individual company commanders in Tab A that in the majority of the cases where the offenders received courts-martial under the present system, the action taken by the company commanders under the proposed system was considerably lighter. It is felt that the lighter punishment adjudged by the company commanders under the proposed system would have a greater disciplinary effect upon the command than court-martial action since such action by the company commander is effective immediately and is not deferred until ordered executed by the convening authority as is the punishment adjudged by the courts-martial under the present system.

2. At this same time, I directed my Staff Judge Advocate to conduct a study covering the months of November and December, 1959,

TAB D

1 January 1960

SUBJECT: Proposed Changes to the Uniform Code of Military Justice Made by the Ad Hoc Committee to Study the Uniform Code of Military Justice and Preliminary Report of 9 December 1959

as concerns Tab D of the Preliminary Report of the Ad Hoc Committee, subject, Processing and Trial of General Court-Martial Cases. This report is attached as Tab B. During the two month period covered, 21 Article 32 investigations were received in the Office of the Staff Judge Advocate. The report covers the actual processing time to trial under the present system and the proposed processing time under the changes recommended by the Ad Hoc Committee in Tab D of the Preliminary Report. The report also indicates in each case how the saving of time under the new system would be accomplished. During this same period only three Article 32 investigations were conducted at Fort Campbell that were not forwarded to the Office of the Staff Judge Advocate. This is an indication that battle group and separate battalion commanders normally determine before referring a case to an Article 32 investigation that in all probability it will result in a recommendation for trial by general court-martial. This report proves conclusively that the proposals of the Ad Hoc Committee are sound and that such proposals will result in a great saving of processing time and also result in a more effective and efficient system for trying serious offenses by general court-martial. It is felt that after the proposals became law, the system of investigation of serious charges would more closely resemble the present system in effect in federal and state criminal jurisdictions.

3. On 28 December 1959 I and my Staff Judge Advocate discussed the possibility of applying the Federal Youth Correction Act to sentencing military offenders with Judge William E. Miller, Federal District Judge of the Middle District of Tennessee, and Fred Ellidge, Jr., the United States Attorney of the Middle District of Tennessee. Both of these officials concurred generally that youthful military personnel convicted of serious offenses could be handled under the provisions of this act. They both felt very strongly that military personnel who commit purely military offenses should not be sentenced under the provisions of this act and confined with prisoners convicted of felonies and offenses involving moral turpitude. Some thoughts concerning the applicability of the Federal Youth Correction Act in the sentencing of military prisoners is attached as Tab C.

4. Although I believe the present type of sentence adjudged by general court-martial is in effect an indeterminate type sentence, I feel that a statutory change is in order to more strongly emphasize this point. Such a change would encourage public recognition that we are continually seeking to improve our system of justice and treat-

ment of offenders. The table of maximum punishment should be referred to as "a guide for establishing an indeterminate sentence" and in each case the court in announcing its sentence should state that the confinement is not to exceed a certain number of years.

The guide for establishing indeterminate sentences must be retained in the hands of the President of the United States in order to meet disciplinary needs during time of emergency and because of the changing world situation.

[s] W. C. Westmoreland
W. C. WESTMORELAND
Major General, USA
Commanding

HEADQUARTERS

1ST AIRBORNE BATTLE GROUP, 506TH INFANTRY

Fort Campbell, Kentucky

"CURRAHEE"

31 December 1959

SUBJECT: Possible Changes of Non-judicial and Judicial Punishment Under Uniform Code of Military Justice

TO: Commanding General
101st Airborne Division
Fort Campbell, Kentucky

1. Reference is made to your discussion on the above subject with officers of this command. In accordance with your instructions, we have reviewed all disciplinary actions (to include Article 15) that were administered since 1 November 1959. The results of our review and opinions on the proposed changes are set forth in the following paragraphs.

2. A total of 99 disciplinary actions were handled during the period. This includes Article 15 administered either by the company or group commander. Considering the proposed changes in the Uniform Code of Military Justice mentioned by you, it has been concluded that:

a. All except five (5) of the 99 cases could have been handled under the non-judicial authority of the group or company commander. The five cases that would have been referred for trial included four (4) thieves and one (1) deserter. (The deserter is also a thief.) For info—the actual cases were administered (or will be administered) in the following manner:

AW 15	79
Summary	11
Special	5
General	4
Total	99

b. A large saving in administrative work could be realized. This includes the preparation and investigation of charges, the time involved in court procedures, and the subsequent reviews.

c. A more timely system of non-judicial punishment would be effected. Under the proposed changes to the Uniform Code of Military Justice, all cases (except the court cases) could have been handled within 24 hours, as opposed to the days or weeks involved in summary or special court procedures.

d. A more efficient system of non-judicial punishment will result. A company commander knows the background, personal problems and potential of the offender. As such, he is in a better position to administer punishment or to recommend appropriate punishment to the next higher commander.

e. The disciplinary problems of minor offenders would be reduced by at least one-half. The time and effort involved in the preparation of summary court cases (or Article 15 reductions) frequently causes company or unit commanders to resort to the restriction or extra duty authority of Article 15. This, in reality, is more of an inconvenience than a punishment. The proposed change would give the small unit commander an authority to punish that has meaning, and a reduction in petty offenses should result.

f. There would be a definite increase in the prestige of the small unit commander. The above discussion attests to this fact.

3. There are several other proposed changes to the Uniform Code of Military Justice which are not covered by the discussion of paragraphs above. The following opinions with respect to certain of these changes are offered:

a. *Disciplining of officers:* I do not believe that company or similar unit commanders should have the authority proposed under the changes to the Uniform Code of Military Justice. There is so close an association at small unit level that this tool of punishment can be administered best by the battle group or similar commander without destroying or lessening the effectiveness of the small unit commander. Otherwise, I agree with the proposed changes.

b. *Appeal:* The authority to appeal is most essential. This will serve to prevent abuses and to correct the errors or injustices of immature or inexperienced commanders.

c. *Records of punishment awarded by commanders:* It is recommended that records of punishment be maintained as follows:

(1) For punishment awarded by company or similar unit commanders—One (1) year or until discharge; whichever is less.

(2) For punishment awarded by group or similar commanders—Two (2) years or until discharge; whichever is less (In this connection, the records of fines, reductions and similar punishment should be retained and maintained in accordance with appropriate Finance and AG requirements.)

4. There is general agreement within this group as to the degree of punishment authorized under the proposed changes to the Uniform Code of Military Justice, with the exception of that pertaining to officers as discussed in subparagraph 3a above.

31 December 1959

SUBJECT: Possible Changes of Non-judicial and Judicial Punishment Under Uniform Code of Military Justice

5. The reports of two company commanders are attached for information. Similar reports of other commanders substantiate the conclusions and recommendations of this report.

6. In summary, it is concluded that the system and proposed changes to the Uniform Code of Military Justice would enhance the prestige of commanders by:

a. Providing a more efficient and timely system of non-judicial punishment.

b. Saving in administration through a reduction of overhead and administrative requirements.

c. Reducing the number of offenders for minor offenses.

[s] Harry H. Critz
HARRY H. CRITZ
Colonel, Artillery
Commanding

2 Inclosures
As stated

COMPANY "C"

1ST AIRBORNE BATTLE GROUP 506TH INFANTRY

Fort Campbell, Kentucky

"CURRAHEE"

24 December 1959

SUBJECT: Theoretical Resurvey of Uniform Code of Military Justice Actions

TO: Commanding Officer
1st Airborne Battle Group
506th Infantry
Fort Campbell, Kentucky

In accordance with verbal orders Commanding General, 101st Airborne Division and Fort Campbell, the following is submitted:

1. The proposed changes to the Uniform Code of Military Justice as pertains to the Company Commander's authority to adjudge punishment to the enlisted members of his command, I feel is a definite step in the right direction. There is attached hereto, as inclosure 1 and 2, a listing of those enlisted men that have appeared before, or been referred to court by me, for punishment. In each case the matter could have been more adequately dispensed with if the proposed changes were already in effect. I have indicated in each instance the action that would have been taken.

2. In regards to the disciplining of company officers by the Company Commander, I do not feel that this is wise since on no other level, or toward any other group, is the personality of the Commander felt with greater consequences. I feel, as do my company officers, that this tool of justice could, and would, turn in very short order into a rapier of injustice. I feel that this authority would degenerate into a club to correct tactical transgressions rather than character indiscretions.

24 December 1959

SUBJECT: Theoretical Resurvey of Uniform Code of Military Justice Actions

3. In the light of the preceding I would recommend that the Battle Group Commander be granted the authority as outlined within the proposed changes and that he, and he alone, be the first echelon of command to be empowered to impose monetary punishment upon a commissioned officer.

[s] R. L. Brons
R. L. Brons
Captain, Infantry
Commanding

2 Incl
A/S

Name	Offense	Art. 15 Punishment	Proposed Punishment	Remarks
A	Public Drunk	14 Days Extra Duty	Off Duty Conf 7 Days	3rd Like Offense.
B	No Drivers License	Admonition	Admonition.	
C	Public Drunk	14 Days Extra Duty	Off Duty Conf 7 Days; 14 Days Extra Duty.	
D	Driving Without Drivers License.	4 Days Extra Duty	4 Days Extra Duty	Only Sober One in Group on Pass.
E	Failure to Repair	14 Days Extra Duty	Forfeit ¼ Pay	Missed Best Squad Competition.
F	Participating in a Fight	14 Days Extra Duty	14 Days Extra Duty and Forfeit $15.	
G	Public Drunk	Reduce From Pfc to Pvt (E–2).	Reduce to Pvt (E–1) and Forfeit ¼ Pay.	3rd Like Offense.
H	Speeding on Post	14 Days Extra Duty, Supervisory Only.	Forfeit ¼ Pay	5th Offense.
I	Absent From Place of Duty; Missed Formation; Missed Kitchen Police; Failed to Get Haircut.	14 Days Extra Duty	Off Duty Conf 7 days; 30 Days Extra Duty.	
J	Failure to Repair	7 Days Extra Duty	30 Days Extra Duty; Forfeit ¼ Pay.	3rd Offense of Failure to Repair.
K	Failure to Repair	7 Days Extra Duty	7 Days Extra Duty.	
L	Leaving Scene of Accident	7 Days Extra Duty, Supervisory Only.	Forfeit ¼ Pay	Happened at Ft. Benning, Georgia.
M	Failure to Repair	14 Days Extra Duty	Forfeit ¼ Pay and 30 Days Extra Duty.	7th Offense.

Name	Offense	Summary Court Punishment Imposed	Proposed Punishment	Remarks
A	AWOL (Art. 86)	C/HL 30 days (Suspended); Forfeit $45 one month; Reduced to Rct (E–1).	30 Days Extra Duty; Forfeit ¼ Pay.	
B	AWOL (Art. 86)	C/HL 30 days (Suspended); Forfeit $45 one month; Reduced to Rct (E–1).	30 Days Extra Duty; Forfeit ¼ Pay.	
C	AWOL (Art. 86)	Forfeit $25 one month	Conf. Off Duty Hours; 30 Days Extra Duty; Forfeit ¼ Pay.	3 Article 15's.
D	AWOL (Art. 86)	C/HL 30 days, Forfeit $50 for one month; Reduced to Rct (E–1).	Conf Off Duty Hours; 30 Days Extra Duty; Forfeit ¼ Pay.	

COMPANY "E"

1ST AIRBORNE BATTLE GROUP, 506TH INFANTRY

Fort Campbell, Kentucky

"CURRAHEE"

24 December 1959

SUBJECT: Modification of Uniform Code of Military Justice

TO: Commanding Officer
1st ABG, 506th Inf
Fort Campbell, Ky

1. Per verbal instructions, Commanding General, 101st Airborne Division on 9 December 1959, the following information relative to the modification of the Uniform Code of Military Justice is hereby submitted.

2. It is felt by all officers and first three graders of non-commissioned officers in this command that more punishment should be available to the unit commander for non-punitive offenses. It is generally felt by enlisted men in this company that the present Article 15 is a farce. The most significant proposed change to the Uniform Code of Military Justice is the authority of the unit commander to fine an individual ¼ of his pay for one month. Personnel that have been broached with this punishment in a hypothetical situation have agreed that this punishment will make a man think twice before committing petty offenses.

3. The most beneficial advantage to a unit commander under the proposed changes is the ability to process non-punitive offenses quickly and efficiently. All cases that would normally require a Summary or Special Court Martial can be handled within a 24 hour period. The impact of rapid punishment for offenders will have a far reaching effect on all personnel.

4. Another advantage of the proposed change is that the unit commander will have more influence in the punishment his personnel receive. A commander knows the background of the offenders: their personal problems, debts, potential and previous offenses. In most cases the unit commander is in a better position to administer or recommend to the Battle Group Commander the punishment offenders should receive.

5. The increased authority of the unit commander over his officers leaves some doubt in my mind. For an experienced company commander it is feasible but I feel that it is too much authority for a young Second Lieutenant who is commanding a company. I recommend that the authority to fine an officer be retained by the Battle Group Commander.

24 December 1959

SUBJECT: Modification of Uniform Code of Military Justice—Continued.

6. Attached Inclosure 1 is a synopsis of Article 15's and Courts-Martial administered by me during the months of November and December. It will be noted under the proposed changes to the Uniform Code of Military Justice, Court Martials have been eliminated. Also the normal one to two weeks delay in processing charges and holding the court will be eliminated. Naturally this will evolve into a great economical saving by reducing man hours presently spent on Court Martials, personnel assigned to the Courts and Boards section in the Battle Group, and the cumbersome paper work that clogs our present Court Martial System.

7. The augmented punishment for extra duty will actually be a punishment instead of an inconvenience. Enlisted men will have much more respect for extra duty than they presently have.

8. The authority of a company commander to reduce a SP/4 in the company would be of great advantage. SP/4's who are leaving the service will perform much better until the end if they realize that the unit commander can reduce them on the spot.

9. The overall proposed changes to the Uniform Code of Military Justice will help restore the prestige that a company commander once enjoyed. I feel that in the long run it will reduce the Article 15's and Court Martials that are currently being administered. The Army's legal system will be conducted cheaper and much more efficiently and the company commander will be given the tools to do his job.

[s] John H. Claybrook
JOHN H. CLAYBROOK
Captain Infantry
Commanding

Incl: 1
Synopsis of Article 15's and Courts-Martial

COMPANY "E"
1ST AIRBORNE BATTLE GROUP, 506TH INFANTRY
Fort Campbell, Kentucky
"CURRAHEE"

ARTICLE 15

Name	Offense	Punishment Imposed	Punishment Desired Under Proposed Changes to UCMJ	Remarks
A	Failure to Repair for Reveille Formation. 0610 hrs 9 Dec 59 and 0610 hrs 10 Dec 59.	Reduced from PFC E-3, Order #34 Dated 10 Dec 59, for Misconduct.	No Change	Subject EM was in process of being discharged.
B	Failure to Repair for Reveille Formation 0610 hrs and remained absent until 0925 hrs 7 Dec 59.	7 Days Extra Duty, 9 Dec 59 thru 15 Dec 59 (Inclusive).	Forfeiture of ¼ of mans pay for 1 month.	Subject EM has been a slacker on many occasions. A forfeiture on his part would be of great value. To shake EM up.
C	Failure to Repair to Company "E" for training at 0700 hrs 18 Nov 59.	7 Days Extra Duty. 20 Nov 59 thru 26 Nov 59 (Inclusive).	Forfeiture of ¼ of mans pay for 1 month. Extra Duty for 1 month, 4 hrs a Day and 8 hrs on Sunday and Holidays.	Subject EM is now on Group Boxing Team. He has been pulled out of Jail on two occasions. Boxing Duties preclude a Suitable Punishment.
D	Failure to Repair for Reveille Formation. 0610 hrs, remained absent until 1600 hrs 17 Nov 59.	7 Days Restriction to Company Area, 17 Nov 59 thru 23 Nov 59 (Inclusive).	Confinement During Off Duty Hours for 7 Days. Forfeiture of 1 months pay for 1 month.	Subject EM given 7 days Restriction since he had a personal problem. I knew he was going AWOL again when he was restricted, which he did. He has many offenses to his credit at this time. EM is in for elimination under provisions of AR 635-208. A confine-

				ment after the first AWOL might have saved the man, However, I doubt it.
E	Borrowing an Automobile and becoming involved in an Accident. 1100 hrs 4 Nov 59.	7 Days Extra Duty, 1 Dec 59 thru 7 Dec 59 (Inclusive).	No Change	None.
A	Failure to Repair for Reveille, 0610 hrs and remained absent until 1137 hrs 16 Nov 59.	7 Days Extra Duty, 16 Nov 59 thru 22 Nov 59 (Inclusive).	No Change	Car broke down on pass. EM called in to CQ.
B	Failure to Stop at Stop Sign; Speeding 36 MPH in 25 MPH Zone.	7 Days Extra Duty, 18 Nov 59 thru 24 Nov 59 (Inclusive).	No Change	None.
C	Hunting out of Season in an Off Limits Area Without a Duck Stamp.	14 Days Extra Duty, 19 Nov 59 thru 2 Dec 59 (Inclusive).	Extra Duty for 1 month Forfeiture of ¼ mans pay for 1 month.	This was second offense of Illegal Hunting. Rod & Gun Club and Civil authorities saved man from Civil Punishment.
D	Failure to Repair for Reveille Formation 0610 hrs and remained absent until 1125 hrs 7 Dec 59.	7 Days Extra Duty 9 Dec 59 thru 15 Dec 59 (Inclusive).	No Change	New man. Exceeded pass limits and missed Bus. EM called Co. and said he would be late.
E	Sleeping while detailed as Barracks Guard. 18 Nov 59.	7 Days Extra Duty 20 Nov 59 thru 26 Nov 59 (Inclusive).	7 Days Extra Duty, Forfeiture of ¼ mans pay for 1 month.	Subject EM is on Group Boxing Team. Platoon Ldr has difficulty making man perform during morning tng.
F	Failure to Repair for Reveille 0610 hrs and remaining absent until 0845 hrs 30 Nov. 59.	7 Days Extra Duty, 1 Dec 59 thru 7 Dec 59 (Inclusive).	No Change	Subject EM missed Bus in Nashville. He called in to Company.

COMPANY "E"
1ST AIRBORNE BATTLE GROUP, 506TH INFANTRY
Fort Campbell, Kentucky
"CURRAHEE"

COURT MARTIALS

Name	Offense	Punishment Imposed	Punishment Desired Under Proposed Changes to UCMJ	Remarks
A	Stealing a Field Jacket; Breaking Restriction.	Special Court Martial Stealing Field Jacket—Not Guilty. Breaking Restriction—15 Days Hard Labor W/O Confinement.	Restriction for 1 month	Man is married to a Mentally Unbalanced woman. Very poor soldier, has excessive debts, will not be permitted to re-enlist in February 1960.
B	AWOL 7 Days	Summary Court: Reduced to E–1, 30 Days Hard Labor W/O Confinement. Forfeiture $55 for 1 month.	Confinement for 1 month, forfeiture of ½ months pay for 1 month, reduction to E–1.	See Remarks, D under Article 15.
	Sitting Down on Post while on Guard.	Summary Court: 30 Days Hard Labor W/O Confinement, Forfeiture of $55 for 1 month.	Restriction for 1 month, forfeiture of ¼ months pay for 1 month.	
C	AWOL 5 Days; AWOL 4 Days.	Special Court: Reduction to Grade E–1 Confinement for 6 months Forfeiture $50 a month for 6 months.	Confinement for 3 months; Reduction to Grade E–1; Forfeiture of ½ pay for 3 months.	Confinement suspended at CO's request. EM in process of elimination under provisions of AR 635–208. EM has: Broken into Co. Mess Hall, AWOL on 2 occasions, Refused to obey orders of NCO's, Started a fight at Co. Party.

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *815. Art. 15. Commanding officer's non-judicial punishment* (a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one of the following disciplinary punishments for minor offenses without the intervention of a court-martial— (1) upon officers of his command— (A) withholding of privileges for not more than two consecutive weeks; (B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks; or (C) if imposed by an officer exercising general court-martial jurisdiction, forfeiture of not more than one-half of one month's pay; and	§ *815. Art. 15. Commanders' corrective powers* (a) Under such regulations as the President may prescribe, any commanding officer may, in addition to or in lieu of a reprimand, and forfeiture of not more than one-fourth of one month's pay, impose the following corrective measures for offenses under this chapter (except for violations of sections 885, 894, 899, 900, 901, 904, 905, 906, 918, and 920(a) of this title (articles 85, 94, 99, 100, 101, 104, 105, 106, 118 and 120(a)) without resort to court-martial— (1) upon officers of his command— (A) withholding of privileges for not more than 30 consecutive days; (B) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;	The Committee Amendment provides for the vesting of appropriate authority in commanders at all levels to take necessary corrective measures without resort to court-martial. The Amendment contains a provision whereby the intended recipient may elect prior to the imposition of corrective action under subsection (a) to have the next higher commanding officer or his designee determine the matter. Also included is a provision for the intended recipient to elect trial by general court-martial, composed of a law officer only, prior to the imposition of corrective measures under subsection (c). The Amendment retains the provision for appeal formerly found in subsection (d). In addition the Amendment provides that corrective measures accepted under this article will operate as a bar to trial by

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
(2) upon other military personnel of his command— (A) withholding of privileges for not more than two consecutive weeks; (B) restriction to certain specified limits, with or without suspension from duty, for not more than two consecutive weeks; (C) extra duties for not more than two consecutive weeks, and not more than two hours per day, holidays included; (D) reduction to next inferior grade, if the grade from which demoted was established by the command or an equivalent or lower command; (E) if imposed upon a person attached to or embarked in a vessel, confinement for not more than seven consecutive days; or (F) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days. (b) The Secretary concerned may, by regulation, place limitations on the powers	(2) upon other military personnel of his command— (A) withholding of privileges for not more than 30 consecutive days; (B) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days; (C) extra duties including fatigue duties for not more than 30 consecutive days; (D) except where a forfeiture has been imposed under this subsection, detention of not more than one-half pay per month for two months; (E) reduction to the lowest grade or to any intermediate grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or within the promotion authority of any officer subordinate to the one who imposes the reduction; (F) except where a restriction has been imposed under clause (B) of this subsection, correctional custody for not more than seven consecutive days.	courts-martial or additional action under this article for the same offense, and further that measures taken under this article shall not be considered a conviction of crime for any purpose. Restriction, arrest and correctional custody are defined in § 809, Art. 9. Correctional custody imposed by company commanders may be limited to nonduty hours by appropriate departmental regulations. It may include extra duties, fatigue duties or hard labor. The DOD Amendments would permit a general court-martial authority to impose a forfeiture of one-half of an officer's pay for a period of two months. A commanding officer in the grade of major or above would be allowed to impose upon enlisted personnel a forfeiture of one-half of one month's pay and confinement for seven consecutive days.

granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers authorized to exercise those powers, and the applicability of this article to an accused person who demands trial by court-martial.

(c) An officer in charge may, for minor offenses, impose on enlisted members assigned to the unit of which he is in charge, such of the punishments authorized to be imposed by commanding officers as the Secretary concerned may by regulation specifically prescribe, as provided in subsections (a) and (b).

(d) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The officer who imposes the punishment, his successor in command, and superior authority may suspend, set aside, or remit any part or amount of the punishment and restore all rights, privileges, and property affected.

(G) if imposed upon a person attached to or embarked in a vessel, confinement for not more than seven consecutive days; or

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

(b) An officer in charge may impose on enlisted members assigned to the unit of which he is in charge, such of the corrective measures authorized to be imposed by subsection (a), as the Secretary concerned may by regulation specifically prescribe.

(c) Under such regulations as the President may prescribe—

(1) The commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, brigade, regiment, detached or separate battalion, battle group, or corresponding unit of the Army; the commanding officer of a district, garrison, fort, camp, station, or other place where members of Army are on duty;

(2) The commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
(e) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.	the United States, any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station base, auxiliary air field, or other place where members of the Marine Corps are on duty; (3) The commanding officer of an air command, an air force, an air division, wing, group, or separate squadron of the Air Force; the commanding officer of an Air Force base, auxiliary air field, or other place where members of the Air Force are on duty; (4) The commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or (5) The commanding officer or officer in charge of any other command when empowered by the Secretary concerned, may, in addition to or in lieu of a reprimand and forfeiture of not more than one-half pay	

per month for three months, impose the following corrective measures for offenses under this chapter (except for violations of sections 885, 894, 899, 900, 901, 904, 905, 906, 918, and 920(a) of this title (articles 85, 94, 99, 100, 101, 104, 105, 106, 118, and 120(a)) without resort to court-martial—

(A) Upon officers of his command—

(i) withholding of privileges for not more than 90 consecutive days;

(ii) restriction to certain specified limits, with or without suspension from duty, for not more than 90 consecutive days;

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

(B) Upon other military personnel of his command—

(i) withholding of privileges for not more than 90 consecutive days;

(ii) restriction to certain specified limits, with or without suspension from duty, for not more than 90 consecutive days;

(iii) extra duties including fatigue duties for not more than 90 consecutive days;

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	(iv) except where a forfeiture has been imposed under this subsection, detention of not more than one-half pay per month for four months; (v) reduction to the lowest grade or to any intermediate grade, if the grade from which demoted is within the promotion authority of the commanding officer imposing the reduction or within the promotion authority of any commander subordinate to the one who imposes the reduction; or (vi) except where a restriction has been imposed under clause (B) (ii) of this subsection, correctional custody for not more than 90 consecutive days. (d) A commanding officer of a command specified in subsection (c), clauses (1) thru (5) may designate an officer of his command in the grade of major or lieutenant commander or above who, in the name of the commanding officer, may exercise the same powers and perform the same duties as the commander designated in subsection (c), clauses (1) thru (5) may perform under this subchapter.	

(e) The corrective measures authorized in subsections (a) and (c) may be combined, except as indicated in those subsections, and will run concurrently.

(f) The corrective measures authorized by subsections (a), (b), and (c) shall not exceed the punishment prescribed for the same or similar offense as established by the President under the provisions of section 856 of this title (article 56).

(g) Under such regulations as the President may prescribe a commanding officer may exercise the corrective powers provided in subsection (a) or (c) over military persons present within his command but not assigned or attached thereto who are junior to him in rank or grade and who commit an offense under this chapter within his command.

(h) Prior to the imposition of corrective measures under subsection (a) any person who is alleged to have committed an offense under this chapter may elect to have the matter determined by the commanding officer, of the next higher command as set out in subsection (c), clause (1) thru (5), or his designated representative as provided in subsection (d).

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	(i) Prior to the imposition of corrective measures under subsection (c) any person who is alleged to have committed an offense under this chapter may elect to be tried by a general court-martial. (j) Where a person has elected trial by general court-martial under subsection (i) he shall be tried by a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)), which determines all questions of law and fact arising during the trial, and if the accused is convicted, adjudge an appropriate sentence. (k) The Secretary concerned may, by regulation, place limitations on the powers granted by this article with respect to the kind and amount of corrective measures authorized, the categories of commanding officers authorized to exercise those powers and the applicability of this article to a person who demands trial by court-martial. (l) A person corrected under this article may, through proper channels, appeal to the next superior authority. The appeal	

shall be promptly forwarded and decided, but the person corrected may in the meantime be required to undergo the correction adjudged. The officer who imposes the correction, his successor in command, and superior authority may suspend, set aside, or remit any part or amount of the correction and restore all rights, privileges, and property affected.

(m) Corrective measures imposed and accepted under subsections (a), (b), or (c) of this section shall be a bar to trial by courts-martial or additional action under subsections (a), (b), or (c) of this section for the same offense. Corrective measures imposed under subsections (a), (b), or (c) shall not be considered as a conviction of a crime for any purpose.

(n) The Secretary concerned may, by regulation, prescribe the form of records to be kept and the type of review to be given corrective measures taken under subsections (a), (b), or (c) of this section.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *816. Article 16. Courts-martial classified* The three kinds of courts-martial in each of the armed forces are— (1) General courts-martial, consisting of a law officer and not less than five members; (2) Special courts-martial, consisting of not less than three members; and (3) Summary courts-martial, consisting of one commissioned officer.	§ *816. Article 16. Courts-martial composition* There shall be in each of the armed forces general courts-martial which shall consist of— (a) a law officer and not less than five members; or (b) only a law officer who is certified to be qualified as a single-officer general court-martial by the Judge Advocate General of the armed force of which he is a member.	The Committee Amendment would delete the present provisions of Article 16, UCMJ, which classified three kinds of courts-martial. The Amendment is designed to establish a general court-martial either with a law officer and at least five members, or a law officer sitting alone at the election of the accused or to dispose of those cases resulting from the nonacceptance of corrective action under the provisions of the Committee Amendment of Article 15. The DOD Amendments would provide for a single-officer special court-martial consisting of a law officer. In view of the elimination of the special court-martial this amendment is not adopted; however, its objective is accomplished by subsection (b) of the Committee Amendment of Article 16.
§ *819. Article 19. Jurisdiction of special courts-martial.*	Repealed.	The Committee would repeal Article 19, UCMJ.
* * *		
§ *820. Article 20. Jurisdiction of summary courts-martial.*	Repealed.	The Committee would repeal Article 20, UCMJ, pertaining to summary courts-martial.
* * *		

§ 823. Article 23. Who may convene special courts-martial. * * *	Repealed.	The Committee would repeal Article 23, UCMJ, pertaining to special courts-martial. The DOD Amendment of Article 23, UCMJ, is not adopted by the Committee in view of the elimination of the special court-martial. The DOD Bill would amend subsection (b) of this article in the same fashion that it would amend subsection (b) of Article 22.
§ 824. Article 24. Who may convene summary courts-martial. * * *	Repealed.	The Committee would repeal Article 24, UCMJ.
§ 842. Article 42. Oaths (a) The law officer, interpreters, and, in general and special courts-martial, members, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, and reporters shall take an oath in the presence of the accused to perform their duties faithfully. (b) Each witness before a court-martial shall be examined on oath.	*§ 842. Article 42. Oaths* (a) The law officer, interpreters, *court-martial* members, trial counsel, assistant trial counsel, * * * (b) Same.	The Committee Amendment would strike out the words "and, in general and special courts-martial," and insert the words "court-martial" since only one kind of court-martial is contemplated.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§843. *Article 43. Statute of limitations* (a) A person charged with desertion or absence without leave in time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at any time without limitation. (b) Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under sections 919–932 of this title (articles 119–132) is not liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command. (c) Except as otherwise provided in this article, a person charged with any offense is not liable to be tried by court-martial or punished under section 815 of this title (article 15) if the offense was committed more than two years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command or before the imposition	§843. *Article 43. Statute of limitations* (a) Same. (b) Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under sections 919–932 of this title (articles 119–132) is not liable to be tried by court-martial or *corrected* under section 815 of this title (article 15) if the offense was committed more than three years before the receipt of sworn charges and specifications *by the commanding officer of the unit to which the accused was assigned at the time the offense was committed or before the imposition of corrective action under section 815 of this title (article 15)*. (c) Except as otherwise provided in this article, a person charged with any offense is not liable to be tried by court-martial or *corrected* under section 815 of this title (article 15) if the offense was committed more than two years before the receipt of sworn charges and specifications *by the commanding officer of the unit to which the accused was assigned at the time the offense*	Subsections (b) and (c) are amended by substituting the accused's commanding officer as the officer who must receive the sworn charges and specifications to toll the statute of limitations, and the reference to the summary court-martial authority is deleted.

of punishment under section 815 of this title (article 15). (d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.	*was committed or before the imposition of corrective action under section 815 of this title (article 15).* (d) Same. (e) Same. (f) Same. (TENTATIVE DRAFT)	

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

C. Military Justice Procedures Before Trial

DISCUSSION

General. Under this heading the Committee will discuss all investigative phases in the processing of charges with a view to trial.

A person who has knowledge of an offense should bring it to the attention of the appropriate commander. That commander must conduct a preliminary investigation in order to make an informed disposition of the allegation. For example, a company commander who is informed of an offense committed by a member of his command must find out the facts concerning the offense. He must decide (a) whether it is an offense for which he as a company commander should apply corrective measures without trial; (b) whether it is an offense which might be handled without trial by his superior commander; or (c) whether it is an offense which appears to require a trial. A battalion or higher commander, may go through the same steps. The offender may be under his immediate command or may come before him at the request of the offender or at the request of a subordinate commander. All of these actions require preliminary or informal investigations.

By judicial interpretation of the Code, certain restrictions have grown up around investigations. These restrictions are most notable in connection with the right of the accused not to incriminate himself and in connection with permissible types of searches. In Article 31, Uniform Code of Military Justice, Congress has established a right against self-incrimination for military personnel that goes much further than the general rights of a citizen under the Fifth Amendment to the Constitution. Not only is a person subject to the Code forbidden to coerce or unlawfully induce a statement by the accused but also the accused must be warned that he is suspected or accused of an offense and that he need not make any statement.

Self-Incrimination. The Committee finds that certain interpretations of Article 31 have invalidated rules expressed by the President in the Manual for Courts-Martial and are impeding the detection and trial of offenses against the Code. This Article has been held to block the admission of evidence derived from body fluids of the accused. It has been held also to exclude obviously trustworthy information or evidence obtained as a consequence of a statement taken without full compliance with Article 31. The meaning of the word "statement", as used in Article 31, has been extended to include, among other things, the handing over of a pass upon demand for proof of authority to be absent from duty. All these interpretations have had the effect of making it extremely difficult to investigate

suspected offenses in the military. They have had an adverse effect upon good order and discipline.

It is the Committee's understanding that the Manual for Courts-Martial treatment of self-incrimination is consistent with the usual legal construction of the scope of the right against self-incrimination. The underlying reason for refusing to admit coerced confessions or admissions is that they may be unreliable and untruthful. Following this line of reasoning, our civilian jurisdictions have generally considered that body fluids and evidence obtained as the result of a confession, particularly items of real evidence, do not come within the circumscription. Scientific tests which reveal the presence of alcohol in the blood or the presence of narcotics in the urine are not affected by failure to warn the accused or even by unlawful inducement or coercion.

The interpretation that a request to produce a pass is a request for a statement has been particularly troublesome. *U.S.* v. *Nowling*, 25 CMR 362 (1958). It ranks high in the comments of senior commanders as an item which should be corrected. It has been reported to the Committee that one effect of this decision has been harassment of innocent soldiers on pass. Each soldier in a pass area may be requested to show his pass two or three times in an evening so that the military police will not be accused of having selected certain individuals for special attention due to some undefined suspicion.

Interpretation of Article 31 has gone far beyond our traditional ideas of protecting an individual against being forced to incriminate himself. In addition, a doctrine known as "general prejudice" has been applied in cases where a violation of Article 31 has been found. This doctrine appears merely to justify punitive action against the Government for improper action on the part of a member of the service.

The Committee is proposing a substantial amendment to Article 31 of the Uniform Code of Military Justice. Care has been taken in preparing the proposed amendment to avoid a change that would in fact or appearance condone activities by military law enforcement agencies offensive to ordinary ideas of fair play. The Committee believes that in all aspects of our judicial procedures and the handling of allegations against soldiers, any deviation from traditional American concepts of fair play and justice would be damaging to the maintenance of discipline. Thus, for example, the Committee's amendment would permit the use of evidence obtained as a derivative of a confession if the sole reason preventing use of the confession itself was a failure to give the required warning. It would not permit the use of evidence obtained as a consequence of a coerced confession. The overall effect of the proposal, we believe, would be to return to the original intent of Congress and to emphasize the importance of this article

as a guarantee that convictions may not be supported by compelled self-incriminating testimony.

Search and Seizure. The second area of major concern in the field of investigative activities is that relating to searches. This area is not presently covered in the Uniform Code of Military Justice; the rules are specified in the Manual for Courts-Martial.

In a recent case (*United States* v. *Brown*, 28 CMR 48 (1959)), the Court of Military Appeals held that a vial containing heroin could not be used as evidence in the prosecution of a soldier because it was taken from his person in a search which the Court found to have been unauthorized. The search was regarded as illegal because the Court found that the commanding officer who ordered the search did not have reasonable grounds to believe that this individual was committing an offense. The facts of the case were these: The company commander of a unit in Korea suspected that a number of his men were using or trafficking in narcotics. The accused was one of those suspected. The accused, along with others who were under suspicion went on pass to an area where narcotics could be obtained easily and cheaply. The commanding officer arranged that when the men under suspicion returned from pass, they would be stopped and searched. On the truck returning from the pass area, there were six men of the group under suspicion and four who were not under suspicion. The commanding officer ordered that all the men on this particular truck be searched. As a result of the search, possession of heroin by the accused was established. He was the only one of the group found to be in possession of narcotics.

The results in this case have caused a great deal of confusion in the service. It is not entirely clear from this decision, or from later decisions, exactly what the Court of Military Appeals considers to be a permissible reason for search. In this state of affairs, the Committee considers it imperative that the law be clarified. The committee has drafted an amendment to the Uniform Code of Military Justice codifying rules governing search and seizure by military authorities, along the lines set out by the President in the Manual for Courts-Martial. The critical part of the Committee's amendment, of course, is the final subsection which gives a commanding officer the right to order a search of a person subject to his authority at any time he deems it necessary to safeguard the health and security of his command or in the interest of good order and discipline. The Committee believes that this broad power is supported by custom in the services and is a matter of military necessity. In this respect, a military community must have rules substantially different from the rules which are applicable in civilian life.

It should be noted that the Committee does not propose to allow a commanding officer to delegate authority to order searches of this

type. Since the authority is based upon military necessity, the determination of military necessity should be made by the commanding officer who is responsible for the health, security and good order and discipline of a command. This is another area in which the Committee believes a commander should be given necessary authority and should bear full responsibility for the use of his authority.

Pretrial Investigation. Formal investigation of charges under Article 32 of the Uniform Code of Military Justice, known as pretrial investigation, presents a problem also. Such an investigation must be conducted before a commander may refer charges for trial by a general court-martial. Field commanders indicate that pretrial investigations are increasingly difficult to conduct and consume too much time.

The nature of preliminary investigations which must be made by commanding officers has been discussed. In addition to the preliminary investigation, there may be investigations by military police. If the case may possibly be referred to a general court-martial, there must be a pretrial investigation by an investigating officer appointed under the provisions of Article 32. And after a case has been referred to a general court-martial there will be additional investigation by the trial counsel and the defense counsel in preparation for trial.

The Committee regards a certain amount of duplication of investigations as inevitable. No responsible individual should take disciplinary or judicial action without satisfying himself as to the true state of facts. Formal pretrial investigation has been characterized as taking the place of consideration by a grand jury which is a feature of our civilian criminal process. It is designed to protect the accused from undergoing a trial on ill-founded charges. In our system, this pretrial investigation also affords the accused an opportunity to know exactly what evidence may be available to prove his guilt. He thus has a right of discovery of prosecution evidence which he does not have in civilian criminal jurisdictions. This right of discovery is entirely in keeping with a sense of fair play and we regard it as a desirable feature in our military justice procedure.

Formal pretrial procedures should be speeded, if it is possible to do this without injury to the rights of the accused. This can be done by having the investigation accomplished by a lawyer who will be the trial counsel if the charges go to a general court-martial, accompanied in the investigation by a lawyer who can defend the accused during the investigation and any subsequent trial. Several advantages can be obtained. In the first place, the activity of the trial and defense counsel at this stage will be their preparation for trial. If the charges are referred to a general court-martial, counsel will be ready to proceed with the case with minimum delay. They will do their preparation while the evidence is fresh and ultimate justice will be promoted. Particularly in complicated cases, the recommendation of a lawyer

who is appointed to investigate will be a more reliable gauge of the justification for trial.

This procedure was used by some units prior to the Elston Act and used in combat situations. It was found to benefit both the Government and the accused. It speeded the preparation of cases for trial to a marked degree and it was effective in screening out ill-founded charges.

The Committee believes an amendment permitting such a procedure would be of great benefit. It is recommended as an alternate to the existing procedure because the Committee believes that there may be some cases which can be handled adequately by a non-lawyer investigating officer. Under the Committee's recommended procedure, a company commander having a set of charges to dispose of and having decided that the matter cannot be handled by commander's corrective action, will refer the charges to his battle group or battalion commander. The battle group or battalion commander may elect to appoint an investigating officer and proceed exactly as is now permitted. When the investigation is completed, he will forward the charges and the investigation to the general court-martial convening authority. On the other hand, if the charges when examined by the battle group or battalion commander seem to be complicated, or if that commander has no suitable officer available to conduct the investigation, he can call the general court-martial authority's headquarters and request that the investigation be made by lawyers. At the completion of the investigation, the report will be submitted to him with the recommendation of the investigating officer. If, after studying the report and the charges, he determines that it is a case not suitable for use of his corrective powers, he will forward the charges, the report of the investigation and his recommendation to the general court-martial convening authority. Because there are alternate procedures, the disposition of charges need not be delayed because legal personnel are not available at the moment.

If the defense counsel is dissatisfied with the manner in which the trial counsel conducts the investigation, the staff judge advocate is available for resolution of disagreements before trial; or the defense counsel can move for appropriate relief before arraignment at the trial.

FINDINGS

1. Judicial interpretations of Article 31 have invalidated rules established in the Manual for Courts-Martial concerning the admissibility of evidence.

2. Judicial interpretations concerning commanders' authority to order searches are unclear and do not appear to satisfy the needs of the military service.

3. Maintenance of good order and discipline is impeded by the interpretation of the law in the above subjects.

4. Procedures for pretrial investigation under Article 32 lack flexibility and require excessive time.

5. In complicated cases better pretrial investigations and better trials will result if the investigation is conducted by a trial counsel and the accused is represented by a defense counsel.

RECOMMENDATIONS

1. That Article 31, Uniform Code of Military Justice, be amended to eliminate the restrictions caused by some judicial interpretations. (Tab B)

2. That the Uniform Code of Military Justice be amended by adding an article to define authority for searches in a military community. (Tab B)

3. That the Uniform Code of Military Justice be amended to permit pretrial investigations (Article 32) by a trial counsel. (Tab B)

Tab A—Report by SJA, 101st Abn Div
Tab B—Legislative Proposals

HEADQUARTERS

101ST AIRBORNE DIVISION AND FORT CAMPBELL

Office of the Staff Judge Advocate

Fort Campbell, Kentucky

1 January 1960

SUBJECT: Article 32 investigations conducted by the trial counsel rather than a layman.

1. PROBLEM:

a. Would there be a saving in time without impairing the rights of the accused if the Article 32 investigation were conducted by the Trial Counsel in the presence of the Defense Counsel and the accused rather than the present method which utilizes an officer who has no formal legal training.

b. If the Article 32 investigation is conducted by the Trial Counsel along with the Defense Counsel, would the Office of the Staff Judge Advocate be able to carry this additional work load without extra personnel.

2. ASSUMPTIONS:

a. That the charge sheets, personal history statement, and summary of the expected testimony had been forwarded by the company commander to the battle group commander and that the battle group commander endorses these papers to the convening authority of a general court-martial indicating that the offense should be investigated by qualified counsel because he feels that the offense warrants punishment by a court rather than corrective action by the commander.

b. That the defense can waive any or all of the Article 32 investigation at any stage.

c. That adequate stenographic help is available to the Trial Counsel and that the Trial Counsel and Defense Counsel are not given too many additional duties, i.e., that they are not interrupted to do legal assistance cases.

d. That the Trial Counsel has immediate access to a photo-copy machine.

3. FACTS BEARING ON THE PROBLEM:

a. Twenty-one cases have been considered in making this report, these cases being disposed of in the Office of the Staff Judge Advocate during the months of November and December, 1959.

TAB A

b. A survey of special court-martial authorities discloses that during this period of time only three cases were given to Article 32 officers that were not forwarded to the general court-martial convening authority. Therefore, the report reflects the true work load if the investigation had been conducted under the proposed change.

4. DISCUSSION: The attached list of cases shows the actual processing time from the date charges were preferred to the date of trial, as well as the estimated processing time under the proposed change.

a. In most instances the saving of time comes from the elimination of repeating the investigation.

b. The greatest saving of time probably comes in those cases in which the Article 32 investigation discloses that a general court-martial is not warranted.

c. Although the Article 32 officer is supposed to indicate whether or not witnesses will be available at the time of trial, he does not always consider this point. In many instances, the victim of a larceny or a key witness is transferred overseas shortly after the Article 32 investigation or is becoming a civilian, necessitating depositions or travel expenses at time of trial. The I case is an example where the victim had been discharged prior to date of trial. Had the Trial Counsel conducted the Article 32 investigation, he could have been on immediate notice to re-arrange his docket or else to preserve the testimony.

d. Although there were no cases during this period of time concerning complicated bookkeeping and accounting procedures, there have been such cases in the past and they could be expected in the future. Often such cases, when given to an untrained investigator, require several days study of regulations and sifting through voluminous records prior to his investigating the case. If the investigation were being conducted by the Trial Counsel, he would almost have his case prepared at this point. In the highly technical cases it is believed that the saving of time would amount to the number of days actually spent by the layman investigator.

e. On "Morning Report" cases the investigation could be conducted by the Trial Counsel in a matter of minutes without him even leaving his office. Once he determines that the extract copy of the morning report is in good order and has discussed the case with the Defense Counsel, the Defense Counsel would likely waive

any investigation after talking the case over with the accused. The same procedure would apply to some extent in other cases involving mostly documentary evidence.

f. The average Article 32 officer under the present system attempts to interview all witnesses listed on the charge sheet and any others that he feels can shed light upon the case. Very often considerable cumulative evidence is gathered which adds little to the file and which is a waste of time and clerical help. If the Article 32 investigation is conducted by the Trial Counsel, he could close his investigation once there was a strong prima facie case established and he could determine that the charges were serious enough to warrant trial by general court. Then in later preparation of his case, he and the Defense Counsel could determine the witnesses to be interviewed and to be called for the court. They do this under the present system to the extent they feel necessary, but they seldom interview or call all of the witnesses covered by the Article 32 investigation. If the accused decides to plead guilty, the interviewing of witnesses beyond those necessary to establish the prima facie case at the time of investigation would be totally unnecessary except those desired by the defense in mitigation.

g. All officers in this section are of the opinion that no additional officer personnel would be required under the proposed change. One stenographer for the Trial Counsel and a photo-copy machine for the Trial Counsel would be sufficient for him to conduct Article 32 investigations in addition to his present work load.

5. CONCLUSIONS:

a. The proposed change to have Trial Counsel conduct the Article 32 investigation provides for a more speedy method of trial.

b. The proposed change would save duplication of effort and save considerable money, not only in the time saved in investigating, but also in timely preservation of evidence.

c. The proposed change is completely fair to both sides in that qualified counsel handle the case in its early stages.

d. That after this proposed change has been in effect for a few months that an even greater saving in time than is indicated by the enclosure would likely result.

e. The proposed change would not require additional personnel other than a stenographer.

6. RECOMMENDATION: That the Article 32 investigation be conducted by the Trial Counsel rather than by a layman.

[s] Robert H. Ivey
ROBERT H. IVEY
Lt Col, JAGC
Staff Judge Advocate

1 Encl
1. "Cases and Processing Time"

General Court-Martial Cases Processing Time

Charges to Trial—November and December, 1959

101ST AIRBORNE DIVISION AND FORT CAMPBELL, KENTUCKY

Name	Offense	Days Total Processing Time From Date Charges Preferred—Date of Trial	Days Proposed Processing Time	Reason for Reduction in Time
A	121	44	29	Initial investigation would have included matters which in this case required further investigation after referral to this office.
B	121	30	26	Elimination of duplicate investigation.
C	86	24	22	Elimination of duplicate investigation.
D	86	37	34	Elimination of duplicate investigation.
E	86	22	19	Elimination of duplicate investigation.
F****	134	38	8	Would have recommended Sp. C. M. at conclusion of Art. 32 investigation.
G****	86	8	5	Elimination of duplicate investigation.
H	121	52	22	Essential witnesses would have been held or testimony preserved.
I	121	51	22	Essential witnesses would have been held or testimony preserved.
J	86 and 121	53	30	Essential witnesses would have been held or testimony preserved.
K	134	23	17	Elimination of duplicate investigation.
L	121	44	35	Elimination of duplicate investigation.
M	121	22	17	Elimination of duplicate investigation.
N****	134	26	20	Elimination of duplicate investigation.
O	134	42	35	Elimination of duplicate investigation.
P	86	25	23	Elimination of duplicate investigation.
Q	78	25	19	Elimination of duplicate investigation.
R	121	24	19	Elimination of duplicate investigation.
S	121	21	18	Elimination of duplicate investigation.

See note at end of table.

General Court-Martial Cases Processing Time—Continued

Charges to Trial—November and December, 1959—Continued

101ST AIRBORNE DIVISION AND FORT CAMPBELL, KENTUCKY—Continued

Name	Offense	Days Total Processing Time From Date Charges Preferred—Date of Trial	Days Proposed Processing Time	Reason for Reduction in Time
T****_____	121	43	25	Initial investigation would have included matters which in this case required further investigation after referral to this office and testimony would have been preserved.
U_____	86	16	14	Elimination of duplicate investigation.

****Asterisks indicate cases returned for Special Courts-Martial. Processing time saved in entire period except for period of investigation.

SUMMARY

The above data was determined after consultation with both counsels involved in each case, evaluation of the case file, and consideration of the work load of the office at the pertinent time. The column showing "Days Proposed Processing Time" reflects the opinion of the undersigned as to time which would be saved under the proposed system. This data is further based on the assumption that there would be at least two trial counsel and three defense counsel, the current strength of this office. In addition, it would, of necessity, include a strengthening of the clerical help due to the increased work load caused by the investigation. It is the recommendation of the undersigned that a clerk-typist be added to the staff of this office to facilitate this investigation if this new system is put into effect. It is the opinion of the undersigned that virtually each case, if handled under the proposed system, would result in a definite saving of time. It is further felt that the proposed system provides for a better pretrial investigation than that currently used.

/s/ Alton H. Harvey
ALTON H. HARVEY
Capt. JAGC
Trial Counsel

/s/ Lloyd K. Rector
LLOYD K. RECTOR
Capt. JAGC
Defense Counsel

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ 810. Article 10. Restraint of persons charged with offenses Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.	*§ 810. Article 10. Restraint of persons charged with offenses* Any person subject to this chapter charged with an offense under this chapter may be restrained as circumstances may require. When any person subject to this chapter is restrained prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to dispose of the charge in any manner provided for by this chapter or to dismiss the charges and release him.	The Committee Amendment would delete the reference to summary courts-martial and offenses "normally tried" thereby that is presently found in Section 810 (Article 10).
None.	*§ 814A. Article 14A. Searches of persons and property* Searches of a person subject to this chapter, his property, or the property of the United States are authorized as follows: (a) All officers, warrant officers, petty officers, noncommissioned officers, and	The Committee Amendment represents an attempt to codify the already existing rules for search and seizure found in paragraph 152 of the MCM, 1951. Subsection *c* would permit the commanding officer to authorize a search of persons in his command even though they

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	such other persons who by proper authority may be designated to perform the duties of military police, may conduct a search when— (1) the search is conducted in accordance with the authority granted by a lawful search warrant; (2) the search is conducted incident to a lawful apprehension; (3) circumstances demand immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods; or (4) the search is made with the freely given consent of the person to be searched or of the owner of the property to be searched. (b) A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned, used, or occupied by persons subject to military law or to the law of war, may be authorized by a commanding officer (including an	might not be suspected of having committed an offense. Under the Committee Amendment the question would not be reasonable or probable cause, or the lack thereof as implied in the *Brown* case (*U.S.* v. *Brown, 10 USCMA 482, 28 CMR 48*), but whether the action is necessary to safeguard the health or security of the command or to preserve good order and discipline.

officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated. The commanding officer may delegate authority to order searches under this subsection to members of his command.

(c) A commanding officer, whenever he deems such action necessary to safeguard the health or security of the command, or to preserve good order and discipline, may authorize the search of a person subject to this chapter who is under his command, or subject to his authority, whether or not the person is suspected of having committed an offense.

§ 831. Article 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of

§ 831. Article 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of

The Committee Amendment would amend subsection (b) so that evidence obtained as a result of a statement which is inadmissible, only because of a failure to warn, would be admissible. To this extent the rule stated in paragraph 140*a*, MCM, 1951, is maintained. If the evidence were obtained as a consequence of a statement obtained through the use of coercion, unlawful influence or unlawful inducement it

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial. (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.	an offense without first informing him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial; *however, evidence obtained as a consequence of a statement made without the warning required by this subsection, is not a violation of this Article.* (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him. (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial; *however, a conviction may not be reversed on appellate review because of the receipt in evidence of a statement obtained in violation of this subsection unless the*	would not be admissible. *United States* v. *Haynes*, 9 USCMA 792, 27 CMR 60. The amendment of subsection (d) is designed to place emphasis on consideration of the merits of a case by prohibiting reversal on the ground of failure to comply with this article unless the failure materially prejudiced the accused. Subsection (e)(1) is designed to permit the use of evidence which does not require the accused to make a testimonial utterance against himself and would assure the admissibility of evidence of body fluids obtained from blood alcohol tests and urine specimens. See *United States* v. *Jordan*, 7 USCMA 452, 22 CMR 242 (urine specimen) and *United States* v. *Musquire*, 9 USCMA 67, 25 CMR 329 (blood alcohol test). Under subsection (e)(2) the production of "pass" or identification papers may be required upon a proper demand and such demand does not bring into play rights against self-incrimination. *United States* v. *Nowling*, 9 USCMA 100, 25 CMR 362.

§ *832. Article 32. Investigation* (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline. (b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection	*admission thereof materially prejudiced the substantial rights of the accused.* (e) *This Article extends only to oral and written statements and does not extend to—* (1) *physical acts which do not require the active and conscious use of the mental faculties of an accused; or* (2) *documents, tokens or papers furnished a person for identification or status determination purposes and the acts necessary to display them upon demand.* § *832. Article 32. Investigation* (a) No charge or specification, except those arising under section 815(i) of this title (article 15(i)), may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline. (b) *The investigation shall be conducted by either—* (1) *a commissioned officer other than one qualified under section 827(b) of this*	(a) Subsection (a) is retained with the exception that a pretrial investigation is not required in cases that result from nonacceptance of corrective action. The maximum punishment that may be imposed is the same that a special court-martial could impose and a pretrial investigation is not required in such cases. (b) This subsection is changed to provide alternate methods of conducting the pretrial investigation. The method of investigation with all the attendant rights of representation provided in the Act of 5 May 1950 is retained. There is added, coupled with an amendment of article 27(a), Uniform Code of Military Justice, a provision for the appointment of qualified counsel to conduct

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
if such counsel is reasonably available or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused. (c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article	*title (article 27(b)), detailed for that purpose who shall advise the accused of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request the accused shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel qualified under section 827(b) of this title (article 27(b)) detailed by the officer exercising general court-martial jurisdiction over the command; or* (2) *a commissioned officer qualified under section 827(b) of this title (article 27(b)). In such event the officer exercising general court-martial jurisdiction will detail an officer similarly qualified to represent the accused. The accused shall also be afforded the right of representation as provided in subsection (b)(1).* (c) At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense	the investigation. If this method is utilized there is a mandatory requirement that counsel with equal qualifications be appointed to represent the accused. The intent and purpose of this additional method is to provide a means to speed up the pretrial preparation of the case by eliminating the need for further investigation by trial and defense counsel in the event the case is referred to trial. The amendment of article 27(a), Uniform Code of Military Justice is required to remove the statutory prohibition of the investigating officer from later acting as the trial counsel on the court to which the case is referred. (c) This subsection retains the provisions for cross-examination and presentation previously provided in subsection (b) of the Act of 5 May 1950. A provision is added that permits the investigating officer to consider the statements of unavailable witnesses although the statements are not supported by oath. This is designed to overcome the error

unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

or mitigation, and the investigating officer shall examine available witnesses requested by the accused. The investigating officer may consider the statements of unavailable witnesses *although the statements are not supported by oath.* If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides including the statements of any unavailable witnesses and a copy thereof shall be given to the accused.

(d) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsections (b) and (c) of this article, no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

raised in *U.S.* v. *Samuels*, 10 USCMA 206, 27 CMR 280 (1959).

(d) This is former subsection (c) and is retained with no changes.

(e) This is former subsection (d) and is retained with no changes.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.	
§ *835. Article 35. Service of charges* The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial before a general court-martial within a period of five days after the service of the charges upon him, or before a special court-martial within a period of three days after the service of the charges upon him.	§ *835. Article 35. Service of charges* The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial before a general court-martial within a period of five days after the service of the charges upon him. (TENTATIVE DRAFT)	The Committee Amendment would delete the reference to special court-martial in Article 35, UCMJ.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

D. Procedures in Trials by Courts-Martial

DISCUSSION

General. The basic reason for recommending discontinuance of summary and special courts-martial is that a general court-martial, with its full complement of lawyers, is the only forum equipped to follow the twists and turns of criminal law as it develops case by case. In keeping with our recommendation concerning commanders' corrective powers, if the Congress does not see fit to grant substantially all of the powers recommended by the Committee under Article 15, it will be necessary to reevaluate the decision to use only one type of trial court. That is a problem which may arise at a later time. Improvements in the procedures of the general court-martial are a matter of urgency regardless of later developments.

Certain of the present procedures of the general court-martial impede rapid and efficient disposition of cases before that court. The Committee attended a trial by general court-martial at Fort Meade and observed certain deficiencies. Others have been brought to our attention by commanders or by judge advocates. Unless some simplification can be achieved, there is a serious possibility that the general court-martial, under the stresses of war, would be unable to fulfill the need for a court of record for serious criminal cases. Cumbersome trial procedures are a principal reason why the majority of commanders at all levels feel that our military justice system would be inadequate in time of war. Some part of this belief stems from the procedures for pretrial investigation. We have already suggested improvements in this area which have been tested under wartime conditions. There is in addition, however, general consensus that trials by general courts-martial take too long, and that the need to assemble court members, legal personnel, the accused and witnesses frequently would prevent the use of a general court-martial during combat.

Pretrial Sessions. In studying this situation, it is the Committee's conclusion that a great deal of simplification can be accomplished if use of the law officer is exploited. Many civilian criminal jurisdictions are speeding up their trials by the device of bringing the lawyers and the civilian judge together before the trial begins. In this so called "pretrial session," many questions of law can be settled. In the trial which the Committee observed, after the court-martial convened, the members of the court immediately were excused so that the law officer could hold a lengthy hearing with the trial counsel, defense counsel, and the accused outside the presence of the members of the court. The purpose of this hearing was to establish the prov-

idence of the accused's plea of guilty. Quite clearly there was no alternative. If the court members had been present and for some reason the accused's plea had been determined to be improvident, it would have been impossible for the court members to sit in judgment on the merits of the case.

The Judge Advocate General has recommended that we indorse changes in trial procedure which will allow the law officer to conduct such hearings with the accused and counsel before the members of the court are required to be present. The more purely legal problems that can be settled before the members of the court arrive, the more efficient the trial will be in terms of the manpower represented by the court members and in terms of the orderly presentation of evidence. Court members, freed from the distraction of legal maneuvers, will be in a much better position to absorb and assess the import of evidence presented. The recommended precedure will do much to enhance the dignity of military trial procedure. We concur with the recommendation of The Judge Advocate General.

Exploitation of Law Officer. In the interest of expeditious handling of cases, we have considered other aspects of the trial with a view to collecting those things which are clearly matters of law and assigning them as duties of the law officer. We want to get as much value as possible out of the professional law officer whose services are available to the court, without changing the basic characteristics of the general court-martial. Following this line of reasoning, we believe that the law officer should, as recommended by the Department of Defense, rule finally on a motion of finding of not guilty. We would go further and say that the law officer should rule finally, also, on the question of the accused's capacity to stand trial and upon challenges for cause, addressed to himself, or to members of the court. Continuances, or recesses during trial, are matters of the orderly conduct of the trial and should be decided by the court, with the qualification that if the legal rights of the accused are involved the court must follow the advice of the law officer in the matter. Whenever the members of the court are present, punishment for contempt should be a matter for decision by the court on advice of the law officer. However, in any proceeding which the law officer is authorized to conduct without the presence of members, he should have equivalent powers to maintain the order and dignity of the proceedings.

One-Officer Courts-Martial. The use of a general court-martial consisting only of a law officer is recommended by many of our senior field commanders. We believe there are cases in which this would be appropriate. There are some cases in which neither the convening authority nor the accused would find any particular need for the presence of members. In the DOD amendment currently before Congress (HR 3387), there is a provision for the use of a one-officer special court-martial with the consent of the convening authority

and the accused. In an earlier session of Congress, the DOD submitted a separate item of legislation which would have authorized a one-officer general court-martial under similar circumstances. We understand that this item was withdrawn from the legislative program because it was suggested that experience with the one-officer special court first should be obtained. Our recommendations, of course, have eliminated the special courts-martial entirely, but we are including a recommendation for the use of a law officer as a single officer general court under conditions previously worked out for the special courts-martial.

There are some cases in which the convening authority will believe it is necessary to have the collective judgment of line officer members. This may be because of the type of offense charged; for example, a charge of conduct unbecoming an officer or a gentleman. It is unlikely that a convening authority would want the findings on such a charge determined by a law officer rather than by the collective judgment of officer court members. On the side of the accused, there is an American tradition that a citizen is not found guilty of serious crimes except by the collective judgment of his peers unless he consents to a trial before a judge. It appears that the accused should have an option. If, upon the advice of counsel, he has determined that he is going to enter a plea of guilty, he will not be interested in collective judgment on the findings. On the other hand, he may be interested in having the benefit of collective judgment on the sentence.

In its recommendation concerning commanders' corrective powers the Committee has already indicated that a special class of general courts-martial should be established for the purpose of hearing the cases of soldiers who elect trial in lieu of corrective action by their commanding officers. By offering to use his corrective powers, the commanding officer indicates in such a case that he believes the individual has continued usefulness to his unit. It would not be appropriate, therefore, for a court used in lieu of commanders' correction to give a sentence to a punitive discharge. It is appropriate to limit the jurisdiction of this special purpose court-martial to confinement for six months and forfeiture of two-thirds pay per month for six months, assign this type of trial to a court consisting of a law officer only, and rule out the possibility of court members. As in any other general court-martial, trial and defense counsel would be qualified lawyers.

Mental Responsibility for Crimes. Both The Judge Advocate General and The Surgeon General have directed the attention of the Committee to a troublesome aspect of the use of expert testimony in trials—expert testimony by psychiatrists on the question of mental responsibility of the accused at the time of the offense. The present military test for insanity incorporates the M'Naughton rule formulated over one hundred years ago, and the irresistible impulse test which was

established in 1886. The Judge Advocate General and The Surgeon General urge a change in the test.

The military test is as liberal in the exculpation of offenders as tests used in the majority of criminal jurisdictions. There is no reason why the military rule should be made more liberal in this respect. However, it is apparent that, by failing to take into account progress in the medical field and the field of psychiatry, the present rule has a tendency to substitute the psychiatrist's judgment for that of a convening authority or court-martial. A psychiatrist who examines an accused before trial and makes his report to the convening authority, or who testifies as an expert witness before the court-martial, is placed in the position of choosing one of two extremes. If he says that the accused is completely deprived of his ability to distinguish right from wrong or to adhere to the right, the individual will not be brought to trial or will, in all probability, be acquitted. Strictly on the basis of clinical experience and professional knowledge, such a statement by the psychiatrist would be an inaccurate description even of persons suffering from severe mental disease, defect or derangement. On the other hand, if the psychiatrist testifies that the individual is severely sick with a mental disease and is not completely deprived of his ability to distinguish right from wrong, or to adhere to the right, the conclusion will follow that the individual is legally responsible for his acts. This may not be a fair appraisal of the situation. If he believes the accused to have been sufficiently ill with a mental disease to justify his exculpation, the psychiatrist is inclined to settle the issue the easy way by saying that this particular individual was completely deprived of his ability to distinguish right from wrong or to adhere to the right. An attempt on the part of the psychiatrist to give expert evidence that is completely accurate from his professional standpoint more often than not results in unnecessarily long and involved records of trial, with both sides taking advantage of the situation either to attempt to impeach the credibility of the expert witness or to push him into an absolute statement.

The American Law Institute, composed of learned members of the legal profession who have been responsible for the drafting of many uniform laws adopted throughout the United States, has recognized the problem which has been described to the Committee. In cooperation with eminent psychiatrists, the American Law Institute has developed a statement of the test for mental responsibility which avoids the mentioned difficulties. This test has been considered by The Judge Advocate General, who has concluded that it would not be more liberal in terms of excusing people for criminal conduct. It is possible that more people will be brought to trial when there is an insanity issue, because the question of mental responsibility will be retained for determination by members of the court. The Com-

mittee recommends adoption of this test. We feel that it will put expert testimony in proper perspective when the issue of mental responsibility is raised. This recommendation is regarded as an important measure in the simplification of trial procedure, since the question of mental responsibility is very frequently associated with the trial of serious charges.

Pleas of Guilty. Finally, the Committee wishes to report on its consideration of the procedures used in the Army to allow accused persons to obtain a limitation of sentence in consideration of the entry of a guilty plea. The Committee is informed that at the present time approximately 60% of the cases coming for trial before a general court-martial are pleas of guilty. The vast majority of these guilty plea cases are processed under an Army procedure which allows a general court-martial convening authority to promise consideration in the form of an agreed sentence when requested by an accused who has determined that it would be in his interest to enter a plea of guilty. A majority of the Committee members have had personal experience with the operation of this procedure at times when they were convening authorities for general courts-martial and have found that the procedure is fair both to the individual and to the government. It promotes the ends of justice. From first-hand observation, the meticulous care of law officers to ascertain that pleas of guilty are voluntary and provident is impressive.

All sources of information available to the Committee have been scrutinized carefully for any indication that the procedures could be unfair to an accused. Commanders who are presently exercising general court-martial jurisdiction have no criticism on this point, although one or two of them have personal objections to "making a deal with criminals". Judge advocates, including officers who are frequently assigned as military defense counsel, regard the procedures as fair. Military defense counsels were asked this specific question: "Does the accused suffer any disadvantage from the procedures when negotiating a plea of guilty?" Eighty percent gave an unqualified "no" response. A number of others felt that there were some disadvantages in having the agreement placed in the record of trial for the president of the court to see at the time he authenticates the record. They suggested that the agreement be placed in the record only after authentication and just prior to forwarding the record for review. The objection could be overcome entirely by an administrative change in the handling and assembly of records of trial, and we would see no objection to following the recommendation if The Judge Advocate General considered it advisable to give such instructions.

The Committee is convinced that the procedures allowing an agreed plea of guilty upon advice of counsel, as they are utilized in connection

with Army general courts-martial, mutually benefit the accused and the government. The Committee recommends the continuation of this program as an important method of simplifying general court-martial trials.

FINDINGS

1. Trials by general courts-martial are slow and cumbersome.

2. The interests of the government and the accused do not require trial of all cases by a court-martial consisting of a law officer and members.

3. In special situations, provision for trials before a law officer only would increase the flexibility of the general court-martial.

4. The rule for mental responsibility (paragraph 120*b*, Manual for Courts-Martial, 1951) hampers medical experts in giving clear and definitive testimony.

5. Army procedures permitting agreed pleas of guilty operate to the mutual benefit of the accused and the government.

RECOMMENDATIONS

1. That the Uniform Code of Military Justice be amended to permit a general court-martial to be convened without the presence of members for the purpose of settling legal questions in special sessions. (Tab B)

2. That the Uniform Code of Military Justice be amended to make all identifiable problems of law matters for resolution by the law officer alone. (Tab B)

3. That the Uniform Code of Military Justice be amended to permit a law officer alone to sit as a general court-martial under conditions specified in the statute. (Tab B)

4. That paragraph 120*b* Manual for Courts-Martial, 1951, be amended to incorporate a rule of mental responsibility conforming with Section 4.01 of the American Law Institute's Model Penal Code (Tentative Draft No. 4, dated 25 April 1955). (Tab A)

5. That no change be made in Army procedures allowing agreed pleas of guilty.

Tab A—Proposed Change to Manual for Courts-Martial
Tab B—Proposed Legislation

PRESENT MANUAL PROVISION	PROPOSED CHANGE
Paragraph 120*b*, Manual for Courts-Martial, 1951:	Paragraph 120*b*, Manual for Courts-Martial, 1951:
"*b. Lack of mental responsibility.*—If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused cannot be legally convicted of that offense (74*a*(3)). A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase "mental defect, disease, or derangement" comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from the moral, faculties. To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. Similarly, mental disease, as such, does not always amount to mental irresponsibility. For example, if a person commits an assault under psychotic delusion with a view to redressing or revenging some supposed injury to his reputation, he is nevertheless mentally responsible if he knew at the time that the act was contrary to law, and if he was not acting under an irresistible impulse. On the other hand, an accused is not responsible for a particular homicide if, as a result of mental disease, he had an insane delusion that another person was in the act of attempting to kill him and he thereupon killed the supposed attacker under the delusion that it was necessary to kill the deceased to preserve his own life."	"*b. Lack of mental responsibility.*—If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused cannot be legally convicted of that offense (74*a*(3)). A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The terms "mental disease or defect" do not include an abnormality manifested *only* by repeated criminal or otherwise anti-social conduct. Although there need not be complete impairment of the accused's mental capacity in order to constitute lack of mental responsibility, there must be *substantial* impairment. This degree of impairment cannot be identified with precision, other than to say that capacity must be greatly impaired. The measurement of substantial impairment is determined by the court. The court weighs evidence on the issue of the accused's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The foregoing does not in any way affect the rule concerning drunkenness as set forth in 154*a*(2)." Paragraph 121, Manual for Courts-Martial, 1951: The only change required in this paragraph would be that of combining *a* and *b* to read as follows: Did the accused at the time of such conduct as the result of mental disease or defect lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of law? The question "*c*" regarding mental capacity would remain the same.

TAB A

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ 817. Art. 17. Jurisdiction of courts-martial in general (a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President. (b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.	*§ 817. Art. 17. Jurisdiction of courts-martial in general* (a) No change. (b) Except as provided in regulations prescribed by the President, appellate review as required by this chapter, following the action of the convening authority authorized to appoint the court, will be carried out by the department that includes the armed force of which the accused is a member.	The amendment to subsection (b) would allow the President to prescribe rules under which one department could review the case of a member of another department. It is contemplated that this subsection would be implemented in time of emergency when one department has established a branch board of review in a theater of operations and because of lack of expeditious means of communication it would be advantageous to have the review conducted in the theater of operations.
§ 818. Article 18. Jurisdiction of general courts-martial Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized	*§ 818. Article 18. Jurisdiction of general courts-martial* (a) Subject to section 817 of this title (article 17), general courts-martial constituted in accordance with subsection 816(a) of this title (article 16(a)), have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, ad-	The Committee Amendment is designed to implement the provisions of the Committee Amendments of Articles 15 and 16(b). There is no substantial change in the provisions of subsection 818(a) of this title (article 18(a)) and the provisions of Article 18, UCMJ. Subsection 818(b) of this title (article 18(b)) establishes the jurisdictional basis for general courts-martial composed of a

by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

judge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.

(b) Subject to section 817 of this title (article 17), and when

(1) the accused, upon advice of counsel and before the court is convened, has requested in writing to be tried by a court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)), and

(2) the convening authority has consented thereto, general courts-martial constituted in accordance with subsection 816(b) of this title (article 16(b)), have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except the penalty of death.

(c) Subject to section 817 of this title (article 17) and when elected by an accused in accordance with subsection 815(i) of this title (article 15(i)), general courts-martial constituted in accordance with single law officer (article 16(b)) to dispose of those cases wherein the accused on the advice of counsel elects to have the law officer alone preside at the trial. This subsection contains the same limitation on punishment as in subsection 818(a) of this title (article 18(a)) with the addition that the death penalty may not be adjudged when a law officer is sitting alone as the general court-martial.

Subsection 818(c) of this article (article 18(c)) establishes the jurisdictional basis for general courts-martial composed of a single law officer (subsection 816(b)) to dispose of those cases resulting from the accused's election of trial by a single officer general court-martial rather than corrective action under section 815 (article 15). This subsection contains the same limitation on punishment as in subsection 818(b) (article 18(b)) with the addition that a dishonorable or bad conduct discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month for more than six months may not be adjudged.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	subsection 816(b) of this title (article 16(b)), have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable or bad conduct discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. (d) General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.	The provisions for the jurisdiction of general courts-martial under the law of war set forth in the last sentence of Article 18, UCMJ, is retained without change in subsection (d) of the Committee Amendment.
§ 822. Article 22. Who may convene general courts-martial. * * * (b) If any such commanding officer is an accuser, the court shall be convened by	*§ 822. Article 22. Who may convene general courts-martial.* * * * (b) *If any person described in subsection (a) except the President of the United States,*	The Committee adopts the DOD Amendment which would amend subsection (b) of this article to provide that if the convening authority (except the President) is an accuser, the court must be convened by

superior competent authority, and may in any case be convened by such authority if considered desirable by him.	is an accuser, the court *must* be convened by *a competent authority not subordinate in command or grade to the accuser*, and may in any case be convened by *a superior competent authority.*	competent authority not subordinate in command or grade to the accuser.
§ 825. Article 25. Who may serve on courts-martial	*§ 825. Article 25. Who may serve on courts-martial*	The only changes made by the Committee Amendment are the reference to a single-officer general court-martial in subsection (a), and the deletion of references to special courts-martial formerly found in subsections (b), (c) (1), and (d) (2).
(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.	(a) Any commissioned officer on active duty is eligible to serve on a general court-martial for the trial of any person who may lawfully be brought before such court for trial. However, to be eligible for appointment as a general court-martial, in accordance with subsection 816(b), of this title (Article 16(b)), the officer must have the qualifications specified for a law officer in section 826(a) of this title (Article 26(a)) and must be certified by the Judge Advocate General of the armed force of which he is a member in accordance with subsection 816(b) of this title (Article 16(b)).	The DOD Amendments would provide that an officer appointed as a single-officer *special* court-martial must be certified as qualified for such duty by an appropriate Judge Advocate General. In view of the elimination of the special court-martial this amendment is not adopted, although its purpose, as related to a single-officer *general* court-martial, is accomplished in subsection (a) of the Committee Amendment of Article 25.
(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.	(b) Any warrant officer on active duty is eligible to serve on a general court-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such court for trial.	
(c) (1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a	(c) (1) Any enlisted member of an armed force on active duty who is not a	

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained. (2) In this article, the word "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them. (d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade. (2) When convening a court-martial, the convening authority shall detail as	member of the same unit as the accused is eligible to serve on a general court-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such court for trial, but he shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be convened and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained. (2) In this article, the word "unit" means any regularly organized body as defined by the Secretary concerned, but in no	

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

§ 826. Article 26. Law officer of a general court-martial

(a) The authority convening a general court-martial shall detail as law officer thereof a commissioned officer who is a member of the bar of a Federal court or of the highest court of a State and who is certified to be qualified for such duty by

case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

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

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

§ 826. Article 26. Law officer of a general court-martial.

Add:

(c) The law officer appointed as a general court-martial under the provisions subsection 816(b) of this title (article 16(b)) shall determine all questions of law and fact arising during the trial, and if the

Article 26, UCMJ, is amended by adding subsection (c) which provides for the duties of a law officer appointed as a single-officer general court-martial as authorized in subsection 816(b) (Article 16(b)).

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
the Judge Advocate General of the armed force of which he is a member. No person is eligible to act as law officer in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case. (b) The law officer may not consult with the members of the court, other than on the form of the findings as provided in section 839 of this title (article 39), except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.	accused is convicted, adjudge an appropriate sentence.	
§ *829. Article 29. Absent and additional members* (a) No member of a general or special court-martial may be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause. (b) Whenever a general court-martial is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. When	§ *829. Article 29. Absent and additional members* (a) No member of a general court-martial may be absent or excused after the accused has been arraigned except for physical disability or as a result of a challenge or by order of the convening authority for good cause. (b) Whenever a general court-martial constituted in accordance with subsection 816(a) of this title (article 16(a)) is reduced below five members, the trial may not proceed unless the convening authority	The Committee Amendment is the same as Article 29, UCMJ, with the exception that the reference to special courts-martial in subsection (a), and subsection (c) in its entirety have been deleted. In addition, appropriate language has been added to subsections (b) and (c) to clearly indicate the applicability of subsection (a) to the general courts-martial composed as provided in the Committee Amendment of Article 16 (a) and (b).

the new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a special court-martial is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. When the new members have been sworn, the trial shall proceed as if no evidence had previously been introduced, unless a verbatim record of the testimony of previously examined witnesses or a stipulation thereof is read to the court in the presence of the accused and counsel.

§ *839. Article 39. Sessions*

When a general or special court-martial deliberates or votes, only the members of the court may be present. After a general court-martial has finally voted on the findings, the court may request the law officer details new members sufficient in number to provide not less than five members. When the new members have been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the law officer, the accused, and counsel.

(c) Whenever a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)) is unable because of one of the reasons in subsection (a) to proceed with the trial the convening authority will appoint another officer qualified to serve as a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)). When the new member has been sworn, the trial may proceed after the recorded testimony of each witness previously examined has been read to the court in the presence of the accused and counsel.

§ *839. Article 39. Sessions*

(a) At any time after the service of charges which have been referred to a general court-martial constituted in accordance with subsection 816(a) of this title (article 16(a)), the law officer may

Subsection (a) of the Committee Amendment is new and provides a means to save considerable time of court members by permitting the law officer to hear and dispose of legal questions and motions for interlocutory relief that are normally

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
and the reporter to appear before the court to put the findings in proper form, and those proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.	convene the court without the presence of the members for the purpose of holding special sessions which shall be in the presence of the accused, the defense counsel and the trial counsel to determine motions for interlocutory relief and other matters. Such proceedings shall, as far as practicable, be governed by the rules of procedure relating to motions raising defenses and objections in the courts of the United States. (b) When a general court-martial, constituted in accordance with subsection 816(a) of this title (article 16(a)), deliberates or votes, only the members of the court may be present. After a general court-martial has finally voted on the findings, the court may request the law officer and the reporter to appear before the court to put the findings in proper form, and those proceedings shall be on the record. All other proceedings, including any other consultation of the court with counsel or the law officer, shall be made a part of the record and shall be in the presence of the accused, the defense	heard in out-of-court hearings during the course of trial. Subsection (b) retains the provisions of Article 39, UCMJ, with the exception that the words "or special" and "in general court-martial cases" have been deleted. Subsection (c) of the Committee Amendment is new and provides for the proceedings before a single-officer general court-martial authorized under subsection 816(b) of this title (article 16(b)).

§ *841. Article 41. Challenges* (a) Members of a general or special court-martial and the law officer of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The court shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered. (b) Each accused and the trial counsel is entitled to one peremptory challenge, but the law officer may not be challenged except for cause.	counsel, the trial counsel, and the law officer. (c) When a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)) has been convened all proceedings shall be on the record, and shall, except as authorized under section 854 of this title (article 54) be made a part of the record, and shall be in the presence of the accused, the defense counsel, and the trial counsel. § *841. Article 41. Challenges* (a) The law officer and members of a general court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The *law officer* shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered. (b) Each accused and the trial counsel is entitled to one peremptory challenge, but the law officer *and an officer appointed as a single-officer general court-martial* may not be challenged except for cause.	Article 41(a), UCMJ, is amended to provide that the law officer shall decide all questions of challenges. This change is in accord with the Committee Amendment of Article 51(b) which makes the ruling of the law officer upon any interlocutory question final. The reference to special court-martial in Article 41(a), UCMJ, is deleted. The DOD Amendment would provide that a single-officer *special* court-martial would only be subject to challenge for cause and could not be peremptorily challenged. The purpose of the amendment as related to a single-officer *general* court-martial is accomplished in subsection (b) of the Committee Amendment.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*—Continued

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *848. Article 48. Contempts* A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.	§ *848. Article 48. Contempts* A court-martial, including a *law officer conducting special sessions pursuant to subsection 839(a) of this title (article 39(a))*, provost court, * * *	Article 48, UCMJ, is amended to provide that a law officer may punish for contempt when he is holding a special session as authorized in the Committee Amendment of Article 39(a).
§ *851. Article 51. Voting and rulings* (a) Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the President, who shall forthwith announce the result of the ballot to the members of the court. (b) The law officer of a general court-martial and the president of a special court-martial shall rule upon interlocutory questions, other than challenge, arising during the proceedings. Any such ruling made by the law officer of a general court-martial	§ *851. Article 51. Voting and rulings* (a) Voting by members of a general court-martial, constituted in accordance with subsection 816(a) of this title (article 16(a)), upon the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court. (b) The law officer of a general court-martial, constituted in accordance with subsection 816(a) of this title (article 16 (a)), shall rule upon all interlocutory questions arising during the proceedings. *Issues*	The Committee Amendment by deleting certain language in subsections (a) and (b) of Article 51, UCMJ, allows the law officer to decide all questions of challenges and questions of the accused's mental capacity as interlocutory questions and his ruling shall be final. References to the president of special courts-martial and to special court-martial are deleted in subsections (a), (b) and (c). The Committee adopts the DOD Amendment which allows the law officer to rule finally on a motion for a finding of not guilty. It further provides that the law officer could change any of his rulings made

upon any interlocutory question other than a motion for a finding of not guilty, or the question of accused's sanity, is final and constitutes the ruling of the court. However, the law officer may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the law officer of a general court-martial and the president of a special court-martial shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

of fact raised in connection with these questions shall be resolved solely by the law officer. Any such ruling made by the law officer of a general court-martial upon any interlocutory question shall be final and shall constitute the ruling of the court; but the law officer may change such ruling at any time during the trial except a ruling on a motion for a finding of not guilty which was granted.

(c) Before a vote is taken on the findings, the law officer of a general court-martial, constituted in accordance with subsection 816(a) of this title (article 16 (a)), shall, in the presence of the accused and counsel, instruct the court as to the elements of the offense and charge the court—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

during the trial except where a motion for a finding of not guilty was granted.

Subsection (d) is a DOD Amendment that pertained to a single-officer *special* court-martial. However, as adopted by the Committee it is related to a single-officer *general* court-martial.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
(3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.	(3) that, if there is a resonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States. (d) In a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)), the law officer shall determine all questions of law and fact arising during the trial and, if the accused is convicted, adjudge an appropriate sentence.	
§ 852. Article 52. Number of votes required (a) (1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken. (2) No person may be convicted of any other offense, except by the concurrence of two-thirds of the members present at the time the vote is taken. (b) (1) No person may be sentenced to suffer death, except by the concurrence of	*§ 852. Article 52. Number of votes required* (a) *In a general court-martial constituted in accordance with subsection 816(a) of this title (article 16(a))* (1) * * * (2) * * * (b) *In a general court-martial constituted in accordance with subsection 816(a) of this title (article 16(a))* (1) * * * (2) * * * (3) * * *	Subsections (a), (b), and (c) are amended in order to distinguish between a court-martial composed of a law officer and members, and a single-officer general court-martial. Subsection (c) is amended further to delete the provisions pertaining to a tie vote in view of the power of the law officer to rule finally on questions of the accused's sanity and a motion for a finding of not guilty under the amendment of Article 51 (a) and (b).

all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(c) *In a general court-martial constituted in accordance with subsection 816(a) of this title (article 16(a))* all other questions to be decided by the members of the court-martial shall be *determined by a majority vote.*

(d) In a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)) the law officer shall determine all questions of law and fact and, if the accused is convicted, adjudge an appropriate sentence.

(TENTATIVE DRAFT)

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

E. Sentences

DISCUSSION

General. In its statement of the requisites of an effective system of a military justice the Committee ranked together two requirements: (1) the military justice system must foster good order and discipline at all times and places; (2) it must provide for rehabilitation of usable military manpower. As an elaboration of the Committee's views concerning sentences and corrective actions, it is well at this point to quote a portion of our interim report.

> " 'An eye for an eye and a tooth for a tooth' and such catch words as 'crime and punishment' are obsolete. Instead, the Committee firmly believes that the weaknesses of the young American called to serve his country present a problem in correction. The Committee further believes that the following factors are basic in the enlightened administration of justice:
>
> (1) Guidance and leadership which prevent the commission of offenses;
>
> (2) Full use of mental health facilities, legal assistance and opportunities for religious guidance as a supplement to leadership;
>
> (3) Early identification and elimination of those who because of inherent or ingrained defect do not have the potential to develop into soldiers;
>
> (4) Rapid development of facts followed by prompt and speedy corrective action when an offense is committed;
>
> (5) Use of the minimum sanction consistent with correction and deterrence in dealing with offenders;
>
> (6) Assurance that the widest appropriate range of offenses is disposed of by commanders' correction, taken by fair and understanding leaders—thus avoiding the ordeal of trial and the stigma of conviction;
>
> (7) Opportunity for rehabilitation for military service after conviction for all but the most serious offenses—to include the erasure of punitive discharge when restoration has been earned;
>
> (8) Opportunity for rehabilitation for future useful life in a civilian community for those sentenced to confinement after conviction of a serious offense precluding further military service."

In making such statements, the Committee did not consider that it was advancing new ideas, but rather that it was reaffirming principles which are common to the administration of military justice and the treatment of offenders throughout the Army. No one is more interested in his men than the commander; and his interest does not stop when a member of his command gets in trouble. The entire system of sentences under the Uniform Code of Military Justice is an open-end system. There is opportunity, generally regardless of the length of the sentence, for an individual to demonstrate his worthiness for restoration to honorable service. It is a prime concern of the Army that each offender be encouraged to make use of this opportunity.

Rehabilitation and Restoration. We have, under the present system, essentially two groups of persons sentenced to confinement: First, there is a group whose sentences do not include a punitive discharge. Their sentences are generally for six months or less and they serve their confinement at local stockades. Usually their commanders have referred their cases to a special or summary court-martial and by this action have indicated that they believe the offender may be corrected and returned to useful duty by treatment at the local level. Unless they have some ingrained or inherent defect which will prevent them from becoming useful soldiers all members of this group should be able to return and render useful service. There is a carefully devised screening program which operates at the stockade. Personnel from mental health units, in cooperation with confinement personnel and local commanders, make every effort to improve the motivation and relieve the problems of those who are capable of restoration and screen out those men who cannot adapt themselves to military life.

The second major category of persons in confinement includes offenders convicted of more serious offenses and sentenced to terms of confinement longer than six months. These men usually are sentenced also to a bad conduct or dishonorable discharge. The Committee has found that certain interpretations of law have tended to complicate the problem of treating this group. Paragraph 127*b*, Manual for Courts-Martial, 1951, formerly restricted courts-martial from sentencing an enlisted person to more than six month's confinement unless the court had determined that he should receive a punitive discharge as part of his sentence. Complementary to this provision, the Manual authorized a special suspension of a punitive discharge which would last until the accused completed confinement or until appellate review of his case was completed, whichever was later. Utilization of a combination of these provisions gave the offender an opportunity to demonstrate by his behavior while in confinement that he was worthy of restoration to military duties. If he demonstrated these qualities he could be restored and his punitive discharge remitted. Then, at the completion of an honorable term of service he would receive an honorable discharge and would never have received any other type. On the other hand, if he did not demonstrate his worthiness he could be given his punitive discharge without further processing as soon as the later of the two conditions occurred.

Effect of Judicial Interpretation. Strenuous efforts were made by the Department of the Army to educate commanders responsible for the approval of sentences including punitive discharges to make use of the combination of these provisions so that the optimum climate for restoration would exist. The Court of Military Appeals has held that neither of these beneficial provisions contained in the Manual for Courts-Martial is within the scope of the President's regulatory

authority. It is, therefore, now possible for offenders to be sentenced to terms of confinement for more than six months without receiving a sentence to a punitive discharge. *U.S.* v. *Holt*, 26 CMR 256 (1958); *U.S.* v. *Varnadore*, 26 CMR 251 (1958). If a punitive discharge is adjudged, the only way to suspend it is by making the individual a probationer who will be entitled to remission of the punitive discharge unless he commits some subsequent misconduct to justify vacation of the suspension. *U.S.* v. *May*, 27 CMR 432 (1959); *U.S.* v. *Cecil*, 27 CMR 445 (1959).

Under the Committee's recommended plan for placing corrective powers in the hands of commanding officers, the number of persons who receive convictions and sentences to confinement for six months or less should be reduced drastically. Some of the same men who would otherwise have received a conviction by special or summary court-martial and a sentence to confinement will, however, come within the scope of the stockade screening program by virtue of being placed in correctional custody under Article 15. A few men will receive sentences to confinement without punitive discharge from the special type of general court-martial established for the trial of those who elect trial in lieu of correction by their commanding officers. Finally, there will always be a group of persons who have been tried by a general court-martial because they have committed offenses which indicate to their commanders that they are probably beyond the resources of local units for rehabilitation. Most of these men will receive sentences sufficient in length to warrant their transfer to other treatment facilities, but there will be a few who receive a short term of confinement, with or without a punitive discharge, and stay in a local facility. As noted, through the combined efforts of commanders, The Provost Marshal General, The Surgeon General, and The Judge Advocate General, a strong and effective program has been developed to achieve the objective of maximum rehabilitation from stockade confinement. The Committee's recommendation will not in any way interfere with this highly successful program or require additional facilities. There simply will need to be a reorientation of some parts of the program to emphasize the difference between offenders who have been convicted by a court-martial and those who are treated as correctional problems by their commanding officers.

There is a great difference in motivation for restoration between demonstration of worthiness for restoration and mere abstention from misconduct. The result has been to make convening authorities who are responsible for approving or suspending sentences or parts of sentences very selective. They are now suspending the punitive discharge in less than ten percent of the cases in which a punitive discharge has been adjudged by the court-martial, whereas over sixty

percent of the punitive discharges were being suspended by the convening authorities before the *Cecil* and *May* cases.

The Committee considers that former practices prescribed or allowed by the Manual for Courts-Martial were designed to foster good order and discipline. These practices should be restored. The Committee proposes an amendment to Article 56, Uniform Code of Military Justice, to reestablish the rule that unless an officer is given a dismissal he may not be sentenced to confinement (cf. *U.S.* v. *Smith*, 27 CMR 227 (1959)), and an enlisted man may not be sentenced to more than six months confinement unless it has been determined that he should have a punitive discharge. In the same article we propose an amendment designed to cause the reduction of an enlisted member of other than the lowest pay grade to the lowest pay grade upon approval of a sentence including a punitive discharge, confinement, or hard labor without confinement. An Executive Order for that purpose has been declared to be an invalid exercise of the authority by the President. *U.S.* v. *Simpson*, 27 CMR 303 (1959). Disturbance by the Court of Military Appeals of the rules laid down by the President has, without doubt, had a bad effect upon good order and discipline in the service. Senior commanders are nearly unanimous in this opinion. The action of the Court of Military Appeals has degraded the honorable status of officers and noncommissioned officers by stating that an officer or noncommissioned officer convicted of an offense and sentenced to confinement may retain his status. The remarks of The Provost Marshal General concerning the deleterious effect of these decisions upon the operation of confinement facilities are appended, Tab A.

Persons Awaiting Result of Appellate Review. The Committee is aware of the difficult problem faced by a commander who has an officer, not in confinement, awaiting appellate action on a sentence to dismissal. These cases are not numerous, but they are exceptionally troublesome. Generally there is no productive way to use the services of such an officer, and other officers do not want to associate with him. Enlisted men properly resent being required to pay him respect. He is a symbol of disgrace to his uniform.

Numerous solutions have been advanced; all have disadvantages. Attempts to take away or suspend his status as an officer before appellate review is complete are fraught with legal complications. There is a definite possibility that any device of this sort would put the officer beyond reach of court-martial jurisdiction if a rehearing were ordered. No reserve officer released from active duty pending completion of appellate review has been subjected to jurisdiction for rehearing purposes. The least objectionable plan is to order the officer to his home to await result of appellate review in a full duty status. If he had received partial forfeitures they could be applied against his pay. Even if he drew full pay, it is the considered opinion

of the Committee that the military service would benefit from his removal. And he would remain subject to court-martial jurisdiction.

The Committee is recommending legislation to authorize this course of action at the discretion of the Secretary. The statute authorizes similar treatment of reserve officers, warrant officers, and enlisted men. Thus it will not be discriminatory and will give the Secretary maximum flexibility.

Confinement—Treatment and Computation. With respect to the question of suspension of a punitive discharge during a period sufficient to assure that the individual has an opportunity to demonstrate a potential for rehabilitation, the Committee believes that this should not be a problem of probation. We would simply provide [Art. 57, Execution of Sentence] that a punitive discharge may not be carried into execution until it has been affirmed legally and its execution is directed by persons who are responsible for review of sentences. This is done as a part of a general clarification of the Code on the question of who may order parts of sentences executed and when.

Another aspect of this problem is a need to simplify the classification and treatment of prisoners in confinement. There has grown up from the Code and its interpretation a three-fold classification of prisoners: Pretrial, adjudged and sentenced. This three-fold classification has been recognized as an unnecessary complication by the services. The current DOD amendments (H.R. 3387) attack this problem by permitting a convening authority to order the execution of parts of sentences, including the confinement part of a sentence. The Committee feels that, to resolve the problem completely, it is not only necessary to authorize the convening authority to direct that sentences to confinement be carried into execution, but also to make other changes to show a definite intention that all persons in confinement as the result of a court-martial sentence will be treated alike from the time the convening authority directs that their sentences to confinement be carried into execution. Before that point all prisoners should be treated under the applicable rules for pretrial confinement which prohibit punishment other than restraint during this period. Article 13, Uniform Code of Military Justice.

Under the law, at present, service of a sentence of confinement is computed from the date the sentence is adjudged by a court-martial. However, if the accused has been in pretrial confinement under charges for which he is later convicted and sentenced, the period spent in pretrial confinement is "time lost to be made good." In view of this and in view of the gravity of the loss of liberty inherent in pretrial confinement the Committee believes the Code should be modified to state that periods spent in pretrial confinement will be included in the computation of time served on a sentence later adjudged. Of course, the periods during which confinement is suspended would be excluded as at present. Pretrial confinement is now considered by

courts-martial when they adjudge the sentences to confinement and is also considered by convening authorities when they are approving such sentences. We have no doubt that this has been an effective protection for persons in this situation. However, we believe that the essential fairness of the proposed statutory rule will appeal to everyone.

Indeterminate Sentences. Reference has been made previously to the open-end characteristic of military sentences to confinement. This characteristic is found also in one form of the indeterminate sentence used in civilian jurisdictions and used by the Federal courts since 1958. The indeterminate sentence has found increasing approval in civilian jurisdictions in the United States because it minimizes disparity of sentences and permits, within the maximum period adjudged, the release of the accused when his progress toward reformation has demonstrated he is ready for release and can conform to the standards of society. The indeterminate sentence is recognized as an enlightened technique in the disposition and treatment of criminal offenders. An indeterminate sentence system has two essential features; (1) the form of the sentence, and (2) an agency responsible for the disposition of the offender based on his response to treatment.

Sentences to confinement are now announced by courts-martial in terms of a fixed period of time; e.g., one year or five years. In operation, however, these sentences are sentences for a term *not to exceed* the stated period; the offender can be released at any time short of the full term. It would be appropriate for courts-martial to announce their sentences, as confinement for "not more than" or "not to exceed" a certain period. In this form, the sentence would be recognized as the form of indeterminate sentence which is most favored by penologists for its usefulness in rehabilitation efforts.

To complete a recognizable system of indeterminate sentences which would encourage public confidence that the services are adhering to modern standards in the treatment of offenders, would require the establishment of a single agency with full authority to determine the disposition of offenders. Under present laws, the functions necessary for the proper operation of an indeterminate sentence system are divided between a board of review, which considers the appropriateness of the sentence in the course of appellate review, and the Secretary, who possesses the powers to effect remission, suspension, and restoration. With this arrangement, the Army has developed what is recognized by knowledgeable persons as a superior system for the treatment and rehabilitation of offenders. Conversion of this system to an easily identifiable system of indeterminate sentences, would increase public recognition of the achievements of the Army in this field. It might make possible additional improvements in treatment and correction; certainly it would make possible improvements in the system of appellate review of court-martial cases.

The responsibility of boards of review to consider the appropriateness of sentences in the cases reviewed by them, as distinguished from the legal correctness of the sentence, obviously is delaying the processing of cases to legal finality. Such consideration is extraneous to the boards' principal function of determining the legality of the findings and sentence. It is not a function which should be carried on without reference to the progress of the accused toward reformation. The Committee believes that responsibility for the term of confinement to be served by an individual should rest with an agency which is better equipped, and has more reliable information than a board of review. Overall, the committee believes that a better and more logical system for the sentencing and treatment of offenders, and the appellate review of their cases could be obtained if the Army adopted an outright system of indeterminate sentence. The necessary legislation to carry out this purpose is a part of the Committee's recommended program. One of the features of our proposed amendment to Article 56, Uniform Code of Military Justice, is that all sentences to confinement, other than those for life imprisonment or confinement for six months or less, shall be stated by the court-martial in the form of an indeterminate sentence of confinement for not more than a stated period. In addition, a new Article is proposed for the Code, to authorize the Secretary of a department to constitute one or more sentence control boards.

Sentence Control Board. Under the Committee's plan a sentence control board will be constituted by the Secretary and operate under regulations issued by the Secretary. It will have authority in its own right to manage all aspects of the disposition of prisoners serving an indeterminate sentence to confinement. This will include power to suspend or remit sentences, power to place on parole or to give unconditional release from confinement, power to effect return of worthy individuals to military service and power to substitute an administrative form of discharge for a punitive discharge which has not been executed. This will bring together in one agency the direction of all activities necessary for the operation of an indeterminate sentence system. It will relieve the Secretary from his present statutory obligation to pass on clemency recommendations made in individual cases. The sentence control board will not be in the custodial business, and will not run confinement installations. That function will be performed by the Provost Marshal, as at present. The sentence control board will absorb all of the functions of the Army-Air Force Clemency and Parole Board and final restoration authority now delegated to the Provost Marshal General.

Review of Appropriateness of Sentences. It is the Committee's plan that the sentence control board will assume, also, the function of reviewing sentences for appropriateness which is now performed by boards of review. A sentence control board is better equipped

for this function. A board of review, like a trial court, is limited in its knowledge concerning the accused and must act solely on the record of trial. The board of review does not have reports regarding the accused's reaction and behavior during treatment. Furthermore, action, if it is to be taken by the board of review, must be taken during a very limited period of time, and without knowledge of how the action may affect the treatment and reformation of the prisoner. The board of review does not have at its disposal other options which may be more appropriate in the handling of the individual than a reduction of sentence. For example, a board of review does not have the power to suspend the sentence; nor does it have power to parole.

All that the board of review can do is to make a rough sort of equalization of sentences—always by scaling the higher sentences down to bring them in line with the lower sentences. This action cannot harm an accused and therefore is regarded as an important protection for him. A review of the legislative history of the Uniform Code and the Articles of War shows that Congress definitely has been concerned over the possibility of harsh sentences by courts-martial, particularly under wartime conditions. Review of sentences for appropriateness is a function which cannot be eliminated. It is the Committee's opinion, however, that it can be carried out in an informed and sensible manner only if it is a function of a general review of an offender, his background, physical and mental characteristics and potentialities coupled with results of correctional treatment. Civilian precedent is all in this direction.

After the convening authority has acted, the entire responsibility for discretionary review of indeterminate sentences to confinement should be in an agency properly equipped to handle it. We would then assign to that agency responsibility for review of all sentences of enlisted men to punitive discharge and require this review to be completed before any punitive discharge is executed. A central agency reviewing all punitive discharge sentences and having authority to substitute an administrative form of discharge when appropriate could achieve a considerably higher degree of uniformity in the standards for issuance of punitive discharges. Thus, it should reduce materially the number of applications to the Army Board for Correction of Military Records. As pointed out earlier, this would completely avoid the problem whether a punitive discharge should be suspended by the convening authority. No such discharge would be executed until the individual had received an evaluation by an agency equipped to appraise his suitability for restoration. Thus, each enlisted man would receive consideration somewhat equivalent to that now given to officers sentenced to dismissal by virtue of the fact that their sentences must be approved by the Secretary before the dismissal may be executed.

In order to apply this system for consideration of the punitive discharges received by men whose confinement sentences are below the indeterminate sentence level, the Committee has made special provision that, in addition to the record of trial which goes forward for legal review, a copy of the record with any available information relevant to sentence consideration will be forwarded directly to the sentence control board. It will be a simple matter to arrange by regulation that The Judge Advocate General notify the sentence control board as soon as the conviction and sentence have been affirmed. At this time, the sentence control board should notify the local commander of the disposition to make of the individual. It is assumed that the local commander will have kept the board informed of significant reactions of the prisoner to confinement. If review of the record of trial and the file on the individual indicates that the punitive discharge is appropriate, the sentence control board will merely direct the execution of that portion of the sentence, or, in the interest of uniformity, the board might direct that another type of discharge be issued. To prevent the board having to make a premature decision in cases where information indicates there is still a possibility of restoration to military service, the board will need some way to move men in this category to a place where they can be further evaluated and screened for restoration potential.

In giving this complex of power to the sentence control board it will not be necessary to reduce the prerogatives of local commanders. They will retain power to suspend or remit the sentences to confinement of persons held in facilities subject to their jurisdiction. It can be assumed that they will continue to make considerable use of these powers to salvage men for the service. The chief difference will be that no man will be issued a punitive discharge until directed by the sentence control board.

Youthful Offenders. The Committee has considered at length the scheme which has been adopted by Congress for handling youthful offenders in Federal courts and treatment facilities under the Attorney General. Considering the differences in the military and civilian community, the Committee is of the opinion that it is not desirable at this time to erect within the military a structure for handling youthful offenders parallel to that available to the United States Courts and to the Attorney General. There are two principal reasons for this decision: (1) We believe that it would be morally and psychologically wrong to attempt to divide soldiers according to their age—treating some as juveniles and some as adults; all are soldiers and all have adult responsibilities; (2) The nature of military organization is such that it affords much better and closer guidance for youthful persons than is provided in civilian life, at least for the bulk of those who get treatment under the youthful offender act.

The Committee believes that by the addition of two factors to the

recommended indeterminate sentence system it can tie in with the Federal system for treatment of youthful offenders. The Secretary of the Army already has authority to transfer persons in confinement to any confinement facility operated by the United States. (Article 58, Uniform Code of Military Justice.) It is recommended that there be added to this Article a clause specifying authority to transfer to specialized treatment facilities for youthful offenders which are operated by the Attorney General. Second, the Attorney General should be asked to obtain authorization to accept military prisoners of appropriate age who might benefit from treatment as youthful offenders and whose sentences are sufficiently long to make the treatment feasible. In addition, the Committee recommends that the sentence control board have authority to set aside or expunge a conviction by court-martial when it is determined such extraordinary action is justified.

FINDINGS

1. Administration of confinement facilities and treatment of offenders have been complicated by judicial decisions invalidating portions of the Manual for Courts-Martial.

2. The prestige of honorable officers and noncommissioned officers is damaged by rules permitting confinement of officers without dismissal and confinement of noncommissioned officers without reduction.

3. The presence on a military post of an officer sentenced to dismissal without confinement pending completion of appellate review impairs morale and discipline.

4. Opportunities for offenders to be restored to duty without the issuance of punitive discharges have been decreased by the *Cecil* and *May* decisions.

5. The Army has a superior system for screening, rehabilitating and restoring prisoners in confinement.

6. Boards of review should review records of trial for legal correctness and a specialized agency should review the appropriateness of sentences.

7. Some advantages may be obtained by adjusting the law to clear the way for the Attorney General to treat selected military prisoners as youthful offenders.

RECOMMENDATIONS

That the Uniform Code of Military Justice be amended: (Tab B)

1. to clarify how and when sentences may be carried into execution;

2. to restate permissible sentences;

3. to restore Manual for Courts-Martial rules for automatic reduction and limitations on the use of confinement except when dismissal or punitive discharge is adjudged;

4. to establish indeterminate sentences to confinement;

5. to establish a sentence control board for review of certain sentences and other clemency functions;

6. to remove the requirement that sentence appropriateness be a function of a board of review;

7. to permit the Secretary to order military persons to their homes pending appellate review of sentences to punitive separation when confinement is not authorized; and

8. to authorize the Secretary to transfer selected military prisoners to the Attorney General for further treatment as youthful offenders.

Tab A—Comments of PMG
Tab B—Proposed Legislation

COMMENTS OF THE PROVOST MARSHAL GENERAL

* * *

DISCUSSION

A. CONFINEMENT

1. *Convening authority ordering sentences into execution*

a. The military privileges and prerogatives retained by military personnel who are in confinement pursuant to sentence by a court-martial which, as approved by the convening authority includes confinement but which has not been ordered executed and is awaiting completion of appellate review, makes it extremely difficult to arrange for their training, employment and rehabilitation in the disciplinary barracks.

b. Personnel in this status not only enjoy the military rights and privileges, but the *obligations* and responsibilities of soldiers in a normal duty status. Enlisted military personnel and civilians are not commingled with sentenced prisoners on work details. Noncommissioned officers are required by regulations to wear the prescribed work uniform, including their insignia of grade.

c. The result is that during the appellate process we have in confinement a group of prisoners whose peculiar status hampers and obstructs their proper administration and treatment. They are neither officers and soldiers on duty status discharging their duties in the Armed Forces, nor are they prisoners who can be fitted into the rehabilitation program designed to fulfill the needs of the service with respect to restoring the individual back to duty or to rehabilitate the individual for return to civilian life. Their status as a prisoner whose sentence to confinement has not been ordered into execution often continues for many months, and in some cases for years.

d. This situation could be remedied by amending Article 64 of the Uniform Code of Military Justice to provide that a sentence to confinement approved by the convening authority can also be ordered into execution by the convening authority.

2. *Sentences in excess of six months without punitive discharge*

a. Paragraph 127b, Manual for Courts-Martial, provides that no sentence to confinement for a period greater than six months shall be adjudged unless a dishonorable or bad conduct discharge is included. In US v. VARNADORE (9 USCMA 471, 26 CMR 251) it was held that a sentence to confinement for more than six months without a punitive discharge was not illegal, provisions of the Manual for Courts-Martial notwithstanding.

b. In US v. HOLT (9 USCMA 476, 26 CMR 256) a similar decision was made. In the dissenting opinion Judge Latimer pointed out that under this construction a life-termer might be

TAB A

retained in the service, and doubted whether Congress ever intended to allow that eventuality to happen.

c. Paragraph 127*b*, Manual for Courts-Martial, represents the settled military policy of the United States, laid down by successive Presidents since 1917, that no member of the Army should be confined under sentence while holding the status of an officer or noncommissioned officer, and no such member should be confined under sentence for more than six months unless the sentence includes a punitive discharge. Since the punitive confinement of officers and noncommissioned officers adversely affects the morale, prestige and authority of all officers and noncommissioned officers and since confinement of enlisted persons for longer than six months tends to degrade the armed services by allowing offenders sentenced to long terms for serious offenses to retain the status of military personnel, it is considered advisable that appropriate recommendations be made to amend the code to enact as a matter of law the provisions of paragraph 127*b*, Manual for Courts-Martial, which were nullified by the United States Court of Military Appeals decisions in the Varnadore and Holt cases.

d. Above recommendation takes into consideration not only the prestige of the service but the best interests of the serious offender, who by the nature of his crime forfeits, with rare exceptions, any prospect of further useful military service. Machinery exists, in the form of restoration, to provide for the exceptions.

3. *Suspension of punitive discharges*

a. The Armed Services have utilized the sentencing procedure of suspending punitive discharges until completion of confinement to provide an opportunity for study and observation of selected individuals and to provide for their return to duty without the stigma of an executed punitive discharge. In 1956, Department of the Army announced a policy that punitive discharges would not be ordered executed unless it positively appeared the accused was unfit for restoration. Such a policy was workable until the Court of Military Appeals, in the Cecil-May decision of 1959, interpreted Article 72(b), Uniform Code of Military Justice, to mean that in every case a person whose discharge has been suspended must be automatically restored to duty if there were no subsequent acts of misconduct which would warrant vacation proceedings. The recent Court of Military Appeals decision has resulted in returning many men to duty totally unqualified for service. In the light of this decision, the 1956 policy was ill-advised.

b. As a result of the Cecil-May decisions, 411 disciplinary barracks prisoners were eligible for automatic return to a duty status. Most of these have been determined unsuitable for restoration to duty. Many are psychopathic criminals and men with substandard mentality or serious maladjustments. For example, one recently

returned to duty status from the Fort Leavenworth, Kansas disciplinary barracks under this ruling murdered a female citizen of the City of Leavenworth, while awaiting reassignment.

c. Under The Judge Advocate General's interpretation of the May-Cecil decisions, Article 72(a) vacation proceedings may be initiated only for cause (specific misconduct). On the other hand, the Department of the Air Force has established the policy of initiating vacation proceedings where there is evidence or unsuitability for military service (lack of motivation, low mental level, failure to adjust to the rehabilitation program). Since both Army and Air Force prisoners are confined in Army disciplinary barracks, the above factors are serious morale problems. More important, return of such individuals to their units is bound to impair military efficiency and reflect discreditably upon the Army.

d. The above situation could be corrected by amending Article 72(a) to create a status of probation only in those cases in which the individual has been returned to a full duty status under suspended sentence.

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§*809. Art. 9. Imposition of restraint* (a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person. (b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement. (c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated. (d) No person may be ordered into	§*809. Art. 9. Imposition of restraint* (a) Restriction is the restraint of a person by an order directing him to remain within certain specified areas of a military command. A person placed in restriction will, unless directed otherwise, participate in all military duties and activities of his organization while under such restriction. (b) Correctional custody is the physical restraint of a person imposed under section 815 of this title (article 15) but not in immediate association with persons awaiting trial, or held in confinement pursuant to trial by general court-martial. It includes extra duties, including fatigue duties, or hard labor and may be imposed during duty or non-duty hours. (c) Arrest is the restraint of a person by an order directing him to remain within certain specified limits. Arrest may not be imposed as punishment for an offense under this chapter except as authorized under subsection 815(c) of this title. A person who has been placed in arrest may not exercise command of any kind or bear arms. (d) Confinement is the physical restraint of a person.	The Committee Amendment retains the provisions of Article 9, UCMJ, with only slight modifications and the addition of a statutory definition of the term "restriction" which is substantially the same as found in paragraph *20(b), MCM, (1951);* and the words "correctional custody" which implements the provisions of section 815 (article 15) dealing with commanders' corrective powers.

arrest or confinement except for probable cause. (e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.	(e) An enlisted member may be ordered into restriction, arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commissioned officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into restriction, arrest, or confinement. (f) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into restriction, arrest (except as provided in subsection 815(d) of this title), or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into restriction, arrest (except as provided in subsection 815(d) of this title), or confinement may not be delegated. (g) No person may be ordered into arrest or confinement except for probable cause. (h) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ 812. Article 12. Confinement with enemy prisoners prohibited. No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.	*§ 812. Article 12. Confinement with enemy prisoners prohibited.* No member of the armed forces of the United States may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States, except that a member of the armed forces of the United States may be confined in United States confinement facilities with members of the armed forces of friendly foreign nations.	The Committee adopts the DOD Amendment which amends this article so as to clearly allow the confinement of members of the armed forces in United States confinement facilities with members of the armed forces of friendly nations.
§ 813. Article 13. Punishment prohibited before trial. Subject to section 857 of this title (article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.	*§ 813. Article 13. Punishment prohibited before trial.* No person while being held for trial or while awaiting action by the convening authority with respect to a sentence adjudged by a court-martial shall be subjected to punishment or penalty other than restriction, arrest or confinement, nor shall the restriction, arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.	The Committee Amendment would eliminate the present distinction in treatment accorded a person in confinement under an adjudged sentence and a person whose sentence has been finally approved. This amendment is a necessary and desirable complement to the DOD Amendment of Article 71, UCMJ, and provided for in Article 57(e) of the Committee Amendments, which would permit the convening authority to order executed all court-martial sentences and portions of sentences except those extending to death, general officer cases, dismissal and punitive discharge cases.

		The provisions of Article 13, UCMJ, prohibiting punishment of prisoners before trial is retained. Article 55, UCMJ, is retained without change.
§ 855. Article 55. Cruel and unusual punishment prohibited. * * *	No change.	
§ 856. Article 56. Maximum limits The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.	*§ 856. Article 56. Limitations; indeterminate sentence; included punishments* (a) Whenever the punishment for an offense under this chapter is left to the discretion of a court-martial the punishment adjudged may not exceed such limits as the President may prescribe for that offense. Subject to such limits, if the sentence adjudged does not extend to death or life imprisonment, *a sentence to confinement for more than six months shall be for an indeterminate period not to exceed a specified term.* (b) A sentence to death includes dismissal or dishonorable discharge, confinement until the death sentence is carried into execution, and forfeiture of all pay and allowances, and in the case of enlisted members of other than the lowest pay grade, reduction to the lowest pay grade.	The Committee would amend Article 56, UCMJ, and in subsection (a) provide an indeterminate form of sentence if the period of confinement is for more than six months and if the sentence adjudged does not extend to death or life imprisonment. Subsection (b) specifically provides that a sentence to death shall include confinement until the sentence is executed and also a dismissal or dishonorable discharge and total forfeitures. The provisions of subsection (c) are designed to overcome the problems raised in *United States* v. *Smith*, 10 USCMA 152, 27 CMR 227 (officer may be sentenced to confinement without dismissal); *United States* v. *Varnadore*, 9 USCMA 471, 26 CMR 251, (an enlisted man may be sentenced to confinement for more than

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	(c) Unless otherwise prescribed by the President— (1) A sentence to confinement for any period involving a commissioned officer, cadet, or midshipman includes dismissal. (2) A sentence to confinement for any period involving a warrant officer includes dishonorable discharge. (3) A sentence to confinement for more than six months involving an enlisted member includes a bad conduct discharge, unless the court adjudges a dishonorable discharge. (4) A sentence to dishonorable or bad conduct discharge, or confinement or hard labor without confinement for any period involving an enlisted member of other than the lowest pay grade includes reduction to the lowest pay grade. If the sentence does not include forfeiture of all pay and allowances, the rate of pay of an enlisted member so reduced shall be commensurate with his cumulative service. (5) A sentence to forfeiture may not include forfeiture of allowances or forfeiture of more than two-thirds pay per month for six	six months without a punitive discharge); *United States* v. *Jobe*, 10 USCMA 276, 27 CMR 350, (total forfeitures may be imposed without a punitive discharge); *United States* v. *Simpson*, 10 USCMA 229, 27 CMR 303, (provisions of paragraph 126*e* MCM, 1951, regarding automatic reduction to lowest enlisted grade upon approval of a sentence including either a punitive discharge, confinement or hard labor without confinement, are invalid).

§ *857. Article 57. Effective date of sentences*

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

(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement.

(c) All other sentences of courts-martial are effective on the date ordered executed.

months unless the sentence also includes dismissal, or dishonorable or bad conduct discharge.

§ *857. Article 57. Execution of sentences*

(a) That part of a court-martial sentence extending to the death penalty shall not be carried into execution until affirmed as provided in this chapter and until directed by the President.

(b) Those parts of a court-martial sentence involving a general or flag officer extending to punishment other than confinement or forfeitures shall not be carried into execution until affirmed as provided in this chapter and until directed by the President.

(c) That part of a court-martial sentence extending to the dismissal of a commissioned officer other than a general or flag officer, the dismissal of a cadet or midshipman, or the dishonorable discharge of a warrant officer shall not be carried into execution until affirmed as provided in this chapter and until directed by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by him.

(d) That part of a court-martial sentence extending to the dishonorable or bad conduct discharge of an enlisted member shall not be

The Committee Amendment is designed to combine those portions of Article 57 and 71, UCMJ, that are concerned with the authority to direct the execution of any type of sentence and the determination as to when the sentence is to be effective.

The DOD Amendment of Article 71, UCMJ, would allow all court-martial sentences and portions of sentences (excluding death, general officer cases, dismissal and punitive discharge cases) to be ordered executed by the convening authority. The objective of the DOD Amendment of Article 71, UCMJ, is accomplished in the Committee Amendment of Article 57 by allowing parts of sentences to be placed in execution prior to the completion of appellate review.

Subsection (d) assures that the appropriateness of each punitive discharge will be considered by an agency equipped to apply uniform standards. It is a substitute for sentence appropriateness consideration by the board of review.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	carried into execution until affirmed as provided in this chapter and until directed by a sentence control board. (e) All other sentences or parts of sentences adjudged by a court-martial shall be carried into execution when directed by the convening authority or the officer who vacates a suspension under section 872 of this title (article 72). (f) Forfeitures shall not apply to any pay or allowances accrued before the date on which competent authority directs they be carried into execution. Unless the accused is in confinement the execution of forfeiture of allowances or forfeiture of more than two-thirds pay per month is stayed automatically until competent authority directs execution of a dismissal, dishonorable, or bad conduct discharge. (g) Under such regulations as the Secretary concerned may prescribe, (1) a member of the armed forces sentenced to dismissal or dishonorable or bad conduct discharge without confinement and whose sentence is approved by the convening authority, or	The amendment overcomes the problem raised in the *May* and *Cecil* cases because no punitive discharge will be executed until a determination has been made that the person is nonrestorable. See *United States* v. *May*, 10 USCMA 258, 27 CMR 432; *United States* v. *Cecil*, 10 USCMA 371, 27 CMR 445, ("technical suspension" of sentence to discharge until expiration of confinement or completion of appellate review whichever is later, may not be vacated without cause and a hearing). Subsection (g) is intended to correct the present practice of allowing a member who is sentenced only to dismissal, dishonorable or bad conduct discharge or who has served his period of confinement prior to completion of appellate review and execution of the punitive discharge to be retained in a duty status. Retention of such a person in a duty status adversely affects the morale of other members of the command. The Government does not benefit by such persons presence since because of his status it is inappropriate to assign him to responsible duties. This

(2) a member of the armed forces sentenced to confinement and to dismissal, or a dishonorable or bad conduct discharge who has served the period of confinement approved by the convening authority, may pending completion of appellate review and before his sentence to dismissal, or dishonorable or bad conduct discharge has been carried into execution, be ordered to his home of record to await completion of appellate review and the execution of the dismissal or dishonorable or bad conduct discharge. A member of the armed forces ordered to his home of record under this section is considered to be in a duty status and shall receive the same pay and allowances he would receive if not so absent, and, should a rehearing or other proceedings be ordered, may be ordered to any proper place for such proceedings.

subsection would give the Secretary authority to order a member of the armed forces, who has an approved sentence to dismissal, dishonorable or bad conduct discharge without confinement or a similar sentence including confinement which has been served, but whose case has not been finally reviewed and ordered executed, to his home of record, in a pay status, to await final appellate review and execution of the sentence.

§ *858. Article 58. Execution of confinement*

(a) Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or

§ *858. Article 58. Places of confinement; conditions; computation*

(a) Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has

The Committee Amendment retains the provisions of Article 58, UCMJ, but adds in subsection (a) provision for transferring persons to the Attorney General for further treatment and supervision under the Federal Youth Correction Act, and adds in subsection (c) a provision for crediting the time spent in pretrial confinement, or in confinement awaiting ac-

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. (b) The omission of the words "hard labor" from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment.	been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, *including transfer to the Attorney General for further treatment and supervision under the Federal Youth Correction Act (18 U.S.C. chap. 402)*, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment, including sentence computation, parole, and supervision upon release from the institution of confinement, as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. (b) No change. (c) Periods served in confinement before trial and before or after trial while awaiting action on the sentence by the convening authority shall be included, but periods during which confinement is suspended shall be	tion by the convening authority, toward the service of the term of confinement adjudged by a court-martial. However, any period during which confinement is suspended will not be credited toward the sentence. The latter provision was formerly found in Article 57(a), UCMJ.

None.

excluded, in computing service of a term of confinement adjudged by a court-martial.

§858A. Article 58A. Sentence control boards

(a) Each Secretary concerned shall establish within his department one or more sentence control boards, each composed of a chairman, who shall be either a general or flag officer, and not less than four other members. The Board shall consist of commissioned officers and civilians, a majority of whom shall be commissioned officers on active duty.

(b) A sentence control board shall review the sentence of

(1) every offender against this chapter sentenced to confinement for an indeterminate period whose sentence to confinement is not suspended by competent authority; or

(2) every enlisted member sentenced to a dishonorable or bad conduct discharge whose discharge is not suspended,

which review shall be as early as practicable after receipt of the record of trial. Under such regulations as prescribed by the Secretary concerned, the Board shall periodically review and examine the sentences of offenders still in confinement. The Board shall examine the reports and recommendations of the officer having custody of the offender and any other

The Committee Amendment provides for the establishment of sentence control boards to implement the indeterminate sentence concept. The function of the board is to control and supervise sentenced offenders and guide the efforts made toward the rehabilitation of these persons.

It is contemplated that in those cases where an accused is sentenced to a punitive discharge without confinement or to confinement which amounts to six months or less he will be retained by the convening authority until his disposition is directed by the Sentence Control Board.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	pertinent records or information available to the Department concerned and shall request any further studies, investigations or additional information considered necessary for appropriate disposition. It shall be the duty of all officers, agencies, and departments of the United States, when not incompatible with the public interest, to furnish the board upon its request any data or other information they may have concerning the offender and their views and recommendations with respect to the disposition of his case. (c) The sentence control board shall have authority to— (1) release on parole any offender to either the military or civilian community upon such terms and conditions as the board may prescribe in each case; (2) remit or suspend the unexecuted parts or amounts of the sentences or such parts or amounts of the sentences as it sees fit of selected offenders; (3) restore to active duty selected offenders who have had the unexecuted parts or amounts of their sentences remitted or suspended and who have not been discharged;	

	(4) appoint enlisted offenders restored to active duty to their former enlisted grades or any intermediate grade considered appropriate; (5) direct the execution of a dishonorable or bad conduct discharge which has been affirmed as provided in this chapter or the issuance of a bad conduct discharge in lieu of a dishonorable discharge or a form of discharge authorized for administrative issuance in lieu of the punitive discharge; and (6) set aside as it sees fit the court-martial conviction of especially selected offenders.	
§ 860. Art. 60. Initial action on the record After a trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the person who convened the court, a commissioned officer commanding for the time being, a successor in command, or any officer exercising general court-martial jurisdiction.	*§ 860. Art. 60. Initial action on the record* After a trial by court-martial the record shall be forwarded to the convening authority for action thereon with respect to the sentence.	The Committee Amendment provides that the convening authority shall act with respect to the sentence only. The definition of convening authority presently found in Article 60, UCMJ, is deleted in view of the Committee Amendment of Article 1, UCMJ (Definitions).
§ 861. Art. 61. Same—General court-martial records The convening authority shall refer the record of each general court-martial to his staff judge advocate or legal officer, who shall submit his written opinion	*§ 861. Art. 61. Reference to the staff judge advocate or legal officer* The convening authority shall refer the record of each general court-martial to his staff judge advocate or legal officer who shall submit his *oral* or written opinion *upon the*	The Committee Amendment eliminates the staff judge advocate review as a part of the legal review of the case since the convening authority has no function in approving the findings. As a result of this change the possibilities of adversary pro-

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
thereon to the convening authority. If the final action of the court has resulted in an acquittal of all charges and specifications, the opinion shall be limited to questions of jurisdiction and shall be forwarded with the record to the Judge Advocate General of the armed force of which the accused is a member.	*appropriateness of sentence to the convening authority.*	ceedings before the convening authority are eliminated, and the staff judge advocate review as a source of error is eliminated.
§ 864. Article 64. Approval by the convening authority In acting on the findings and sentence of a court-martial, the convening authority may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence is approval of the findings and sentence.	*§ 864. Article 64. Convening authority's action on sentence* Subject to applicable restrictions in subsection 856(c) of this title (Article 56(c))— (a) The convening authority may approve or disapprove the sentence or such part or amount of the sentence as he sees fit. (b) If the convening authority disapproves the entire sentence he may direct that the proceedings are abated and the accused shall be deemed not to have been convicted. (c) The convening authority may suspend the execution of the sentence or any part of the sentence approved by him, except a death sentence.	The Committee Amendment eliminates the requirement that the convening authority approve the findings since the validity of findings must be determined as a matter of law. The convening authority under this section has the same powers respecting sentences as the President or Secretary except for the power of commutation. Although the President and Secretary cannot affect the conviction, the convening authority who is the authority referring the charges to trial in the first instance is empowered to terminate them before a conviction can become final under the provisions of Article 76, UCMJ.

§ 874. Article 74. Remission and suspension (a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President. (b) The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.	*§ 874. Article 74. Remission and suspension* (a) Subject to applicable restrictions in section 856(c) of this title (article 56(c)), the Secretary concerned * * *. (TENTATIVE DRAFT)	The Committee Amendment is designed to adjust the power of remission and suspension with the amendment of Article 56(c), relating to included punishments, in order to prevent any inconsistent action that would defeat the purpose of Article 56(c).

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

F. Records of Trial and Review of Findings

DISCUSSION

Duplication in Appellate Procedures. The Committee is convinced that the appellate review of general courts-martial contains unnecessary duplication and wasted effort. Delay in the final decision of cases is bad for the accused and detrimental to good order and discipline in the service, particularly in wartime. Proceedings of a general court-martial are subjected to more reviews than proceedings of any of our civilian criminal courts or criminal trial proceedings of other civilized countries. Review is piled upon review. After a court-martial has found an accused guilty beyond a reasonable doubt, three separate officers or agencies are required to review the case using the standard of reasonable doubt. A staff judge advocate must base his opinion on this standard, a convening authority must base his approval of the findings on this standard, and a board of review must affirm the findings on this standard. A staff judge advocate must consider all aspects of the record to see whether there has been an error of law which has prejudiced the substantial rights of the accused. He then transmits his opinion to the convening authority who sits in judgment upon this legal question.

The record is then forwarded for further review by lawyers who are charged with the same function. After it leaves the convening authority, the record will be reviewed for errors of law or legal correctness at least once, and possibly three times. If it is a case in which the sentence does not require a review by a board of review initially, the record will go to the Office of The Judge Advocate General for examination. If the examiner considers finding or sentence unsupported by law, The Judge Advocate General will refer it to a board of review, and after the board of review has acted in the case it is possible that The Judge Advocate General may refer it to the Court of Military Appeals for resolution of some legal point. A case in which the convening authority has approved a sentence extending to a punitive discharge or confinement for one year or more automatically goes before a board of review. On this type of case the accused has a right to petition the Court of Military Appeals for review of the case after the board of review has acted.

The Committee finds that a great many of the issues in appellate litigation have only indirect connection with the guilt or innocence of the accused or with the question of whether his rights were prejudiced at the time of trial. Although the accused pleaded guilty to all the charges at the trial, the form and the content of the staff judge advocate's review may result in lengthy litigation, both before a

board of review and before the Court of Military Appeals. Owing to the peculiar responsibilities of a board of review concerning the appropriateness of a sentence, there is a requirement that appellate defense counsel collect and present material designed to cause a reduction of the sentence and, in many cases, to use oral argument for this purpose. Adversary procedures are being pushed into new areas. For example, the staff judge advocate now has to furnish the accused an opportunity to submit rebuttal for any adverse remarks in the review; also, defense counsel are urging that they should be able to present issues to the convening authority before he refers a case and before he approves it. These are only a few examples of the complications which exist in the appellate review of courts-martial.

Efforts To Simplify Appellate Procedures. An urgent need for simplification of appellate procedures has been recognized for some time. The DOD has had proposed legislation before the Congress for a number of years to effect some simplification. The current DOD bill (HR 3387) would, for example, allow certain general court-martial records to be prepared in summarized form and reviewed in the field by a judge advocate in consonance with the present procedure for review of summary and special courts-martial. At the board of review level, the DOD bill would permit an accused to waive in writing his right to have his case reviewed by a board of review. The Committee considers the provisions for summarized records and review in the field eminently sensible and reasonable when the sentence adjudged by a general court-martial does not include a punitive discharge or confinement in excess of six months. On the other hand, the Committee does not believe that the provision in the DOD bill for waiver of review by a board of review will have any significant effect, either in simplifying review procedures or in reducing the time for appellate processing of cases. Even when the accused has pleaded guilty at the trial, there is always a possibility that the board of review can be persuaded to reduce the sentence. It is difficult to see how any zealous defense counsel can advise the accused to forego presenting his case before the board of review. Were it not for the question of appropriateness of sentence, cases in which the findings are based completely on pleas of guilty could and should be eliminated from the category justifying an automatic referral to a board of review. The arguments for transferring consideration of sentence functions to a more appropriate agency are, we believe, convincing. Once this step is taken, cases based on guilty pleas appropriately can receive an initial automatic review in the Office of The Judge Advocate General, but not before a board of review.

Automatic Review. The Committee endorses an automatic review of courts-martial cases. Just as every soldier should be given a fair trial, free from legal error which would materially prejudice his substantial right—so he should be entitled to an automatic review by

professional and skilled personnel as a safeguard that this standard of trial procedure will be maintained. The nature of the review should be appropriate to the legal issues in the case and the gravity of the penalty to which the accused is subjected.

Review of Findings by Convening Authority. After close scrutiny of the appellate processes, the Committee concludes that review of the findings of a general court-martial by a convening authority is an anachronism. This procedure developed in earlier days when the trial itself was not conducted with the participation of lawyers. Review by the staff judge advocate might be the first time the professional knowledge and skill of a lawyer was brought to bear in the entire proceedings. This state of affairs has not existed since 1949 when the Elston Act went into effect and required the participation of lawyers in general courts-martial as counsel for the accused, for the government and as legal advisor for the court.

The Committee also concludes that review by the staff judge advocate and by the convening authority of the findings of a general court-martial is of no substantial value to the accused. The procedures at his trial have been supervised by lawyers. The effect of any errors which have been committed will be judged by lawyers who are assigned the duty of judging these issues.

The convening authority is in the position of a single layman juror who is called upon to judge a matter of law based on legal advice given by his staff judge advocate. One-half of the commanders presently exercising general courts-martial jurisdiction agree that there is no necessity for the convening authority to be concerned with the legality of the proceedings. Many of the others support the necessity for continuation of review by the convening authority on the ground that it is necessary for early detection of errors which might require a rehearing of the case.

Revision or Rehearing Authorized by Law Officer. If there is to be a rehearing, it is in the interest of justice that this fact be determined at the earliest point possible; otherwise, it may become impossible to assemble the necessary witnesses. Fairness to the accused requires that if there has been a legal error it be noted as early as possible so that he may receive the benefit of any more favorable result obtainable at a rehearing. A written opinion by the staff judge advocate and consideration of the opinion by the convening authority should not be necessary to obtain this objective. The Committee proposes amendments which will permit motions for revision or reconsideration to be made to the law officer as soon as the record of trial is available as a basis for such motions. The motion can originate with the accused, with the government, or with the law officer. Thus, if the trial counsel who reads the record, or a staff judge advocate, considers that prejudicial error has occurred, he will bring it to the attention of the law officer. The law officer's judgment in granting

or denying a motion for a rehearing or for reformation of the record will be at least as well informed as the staff judge advocate's decision or advice would have been; and it will certainly be better informed legally than that of the convening authority. With the addition of this procedure to trial practices, the Committee proposes that the staff judge advocate's review of the findings and the obligation of the convening authority to pass upon the findings be eliminated.

Review of Sentence by Convening Authority. A convening authority is properly concerned with the sentence which has been adjudged and its effect on manpower available to his unit as well as upon order and discipline in his unit. He should have the opportunity, as he does now, to take any normal clemency action with respect to the sentence. When he sent the charges to the general court-martial for trial, he indicated that he had made an initial determination that this man, if found guilty as charged, was a potential loss to his organization. Matters may have been brought out at the trial, however, which would change that decision. The opportunity for the convening authority to pass on the appropriateness of the sentence gives him the opportunity to consider anew his decision concerning the future value of the accused to his unit. Under the Committee's plan, the convening authority will retain all of his present powers to deal with the sentence, including the authority to disapprove the entire sentence. If he disapproves the entire sentence, he may, under the proposed revision of the Code, determine that the entire proceedings should be nullified.

All of these determinations are completely within the discretion of the convening authority and he is tied with no legal rules except that he may not increase the punishment adjudged by the court-martial. In keeping, however, with the new proposed statutory rules for inclusion of reduction to the lowest enlisted grade in sentences of confinement, and in inclusion of punitive separation in certain sentences to confinement, the convening authority's clemency actions must be in consonance with the rules which will be prescribed by the statute or by the presidential regulation. He cannot, for instance, disapprove reduction of a noncommissioned officer to the lowest enlisted grade and approve and order confinement executed. This would defeat the purpose of the Committee's proposed statute.

To the maximum extent possible, the Committee's revision of the Code will let the convening authority direct the execution of sentences, or parts of sentences to foster proper administration and management at the local level and to achieve the maximum immediate deterrent effect.

The size and type of the sentence approved by the convening authority will continue to be the basic determinant for the type of appellate review to be afforded the record. The type and extent of the sentence adjudged by the court will govern the type of record to be prepared.

This is in accordance with the scheme advanced in the DOD amendment (HR 3387).

Eliminating Board of Review in Guilty Plea Cases. In its discussion of sentences, and particularly the appropriateness of sentences, the Committee has laid the ground work for one of its most important recommendations in the field of appellate procedure. The Committee recommends that any record of trial, which because of the size of the sentence would under present rules be reviewed by a board of review, should be reviewed instead by a reviewing officer in the Office of The Judge Advocate General if the accused has been convicted only of offenses to which he pleaded guilty. Tremendous savings in time and personnel for appellate procedures can be foreseen from this change. From one-third to one-half of the cases now going before a board of review will be eliminated from the adversary type of appellate procedures with complete fairness to the accused. This action is possible only if the Committee's recommendation concerning the establishment of a sentence control board with responsibility for reviewing the appropriateness of indeterminate sentences is adopted. If the latter recommendation is not adopted, then the Committee can go no further in this direction than to endorse the current DOD amendment to allow accused persons to waive consideration of their cases by a board of review. We have already commented on this proposal and have stated our appraisal that it will not effect any significant reduction in the volume of appellate litigation or the time required for finalization of cases.

Additional Powers for TJAG. The Committee has considered the DOD proposals which would give to The Judge Advocate General additional powers with respect to cases which are reviewed or examined in his office as distinguished from those which go before a board of review. The additional powers recommended are appropriate and will add to the flexibility of the operation of The Judge Advocate General's Office. For the same reason, the Committee endorses the provisions of the DOD bill that would allow The Judge Advocate General to determine that a rehearing of a case is impracticable and dismiss the charges instead of forwarding the case to the field for a rehearing which has been authorized by a board of review or by the Court of Military Appeals. The Committee likewise endorses the DOD amendment which would extend the period for filing a petition for new trial under Article 73 from one year to two years and would give The Judge Advocate General additional flexibility in the handling of those petitions.

FINDINGS

1. There is unnecessary duplication and wasted effort in the appellate review of general courts-martial proceedings.

2. Many of the past issues litigated on review had no direct bearing

on the guilt or innocence of an accused or whether he had received a fair trial.

3. The tendency toward the multiplication of present adversary procedures militates against the simplification of military justice.

4. The requirement for the general court-martial convening authority to approve findings delays the appellate process and is unnecessary to military justice as long as the convening authority has full powers of clemency with respect to the sentence.

5. Department of Defense amendments (HR 3387) will simplify appellate review to some extent, but will not fulfill all the requirements for needed improvement.

6. The key to important progress toward simplification is to provide for review of sentences apart from legal procedures.

RECOMMENDATIONS

That the Uniform Code of Military Justice be amended (Tab A):

1. To remove any requirement for a convening authority to approve the findings of a general court-martial.

2. To incorporate authority to prepare summarized records of trial in certain general court-martial cases.

3. To permit the law officer to hear motions for revision and rehearing based on the record of trial and authorize revision proceedings or rehearings to be held.

4. To remove the requirement for a staff judge advocate review.

5. To limit boards of review to consideration of correctness in law and fact.

6. To authorize initial appellate review in OTJAG rather than by a board of review when the accused has pleaded guilty to all specifications and charges of which he was found guilty.

7. To give TJAG additional powers in the disposition of (1) cases initially reviewed in OTJAG, (2) cases in which a board of review or the Court of Military Appeals has ordered a rehearing, and (3) petitions for new trial.

Tab A—Proposed Legislation

Uniform Code of Military Justice	Committee amendment	Sectional analysis
§ *854. Article 54. Record of trial* (a) Each general court-martial shall keep a separate record of the proceedings of the trial of each case brought before it, and the record shall be authenticated by the signatures of the president and the law officer. If the record cannot be authenticated by either the president or the law officer, by reason of his death, disability, or absence, it shall be signed by a member in lieu of him. If both the president and the law officer are unavailable for any of those reasons, the record shall be authenticated by two members. (b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall contain the matter and shall be authenticated in the manner required by such regulations as the President may prescribe. (c) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.	§ *854. Article 54. Record of trial* (a) Each general court-martial shall make a separate record of the proceedings of the trial of each case brought before it. A record of the proceedings of a trial in which the accused is— (1) a general or flag officer; or (2) sentenced to death, dismissal, dishonorable or bad conduct discharge, confinement for more than six months, forfeitures for more than six months, or a fine of more than $500.00 shall contain a complete verbatim account of the proceedings and testimony before the court, and shall be authenticated in such manner as the President may, by regulation, prescribe. All other records of trial shall contain such matter and be authenticated in such manner and the President may by regulation, prescribe. (b) A copy of the record of the proceedings of each general court-martial shall be given to the accused as soon as authenticated.	The committee adopts the DOD Amendment except the reference to special court-martial and the provision that accused may buy a verbatim record. The latter provision would place reviewing authorities in an undesirable position and would cause administrative difficulties.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendment	Sectional analysis
§ 862. Article 62. Reconsideration and revision (a) If a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any further appropriate action. (b) Where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused, the convening authority may return the record to the court for appropriate action. In no case, however, may the record be returned— (1) for reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty; (2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specifica-	*§ 854A. Article 54A. Revision* At any time after a record of trial has been prepared and before the convening authority has acted on the sentence, the law officer, or a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)), upon his own motion or motion of the United States or the accused, may authorize proceedings in revision. Revision proceedings may be had where there is an apparent error or omission in the record or where the record shows improper or inconsistent action by a court-martial with respect to a finding or sentence which can be rectified without material prejudice to the substantial rights of the accused. *Revision proceedings may not be used to—* (1) reconsider a ruling *of the law officer amounting* to a finding of not guilty; (2) reconsider a finding of not guilty of any specification; (3) reconsider a finding of not guilty of any charge unless the record shows a finding of guilty under a specification laid under that	The Committee would repeal Article 62, UCMJ (Reconsideration and revision), and substitute the Committee Amendment, Article 54A. The Amendment provides that the revision proceedings may take place upon the motion of the law officer, government or the accused at any time prior to the convening authority's action on the sentence.

tion laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

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

§ *863. Article 63. Rehearings*

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

(b) Each rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the charge which sufficiently alleges a violation of some article of this chapter;

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

§ *854B. Article 54B. Rehearings*

(a) At any time after a record of trial has been prepared and before the convening authority has acted on the sentence, the law officer, or a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b)), upon his own motion or motion of the United States or the accused, may set aside the findings and sentence and authorize a rehearing whenever he considers such action necessary or appropriate in the interest of justice. If a rehearing is authorized but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(b) Each rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. The law officer of a general court-martial constituted in accordance with subsection 816(b) of this title (article 16(b))

The Committee would repeal Article 63, UCMJ (Rehearings), and substitute the Committee Amendment, Article 54B. The Amendment authorizes the law officer to set aside the findings and sentence, and authorize a rehearing, upon his own motion or upon the motion of the government or the accused. However, if the convening authority finds that a rehearing is impracticable he may dismiss the charge. The intent and purpose of this amendment is to expedite the correction of errors of law and prevent the miscarriages of justice at the earliest opportunity. A significant and desirable change is made in subsection (b) in that the law officer who first heard the case is made eligible to serve as law officer at the rehearing.

The added language to restrict the sentence on rehearing to one not in

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendment	Sectional analysis
original proceedings, or unless the sentence prescribed for the offense is mandatory.	which first heard the case shall not serve in a rehearing. *The law officer of the court-martial constituted in accordance with subsection 816(a) of this title (article 16(a)) which first heard the case is eligible to serve as law officer at a rehearing.* Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe *than imposed by the court-martial which first heard the case* may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory.	excess of or more severe than imposed by the court-martial which first heard the case is to clearly define the intent of Congress. *United States* v. *Jones,* 10 USCMA 532, 28 CMR 98 (1959) holds the sentence on rehearing is limited to the lowest quantum of punishment approved by a convening authority; board of review, or other authorized officer under the Code, prior to the second trial, unless the reduction is expressly and solely predicated on an erroneous conclusion of law.
§ *865. Article 65. Disposition of records after review by the convening authority* (a) When the convening authority has taken final action in a general court-martial case, he shall send the entire record, including his action thereon and the opinion or opinions of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.	§ *865. Article 65. Disposition of records by convening authority* (a) When the convening authority has acted on the sentence in a general court-martial case he shall— (1) send the record to the appropriate Judge Advocate General if the sentence then— (A) includes the death penalty;	Article 65, UCMJ, is amended to complement the Committee Amendments pertaining to the sentence control board, and the convening authority's action on the sentence. The Committee Amendment would delete all references to summary and special court-martial records in Article 65, UCMJ. The Committee Amendment obtains

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

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

(B) involves a general or flag officer;

(C) includes dismissal, dishonorable or bad conduct discharge;

(D) includes confinement or forfeitures for more than six months; or

(E) includes a fine of $500.00 or more.

(2) send a copy of the record and all available information relevant to sentence consideration to a sentence control board if the sentence, then—

(A) includes an unsuspended indeterminate sentence to confinement;

(B) includes unsuspended a dishonorable or bad conduct discharge.

(b) All other court-martial records shall be reviewed by a judge advocate of the Army or the Air Force, a law specialist of the Navy, or a law specialist or lawyer of the Coast Guard or Department of the Treasury, and shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

the objective of the DOD Amendment to the various subsections of Article 65, UCMJ, which has the result of no longer requiring general court-martial cases to be forwarded for appellate review where the sentence did not include a bad conduct discharge or was no greater than could be adjudged by a special court-martial.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendment	Sectional analysis
§ *866. Art. 66. Review by board of review* (a) Each Judge Advocate General shall constitute (in his office) one or more boards of review, each composed of not less than three commissioned officers or civilians, each of whom must be a member of the bar of a Federal court or the highest court of a State. (b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more. (c) In a case referred to it, the board of review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine contro-	§ *866. Art. 66. Review by a board of review* (a) No change. (b) The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the approved sentence— (1) extends to death; (2) affects a general or flag officer; (3) extends to the dismissal of a commissioned officer or a cadet or midshipman, or includes a dishonorable or bad conduct discharge, or confinement for one year or more, *unless the accused pleaded guilty to each offense of which he was found guilty.* (c) In a case referred to it, the board of review shall affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. (d) No change. (e) The Judge Advocate General may dismiss the charges whenever the board of review	Subsection (b) of Article 66, UCMJ, is amended to incorporate the DOD Amendment except the requirement that the accused *waive* review by the board of review. In this regard the DOD Amendment provides: "(b) The Judge Advocate General shall refer to a board of review each record of trial by court-martial in which the approved sentence— * * * "(4) includes a dishonorable or bad-conduct discharge, or confinement for one year or more, unless the accused pleaded guilty to each offense of which he was found guilty *and has stated in writing, after the convening authority has acted in his case, that he does not desire review by a board of review.*" Subsection (c) is amended and removes sentence appropriateness consideration from the board of review because that function would be performed by a sentence control board. The DOD Amendment is adopted in subsection (e) and gives The Judge

verted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the board of review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the Board of Review. If the board of review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for boards of review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Boards of Review.

has ordered a rehearing and he finds a rehearing impracticable. Otherwise the Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, or the Court of Military Appeals, instruct the convening authority to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing and the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) No change.

Advocate General authority to dismiss the charges whenever a board of review orders a rehearing and he finds a rehearing impracticable.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendment	Sectional analysis
§ 869. Article 69. Review in the office of the Judge Advocate General Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the appellate review of which is not otherwise provided for by section 866 of this title (article 66), shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if the Judge Advocate General so directs, the record shall be reviewed by a board of review in accordance with section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).	*§ 869. Article 69. Review in the office of the Judge Advocate General* (a) Every record of trial sent to the Judge Advocate General as provided by section 865 of this title (article 65), the appellate review of which is not otherwise provided for by section 866 of this title (article 66), shall be reviewed in the office of the Judge Advocate General. (b) If any part of the findings or sentence is found unsupported in law, the Judge Advocate General shall either refer the record to a board of review under section 866 of this title (article 66) or take such action as a board of review may take under sections 866(c) and (d) of this title (article 66 (c) and (d)). If the record is reviewed by a board of review, there may be no further review by the Court of Military Appeals, except under section 867(b)(2) of this title (article 67(b)(2)).	The Committee adopts the DOD Amendment which gives The Judge Advocate General the power to take corrective action on cases reviewed in his office under this article to the same extent that a board of review may take corrective action on cases reviewed by it. In addition, the article is amended to provide for review of cases involving fines of more than $500 and confinement and forfeitures extending for more than six months. The fine and confinement provisions are intended to cover any serious cases involving civilians subject to the Code.
§ 871. Article 71. Execution of sentence; suspension of sentence (a) No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the President. He shall approve the sentence or	*§ 871. Article 71. Action by the President or Secretary* (a) The President shall approve a sentence extending to death or involving a flag or general officer or such part, or amount, or commuted form of the sentence as he sees fit, and	The Committee would amend Article 71, UCMJ, by retention of only the provisions relating to Presidential or Secretarial action of approval and suspension of sentences in certain types of cases. The provisions concerned with

such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

(b) No sentence extending to the dismissal of a commissioned officer (other than a general or flag officer), cadet, or midshipman may be executed until approved by the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by him. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

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

may suspend the execution of the sentence or any part of the sentence, as approved by him except a death sentence.

(b) The Secretary concerned shall approve a sentence extending to dismissal of a commissioned officer (other than a general or flag officer), cadet, midshipman, or a sentence extending to dishonorable discharge of a warrant officer or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of any part of the sentence as approved by him. In time of war or national emergency he may commute a sentence to dismissal or dishonorable discharge of a warrant officer to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

the execution of sentences have been incorporated in the Committee Amendment of Article 57, and the sectional analysis of the Committee Amendment explains the adoption of the DOD Amendments of Article 71, UCMJ.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendment	Sectional analysis
(d) All other court-martial sentences, unless suspended, may be ordered executed by the convening authority when approved by him. The convening authority may suspend the execution of any sentence except a death sentence.		
§ *873. Article 73. Petition for a new trial* At any time within one year after approval by the convening authority of a court-martial sentence which extends to death, dismissal, dishonorable or bad-conduct discharge, or confinement for one year or more, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court. If the accused's case is pending before the board of review or before the Court of Military Appeals, the Judge Advocate General shall refer the petition to the board or court, as the case may be, for action. Otherwise the Judge Advocate General shall act upon the petition.	§ *873. Article 73. Petition for a new trial* At any time within *two* years * * * as the case may be, for action. The board of review or the Court of Military Appeals, as the case may be, shall determine whether a new trial, in whole or in part, should be granted or shall take appropriate action under section 866 or 867 of this title (article 66 or 67), respectively. Otherwise, the Judge Advocate General may grant a new trial in whole or in part or may vacate or modify the findings and sentence in whole or in part. (TENTATIVE DRAFT)	The Committee adopts the DOD Amendment to provide for a two year period for application for a new trial. The amendment also allows a new trial to be ordered on a part of the findings only and would also allow TJAG to take corrective action upon an application for a new trial by modifying or vacating the findings and sentence in whole or in part.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

G. Jurisdiction and Substantive Offenses

DISCUSSION

Jurisdiction. The armed forces have court-martial jurisdiction over retired members of a regular component who are entitled to draw pay and retired members of a reserve component who are receiving hospitalization from an armed force. Article 2, Uniform Code of Military Justice. Retired persons rarely have been tried by court-martial. However, as a result of their being subject to the Uniform Code of Military Justice, the Army is often asked to handle complaints, sometimes frivolous, that retired personnel are believed to have committed violations of the Code. The former attitude that members drew retired pay to keep themselves ready to return to active duty has been replaced by the concept that retired pay is a vested right accruing from honorable service for a prescribed time. Thus one of the main rationalizations for continuation of court-martial jurisdiction largely has evaporated.

Retired members of the armed forces are merged with the general civilian population of the United States. They should be subject to the same laws as their neighbors with the same obligations and the same freedom of action. Courts-martial jurisdiction imposes an obligation to abide by a different set of laws.

Good order and discipline in the armed forces are not benefited by continuing jurisdiction over retired members unless they are on active duty. If they are receiving hospitalization from an armed force they can be required to abide by hospital rules and regulations to the same degree dependents of members are required to obey while they are undergoing hospitalization in a medical installation of the armed forces.

The Committee considers jurisdiction over retired members unnecessary and recommends amendment to Article 2, Uniform Code of Military Justice, to eliminate that jurisdiction.

Substantive Offenses. Experience with the punitive articles of the Uniform Code of Military Justice as interpreted by the United States Court of Military Appeals clearly indicates a need for modification of some of those articles.

Article 83: Fraudulent enlistment, appointment, or separation. Historically there were two ways a person could gain entry into the service, i.e., appointment, as in the case of commissioned officers, and enlistment, which has been accepted generally to include all ways in which a person can assume the status of an enlisted person in the military service. The Manual for Courts-Martial adopts this and provides that the term "enlistment" includes "induction" (para 162, Manual for Courts-Martial, 1951). In *United States* v. *Jenkins*, 22

CMR 51 (1956), the United States Court of Military Appeals invalidated the Manual provision. There is now no effective way to punish under this article those who fraudulently gain entry to the armed forces under the Selective Service laws. The Committee recommends amendment of the statute to correct this deficiency.

Article 85: Desertion. Pursuant to the authority granted by Article 36, Uniform Code of Military Justice, to prescribe modes of proof, the President provides in the Manual for Courts-Martial (Executive Order) that in cases of desertion, evidence of a long unexplained absence will justify an inference of intent to remain away permanently. In *United States* v. *Cothern*, 23 CMR 382 (1957), the United States Court of Military Appeals held that an instruction patterned after this Presidential rule was erroneous. The Committee feels that a rule is necessary to set fixed periods of unauthorized absence after which desertion is presumed unless the contrary is proven. An amendment to the Uniform Code of Military Justice is offered for this purpose.

Article 92: Failure to obey general order or regulation. Pursuant to this Article commanding officers issued a series of general orders for the government of the personnel of their posts, camps or stations that were analogous to local laws in a civilian community. Violations of general orders issued by some commanders are no longer punishable as failures to obey general orders, *United States* v. *Ochoa*, 28 CMR 168 (1959). The force of all such orders issued by a command below territorial command level has been seriously compromised by decisions holding that actual knowledge is necessary in the prosecution of such offenses. This amounts to an interpretation that ignorance of the law is an excuse as far as the general orders of posts, camps and stations are concerned. *United States* v. *Curtin*, 26 CMR 207 (1958). The Committee recommends correction of this situation by amendment of the statute.

Article 95: The Uniform Code of Military Justice presently makes a distinction between escape from custody and escape from confinement. In doing so, a legal fiction has been created wherein two offenses are treated separately when the two offenses should be considered as one and the same. An accuser is confronted with an extremely technical distinction between custody and confinement. Yet the essential character of both statutes is basically simple. Both stem from physical restraint, lawfully imposed. The gravamen of the offense committed in either case is escape from such physical restraint, whether imposed by an armed force policeman as a result of apprehension, imposed by a commanding officer or his delegate, or imposed as a result of properly authenticated confinement orders. The maximum punishment imposable is the same (Manual for Courts-Martial, 1951, para 127*c*, p 221). The accused, moreover, has been well informed by the specification of the offense with which he is

charged, and there is no possibility of his again being placed in jeopardy. In many cases it is difficult to decide whether a man is in "custody" or "confinement", CM 356107, *Wildman*, 6 CMR 406 (1952).

The DOD amendments (HR 3387) provide that "escapes from *custody or confinement*" shall be changed to "escapes from *physical restraint lawfully imposed*". This will abolish the fictional distinction that presently exists. The Committee endorses the DOD solution.

Article 107: False official statements. There is probably no need in a military force greater than the need for reliance upon subordinates for information. Such information is not only worthless but dangerous if it is not truthful. Judicial decisions have interpreted Article 107, Uniform Code of Military Justice, to provide no sanction against a suspect who makes a false statement to an investigating officer. In effect he may lie with impunity. (*United States* v. *Osborne*, 26 CMR 235 (1958); *United States* v. *Aronson*, 25 CMR 29 (1957)—dicta to the effect that when a person is suspected or accused of a crime unrelated to any duty or responsibility imposed upon him, an interrogating agent has no right or power to require a statement from him and accordingly any statement given is not "official" within the meaning of the Uniform Code of Military Justice, Art. 107).

The Committee has no intention of suggesting that a suspect be required to furnish evidence against himself, but, once he elects to speak, his words to an investigator are "official" and should reflect the truth. The Committee recommends amendment of the statute.

Article 118: Murder. This article presently reads in pertinent part:

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(3) is engaged in an act which is inherently dangerous to *others* and evinces a wanton disregard of human life; . . . is guilty of murder . (emphasis added).

The word "others" has been construed by the Court of Military Appeals not to include the singular, *United States* v. *Davis*, 10 CMR 3. Thus, at present, there is a requirement that more than one person must be imperiled in order for the accused to be guilty of the wanton conduct denounced by that section. This may result in a life sentence if an accused wantonly kills a third-person passenger in a jeep, *United States* v. *Stokes*, 19 CMR 191 (unpremeditated murder) and a three year maximum if only the accused and the victim were present when the wanton conduct resulting in death occurred, CM 365446, *Horton*, 12 CMR 559.

The remedy is to change the word "others" in Article 118(3) to the word "another".

The substitution of the word "another" has a military precedent. In MCM 1928, the following language appears: ". . . knowledge

that the act . . . will probably cause the death of, or grievous bodily harm to, *any person* . . . although such knowledge is accompanied by indifference . . ." (emphasis added) (Manual for Courts-Martial, 1928, pages 163–164).

The Committee is proposing an amendment to the statute to correct the situation.

Article 121: This article was intended to combine the offenses of larceny, false pretense and embezzlement under the general heading of larceny and wrongful appropriation depending on the permanency of the intent involved.

With reference to that aspect of the offense (withholding) that formerly constituted embezzlement the Manual for Courts-Martial, 1951, at para 138*a* provides:

"It may be presumed that one who has assumed the custody of the property of another has stolen such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required."

The presumption is founded on logic. It is important in embezzlement cases because the nature of the offense leaves little other evidence. The United States Court of Military Appeals has ruled that mere failure on the part of a custodian to account for intrusted funds does not by itself constitute a larceny and that the specific intent to steal must be proved.

The Committee believes that the best method to clarify the confusion existing in embezzlement cases is to make specific statutory provision therefor.

Article 123a: Forgery. Presently, violations which involve the passing of bad checks may be prosecuted, depending on the circumstances and grade of the offender, as violations of Article 121 (larceny), Article 133 (conduct unbecoming an officer and a gentleman), and Article 134 (conduct of a nature to bring discredit upon the armed forces), none of which may be considered as a bad-check statute. Because of technical difficulties which arise as a result of pleading the wrong article, guilty persons sometimes escape punishment.

Further there is no presumption relative to the intent to defraud.

The Department of Defense amendments propose to correct this situation by inserting an additional punitive article (123a) similar to the bad-check statutes of the District of Columbia (Title 22, D.C. Code, Sec. 1410) and the State of Missouri (Revised Statutes of Missouri 561.460, 561.470, 561.480). The Committee supports this recommendation.

Article 131: Perjury. In *United States* v. *Smith*, 26 CMR 16 (1958), the Court of Military Appeals held that, although false swearing was an offense at common law and may be recognized as

an offense in military law, it is not an offense which can be committed in a judicial proceeding. If a false statement is made under oath in a judicial proceeding, it must meet the requirements for perjury under Uniform Code of Military Justice, Article 131, or no offense has been committed. The Committee feels that false testimony in a judicial proceeding should be punishable whether amounting to perjury or not.

False swearing other than in judicial proceedings or in a course of justice also should continue to be punishable.

Article 87: Missing movement. The Committee has been informed of the difficulties encountered by Commanders of Transportation Commands with personnel who intentionally miss movement on the Arctic Resupply Mission. The confinement presently imposable (6 months) barely exceeds, and any confinement served is less than, the time required to complete the mission. If a soldier is willing to risk the imposition of a punitive discharge he can be out of the stockade before the unit returns. The authorized confinement provides an inadequate sanction to enforce compliance with movement orders. Accordingly, the Committee recommends an increase in the authorized maximum confinement.

As indicated, some of these deficiencies have already been brought to the attention of the Congress by proposals contained in the DOD Omnibus Bill (HR 3387). Others were emphasized in a letter to the Honorable Paul J. Kilday, Chairman, Special Subcommittee, with regard to amendments to the Uniform Code of Military Justice, Committee on Armed Services, who invited the views of Major General Stanley W. Jones, The Assistant Judge Advocate General (Tab A). Others have not been highlighted previously.

FINDINGS

1. Court-martial jurisdiction over retired members not on active duty does not contribute to maintenance of good order and discipline and can be eliminated.

2. The United States Court of Military Appeals has interpreted the Uniform Code of Military Justice to invalidate traditional modes of proof approved by the President as Commander in Chief.

3. The Uniform Code of Military Justice is inadequate to support good order and discipline under present conditions because constant changes in definitions of offenses and modes of proof make court-martial results uncertain.

4. The punishment presently imposable for missing movement of a ship, aircraft or unit through design provides an inadequate deterrent for such offenses.

RECOMMENDATIONS

1. That the Uniform Code of Military Justice be amended as follows (by Articles):

a. *Article 2.*—To eliminate jurisdiction over retired members not on active duty.

b. *Article 83.*—To provide for punishing a person who procures or permits his entry in the armed forces by any knowingly false representation or deliberate concealment of his qualifications.

c. *Article 85.*—(1) To provide that absence without proper authority for more than six (6) months in peacetime and thirty (30) days in wartime creates a presumption of desertion unless the contrary is proved.

(2) To provide that enlistment in another armed force shall constitute desertion.

d. *Article 92.*—(1) To define the commands authorized to issue general orders.

(2) To define "general order".

(3) To establish the mode of proof of knowledge of general orders.

e. *Article 95.*—To abolish the distinction between custody and confinement.

f. *Article 107.*—To provide that statements made in line of duty including statements made to investigators are official statements.

g. *Article 118(3).*—To proscribe an act inherently dangerous to *another.*

h. *Article 121.*—To add the offense of embezzlement.

i. *Article 123a.*—To add a specific bad check statute.

j. *Article 131.*—To add the offense of false swearing when it occurs in a judicial proceeding.

2. That the Table of Maximum Punishments be amended by Executive Order to increase the confinement imposable for missing movement of ship, aircraft or unit through design to one (1) year.

Tab A—Ltr 8 Oct. 59 to Hon. Paul J. Kilday
Tab B—Proposed Legislation

DEPARTMENT OF THE ARMY

Office of The Judge Advocate General

Washington 25, D.C.

8 October 1959

Honorable Paul J. Kilday
Chairman, Special Subcommittee With
Regard to Amendments to the Uniform
Code of Military Justice
Committee on Armed Services
House of Representatives
Washington 25, D.C.

Dear Mr. Kilday:

In the course of your recent study of the operation of the Uniform Code of Military Justice you extended to me an invitation to comment informally concerning the problems of military justice—not as an official spokesman for the Department of the Army or Department of Defense, but as a practitioner in this specialized field of law.

After working with the Code for more than eight years, it is my conclusion that there is a very real necessity for certain changes if proper discipline is to be maintained in the military establishment. These changes are urgently needed even under the relatively peaceful conditions obtaining in the world today; the need is more acute, if the statute is to operate practically and effectively under combat conditions.

This need for modification has stemmed from the fact that certain of the procedures set forth in the Code have proved to be unnecessarily cumbersome. Moreover, certain refinements have been introduced by judicial interpretation that tend to dilute its efficiency to support military operations.

At the outset it is fair to say that a number of decisions of the United States Court of Military Appeals have made it unduly difficult to collect evidence and prosecute military offenders. The stated objective of the Court is "to place military justice on the same plane as civilian justice." (*United States* v. *Clay*, 1 USCMA 74, 1 CMR 74). In order to achieve this objective there has been a pronounced tendency, on the part of the Court, to import civilian rules.

It is relevant to ask whether a military force can perform its mission by applying standard rules of civilian criminal process. An indication of the vexing ramifications of this approach on military order and discipline may be seen in the case of *United States* v. *Brown*, 10 USCMA 482, 28 CMR 48, which is the most recent example of a tendency to limit commanders' search powers and to analogize searches and

TAB A

seizures in the military to civilian practices. In this case the commander's search on suspicion that the soldiers returning to camp were in possession of heroin was held to be illegal because based on mere suspicion rather than probable cause.

Indication of some problem areas in the Code itself may be seen by a consideration of Article 31, Uniform Code of Military Justice. Article 31 provides that in certain circumstances an accused must be warned that he need make no "statement". Just how far is Article 31 intended to reach? Is it intended that production of documents establishing liberty status upon request be a "statement"? Does it mean that samples of body fluids are "statements"? Does it mean that a failure to warn not only invalidates a confession but also makes inadmissible independent evidence discovered as a result of these confessions? These are all questions of interpretation of a statute and could be settled by amplification of the statute.

I would like to say that the Department of Defense Bill (H.R. 3387) is a good first step towards curing some of the defects in our present system. However, it is only a first step and not a complete remedy. I am firmly convinced that it is urgent and essential that Congress go further and legislatively reemphasize the Constitutional and traditionally accepted power of the President, as Commander in Chief, to make regulations for the government of the armed forces. Article 36, Uniform Code of Military Justice. In recent years there has been a pronounced tendency in Court of Military Appeals decisions to downgrade the standing of the Manual for Courts-Martial which is a Presidential Regulation and, in effect, to declare that many provisions of the Manual are invalid exercises of the President's authority as Chief Executive and Commander in Chief. This tendency has been particularly marked in the sentence and punishment area, but it has extended to such other fields as the Executive's power to establish the conditions of probation, Executive definition of "important service" for the purposes of desertion, definition of "official statements" for the purpose of insuring that military operations are based on trustworthy and accurate reports, and designation of commanders authorized to issue general orders. The Court has also held invalid Executive determinations of evidentiary rules such as the testimonial competency of wife and husband.

Experience, precedent and reason all dictate that the Commander in Chief should be given wide latitude in determining the rules for the operation of the military forces including rules of evidence. It is absolutely essential to the maintenance of discipline and good order that the President should possess the power to state authoritatively general policies governing extent of military penalties, customs of service, minimal standards of conduct for particular grades and, in general, to promulgate rules essential to the maintenance of discipline in a fighting force as distinguished from a civilian community. The

Court of Military Appeals has not recognized that, except in those instances that the Executive power is curtailed by express statute, the Constitution confers upon the President plenary power to regulate military justice.

Your personal interest in the subject of military justice is well known and, of course, appreciated by all of us in the Army. Under your guidance, legislative examination of the Uniform Code of Military Justice is certain to be constructive and beneficial to the military services.

Sincerely yours,

[s] Stanley W. Jones
STANLEY W. JONES
Major General, USA
The Assistant Judge Advocate General

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *883. Article 83. Fraudulent enlistment, appointment, or separation* Any person who— (1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or (2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.	§ *883. Article 83. Fraudulent enlistment, appointment, other induction, or separation* Any person who— (1) procures *or permits* his own enlistment, appointment, induction, or entry by any other means into the armed forces by means of knowingly false representation or deliberate concealment as to his qualifications for such enlistment, appointment, induction, or entry into the armed forces, and receives pay or allowances thereunder; or (2) No change.	The Committee Amendment would extend Article 83, UCMJ, to apply *to any induction.* This addition is necessary and desirable in view of the holding in *U.S.* v. *Jenkins, 7 USCMA 261, 22 CMR 51,* that the offense of *fraudulent enlistment* cannot be committed by one who is "drafted."
§ *885. Article 85. Desertion* (a) Any member of the armed forces who— (1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid	§ *885. Article 85. Desertion* * * * (d) Any member of the armed forces who without proper authority goes or remains absent from his unit, organization, or place of duty in time of peace for more than six months, or in time of war for more than thirty days shall, unless the contrary is proved, be presumed to have had the intention of not	The Committee Amendment provides that after a member has been absent without proper authority for a specified time there is a rebuttable presumption that he intended to remain away permanently. The amendment is directed at the problem raised in *U.S.* v. *Cothern, 8 USCMA 158, 23 CMR 382,* holding it to be error to instruct on the basis of

hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion.

(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.

returning to his unit, organization, or place of duty.

paragraph 164*a*, MCM, 1951, that a long unexplained absence justifies an inference of an intent to desert.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ 892. Article 92. Failure to obey order or regulation Any person subject to this chapter who— (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.	*§ 892. Article 92. Failure to obey order or regulation* (a) Any person subject to this chapter who— (1) fails to obey any lawful general order or regulation *promulgated by a territorial, theater or similar area command, or superior command;* (2) *having knowledge of any other lawful general order or regulation fails to obey the order or regulation;* (3) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (4) is derelict in the performance of his duties; shall be punished as a court-martial may direct. (b) A general order is one promulgated which applies uniformly to all members of the command by which it is promulgated. Proof that such an order was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused ought to	Article 92, UCMJ, is amended to provide in subsection (a)(1) the level of command that is authorized to issue general orders and knowledge of such orders may be presumed. This amendment is designed to clarify the *Ochoa* case which held that general orders can be promulgated only at departmental level of by "major commanders". *United States* v. *Ochoa*, 10 USCMA 602, 28 CMR 168. The offense of failure to obey general orders as stated in subsection (a)(2) requires proof of knowledge of the order; however, the existence of such knowledge may be established constructively. Subsection (b) is new and adds a definition of a general order, and further provides that the existence of constructive knowledge on the part of the accused may be established by showing that the general order was widely promulgated and by the exercise of ordinary care the accused should have known of the order. See *United States* v. *Curtin*, 9 USCMA 427, 26 CMR 207. Under this amended article a violation

§ 895. Article 95. Resistance, breach of arrest, and escape Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.	*§ 895. Article 95. Resistance, breach of arrest, and escape* Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from *physical restraint lawfully imposed* shall be * * *.	The Committee adopts the DOD Amendment which would eliminate the present distinction between escape from custody and escape from confinement.
§ 907. Article 107. False official statements Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.	*§ 907. Article 107. False official statements* (a) An official statement consists of any statement, oral or written, made in connection with the operation of the armed forces of the United States, or to a member of the armed forces conducting an investigation, or to a superior officer, whether or not there is a duty to make such a statement or to respond to the question. (b) Any person subject to this chapter who with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other *false official statement* knowing it to be false, shall be punished as a court-martial may direct.	The Committee Amendment retains the provisions of Article 107, UCMJ, and adds in subsection (a) a definition of "official statement" designed to meet the problem raised in *Aronson* (8 USCMA 525, 25 CMR 29), *Osborne*, (9 USCMA 455, 26 CMR 235) and related cases that there is no duty incumbent upon an accused to answer truthfully when questioned concerning a matter related to the accused's duties or responsibilities. The accused may exercise his privilege and remain silent, but if he chooses to speak and if the matter involved is in the line of duty then the statement is official and he must speak the truth.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*—Continued

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *918. Article 118. Murder* Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he— (1) * * * (2) * * * (3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or * * *	§ *918. Article 118. Murder* Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he— (1) * * * (2) * * * (3) is engaged in an act which is inherently dangerous to *another* and evinces a wanton disregard of human life; or * * *	The Committee Amendment would amend Article 118(3), UCMJ, by deleting the word "others" and substituting the word "another." The word "others" has been so construed as not including the singular. *U.S.* v. *Davis, 2 USCMA 505, 10 CMR 3.* Thus, at present, there is a requirement that more than one person must be imperiled in order for the accused to be guilty of the wanton conduct denounced by that section. This may result in a life sentence if an accused wantonly kills a third person. (*U.S.* v. *Stokes, 6 USCMA 65, 19 CMR 191,* unpremeditated murder), and a three year maximum sentence if only the accused and the victim were present when the wanton conduct resulting in death occurred. See CM 365446, *Horton,* 12 CMR 559 (involuntary manslaughter). The substitution of the word "another" has military precedent in the *Manual for Courts-Martial,* 1928, where at pages 163–164 the following language appears: ". . . Knowledge that the act . . . will probably cause the death of, or grievous bodily

§ 921. Article 121. Larceny and wrongful appropriation (a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind— (1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or (2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation. (b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.	*§ 921. Article 121. Larceny, wrongful appropriation, and embezzlement* (a) No change. (b) No change. (c) Any person subject to his code who loans, or wrongfully converts to his own or to the use of another, or deposits in any bank or exchanges for other funds, except as allowed by law, any portion of funds intrusted to him is guilty of embezzlement, and shall be punished as a court-martial may direct.	harm to, *any person* . . . although such knowledge is accompanied by indifference . . . " *MCM*, 1928 (emphasis added). The proposed amendment is designed to reach and overcome the problem raised in *U.S.* v. *Crowell, 9 USCMA 43, 25 CMR 305*, that the inference arising from the failure to account for money or property intrusted is not enough by itself to justify a larceny conviction. The Committee Amendment would go further than merely stating a presumption or inference that was involved in *Crowell* and as a remedy would establish a separate offense of embezzlement.

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
	§ 923A. Article 123A. Making, drawing, or uttering check, draft, or order without sufficient funds (a) Any person subject to this chapter who— (1) for the procurement of any article or thing of value, with intent to defraud; or (2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. (b) The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowl-	The Committee adopts the DOD Amendment which would add an additional punitive article to provide specific statutory authority for the prosecution of bad-check offenses. One of the difficulties arising under existing law is the necessity to prosecute bad-check offenses under one of three separate articles (121, 133, or 134), none of which may be considered as a bad-check statute. Because of technical difficulties that arise as a result of the unfortunate pleading of the wrong article, an obviously guilty person sometimes escapes punishment.

edge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment.

(c) In this section the word *credit* means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

§ 931. Article 131. Prejury Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct.	*§ 931. Article 131. Perjury and false swearing* (a) Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false testimony material to the issue or matter of inquiry is guilty of perjury and shall be punished as a court-martial may direct. (b) Any person subject to this chapter who— (1) in a judicial proceeding or in a course of justice willfully and corruptly gives, upon a lawful oath or in any other form allowed by law to be substituted for an oath,	Section (a) of the Amendment contains the provisions of Article 131, UCMJ, pertaining to perjury. Section (b) (1) is new and adds the offense of false swearing. *United States* v. *Smith*, 9 USCMA 236, 26 CMR 16, held that the offense of false swearing in violation of Article 134, UCMJ, is not a lesser included offense of perjury and cannot be committed in a judicial proceeding. The Committee Amendment is so designed to meet the problem raised in the *Smith* case and section (b) (1) creates a new and separate offense. Section (b) (2) retains the provision of the offense of false swearing

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, SECTIONAL ANALYSIS*—Continued

Uniform Code of Military Justice	Committee amendments	Section analysis
	any false testimony not material to the is ue or matter of inquiry; or (2) in an affidavit or proceeding, other than a judicial proceeding or in a course of justice, willfully and corruptly gives, upon a lawful oath or in any form allowed by law to be substituted for an oath, any false statement not believing the statement to be true; is guilty of false swearing and shall be punished as a court-martial may direct. (TENTATIVE DRAFT)	under Article 134, UCMJ as it pertains to false statements given under oath other than in judicial proceedings or in a course of justice.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

H. Improvements for Stability

DISCUSSION

General. Throughout other sections of this report we have remarked upon the effect of judicial decisions upon good order and discipline. In the majority of such instances, judicial interpretations of the Uniform Code of Military Justice were found to conflict with regulations promulgated by the President, and the regulations were invalidated. The Committee has found in many instances that the invalidated regulations state rules particularly adapted to a military organization. For example, the mode of proof prescribed for showing intent to desert by proving a much prolonged absence without proper authority for which no satisfactory explanation is given (para 164*a*, Manual for Courts-Martial, 1951) was a rule understood by everyone in the service because it was based on reason and experience. This rule had been stated substantially the same way in the Manual for Courts-Martial since 1917. In 1957, after forty years, it was held no longer to be a correct instruction. *United States* v. *Cothern*, 23 CMR 382 (1957). Other rules with long precedent likewise have been overruled. It is noticeable that the bulk of the troublesome decisions to which we have referred have been announced in the last three years. The rate at which old precedents are being overruled seems to have accelerated.

The services have been caught up in a change from a code system (because it was based largely on the Manual for Courts-Martial) to a system depending on individual case decisions gradually to build up the full outline of the law in each individual area. Perhaps, after a very long period the body of case law would form a fairly definite pattern for guidance.

Military services need stability so that they may withstand the shock of combat and meet the requirements of global deployments and commitments. Officers must feel confident and competent in their jobs; soldiers need to know what to expect. Instead, commanders feel that there is just too much change in military justice. A need is felt for some stabilizing influence. The Committee has explored the possibilities for improving stability and recommends three amendments to the Code for this purpose.

President's Regulations. In other sections the Committee has recommended that the statute be amended to meet a special problem. Usually, the amendment would return us to a previous Manual for Courts-Martial rule—one proven workable by long experience. Such measures would correct many existing problems. The Committee believes that recent experience has demonstrated the wisdom of letting

the Commander in Chief state authoritatively general policies concerning military penalties (*U.S.* v. *Holt*, supra), customs of the service and standards of conduct. We think it would be helpful if Congress would enact an amendment to Article 36 to show its intention that the President's rules in the proper sphere be binding. An amendment is proposed, based largely on the precedent by which the Supreme Court prescribes rules for United States Courts.

Harmless Error Rule. Article 59, Uniform Code of Military Justice, states that a finding or sentence may not be held incorrect for an error of law unless the error materially prejudices the substantial rights of the accused. The doctrine of general prejudice as conceived by the Court of Military Appeals in incompatible with Article 59, because it denies any necessity to look into and assess the actual harm done the accused. The accused is entitled to a fair trial. If another trial, with error expunged, would probably bring a more favorable result for the accused, then he should have his original conviction and sentence set aside. If a more favorable result is not likely to be obtained in a rehearing, then it is difficult to understand wherein his substantial rights have been materially prejudiced. The Committee proposes an amendment to Article 59 which should reduce or eliminate the undesirable effect of the doctrine of general prejudice.

Court of Military Appeals. There was considerable discussion in Congress, at the time the Uniform Code of Military Justice was adopted, about the proper composition of the Court of Military Appeals. Consideration was given to the size of the court and the qualifications of the judges. No one had had any experience with this kind of jurisdiction. The legislators demonstrated open minds on the subjects of size and qualification.

Experience has now demonstrated, we believe, that a three-judge Court of Military Appeals is not sufficiently conducive to stable procedures and consistent administration of justice. The replacement of one judge in three has caused a dramatic reversal in the law. A five judge court would be much less susceptible to fluctuation. Because of the particular needs of a military community for stability we recommend legislation to increase the membership of the United States Court of Military Appeals to five judges. We believe the two additional judges would be especially valuable if they could bring to the Court a background of military and legal experience combined. Provision has been made for this in the Committee's proposed amendment to Article 67. In order that the two new judges always will have a reasonably current military background we propose that they be appointed for four years without reappointment. With the usual device of staggered appointments, there would always be one judge not more than two years removed from military experience.

We believe the majority of the Court and the Chief Judge should always be civilians.

FINDINGS

1. The standing of the President's regulations for military justice has been diminished.

2. Some cases are reversed because of errors of law that do not materially prejudice the substantial rights of the accused.

3. Current and future requirements demand increased stability in the administration of military justice.

4. Less fluctuation in military justice would occur if the Court of Military Appeals were increased to five members.

5. It is desirable that one or more judges of the Court of Military Appeals have reasonably current backgrounds in military-legal service.

RECOMMENDATIONS

1. That Article 36 be amended to make the President's regulations final and binding on appellate bodies after having been laid before the Congress for ninety days.

2. That Article 59 be amended to define material prejudice to the substantial rights of an accused.

3. That Article 67 be amended to authorize a five-judge Court of Military Appeals with members who have had recent military-legal experience.

Tab A—Proposed Legislation

COMPARATIVE TABLE OF PRESENT ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE, COMMITTEE AMENDMENTS, AND SECTIONAL ANALYSIS*

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ 836. Article 36. President may prescribe rules (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.	*§ 836. Article 36. President may prescribe rules* (a) The President shall have the power to prescribe by regulations, from time to time, rules of evidence, pleading, practice, procedure, and modes of proof with respect to any or all proceedings before courts-martial, courts of inquiry, military commissions, and other military tribunals. So far as he deems practicable, he shall apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. (b) All regulations made under this article shall be uniform insofar as practicable. (c) Such regulations shall not take effect until they have been reported to Congress by the President at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. After such rules have taken effect, they shall be binding on all tribunals and appellate bodies.	The Committee Amendment is an adaptation of the provisions of *18 U.S.C. § 3771* which is the statutory authority for the Supreme Court of the United States to prescribe the rules of pleading, practice, and procedure in criminal cases in the United States district courts. The Amendment is designed to lend stability to military judicial proceedings as a result of the binding effect of the regulations after having been laid before the Congress for the required time.

§ 859. Article 59. Error of law; lesser included offense (a) A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. (b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.	*§ 859. Article 59. Error of law; lesser included offense* (a) A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. An error of law, including a violation of a provision of this chapter, will not be considered to materially prejudice the substantial rights of an accused unless, after consideration of the entire record, it is affirmatively determined that a rehearing would probably produce a materially more favorable result for the accused. (b) Any reviewing authority with the power to affirm a finding of guilty may affirm, instead, so much of the findings as includes a lesser included offense.	The Committee Amendment is designed to restrict the application of the doctrines of "military due process" and "general prejudice" as conceived by the Court of Military Appeals. Article 59(a), as presently construed, requires a finding of specific prejudice to accused's substantial rights before a case is reversed due to some error of law even though such error does not specifically prejudice accused's rights. If the competent evidence of record in such a case is compelling, and a rehearing would probably not produce a result materially more favorable to the accused, it is difficult to see how a reversal would benefit accused. In such a case, a reversal becomes a punitive measure against the government. The inequity of requiring the government to expend time and money for a retrial, where no tangible benefit accrues to the accused, is apparent. There are more effective means available in the armed forces to police the administration of military justice. Those who deprive an accused of a right guaranteed by the Code may be summarily relieved of their duties, or even tried by court-martial.

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
§ *867. Article 67. Review by the Court of Military Appeals* (a)(1) There is a Court of Military Appeals, located for administrative purposes in the Department of Defense. The Court of Military Appeals consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of that court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge is entitled to a salary of $25,000 a year and is eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court.	§ *867. Article 67. Court of Military Appeals* (a)(1) There is hereby established a Court of Military Appeals, which shall be located for administrative purposes in the Department of Defense. The Court of Military Appeals *shall consist of five judges appointed by the President,* by and with the advice and consent of the Senate. *Three judges shall be appointed from civilian life* for a term of fifteen years. Not more than two of these judges shall be appointed from the same political party, nor shall any person be eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. *These judges shall be eligible for reappointment. The President shall designate from time to time one of these judges to act as Chief Judge. Two judges shall be appointed for a term of four years from among the retired commissioned officers of the armed forces, who have completed at least 15 consecutive years service on active duty as a judge advocate of the Army or Air Force or as a legal specialist of the Navy within two years of their appointment. These two judges shall not be eligible for reappointment. In the performance of their duties as judges they shall*	The Amendment is designed to implement the Committee's recommendation to add additional members with appropriate military and legal experience. The amendment of subsection (d) is designed to assure that questions certified by The Judge Advocate General will be answered. The Committee adopts the DOD Amendments which would amend section (f) and give The Judge Advocate General authority to dismiss the charges whenever the Court of Military Appeals has ordered a rehearing and he finds a rehearing impracticable.

Upon his certificate, each judge is entitled to be paid by the Secretary of Defense (1) all necessary traveling expenses, and (2) his reasonable maintenance expenses, but not more than $15 a day, incurred while attending court or transacting official business outside the District of Columbia.

(2) The terms of office of the three judges first taking office after February 28, 1951, expire, as designated by the President at the time of nomination, one on May 1, 1956, one on May 1, 1961, and one on May 1, 1966. The terms of office of all successors expire 15 years after the expiration of the terms for which their predecessors were appointed, but any judge appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed may be appointed only for the unexpired term of his predecessor.

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

(4) If a Judge of the Court of Military *be subject to no supervision, control, restriction, or prohibition other than would be operative with respect to them if they were in no way connected with the military and they shall not possess or exercise any supervision, control, powers, or functions, other than such as they possess as judges, with respect to the armed forces or any component thereof.*

(2) Each judge shall receive a salary of $25,500 per year. Except as provided in subsection (1), the appointment to the court of a commissioned officer of the armed forces, and his acceptance of and service in such office, shall in no way affect any status, office, rank, or grade he may occupy or hold in the armed forces, or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade. Any such commissioned officer shall, while serving as judge receive the military pay and allowances (active or retired, as the case may be) payable to a commissioned officer of his grade and length of service and shall be paid annual compensation at a rate equal to the amount by which $25,500 exceeds the amount of his annual military pay and allowances. Upon his certificate, each judge is entitled to be paid by the Secretary of Defense (1) all

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of a United States Court of Appeals to fill the office for the period of disability. (b) The Court of Military Appeals shall review the record in— (1) all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death; (2) all cases reviewed by a board of review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and (3) all cases reviewed by a board of review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review. (c) The accused has 30 days from the time when he is notified of the decision of a board of review to petition the Court of Military Appeals for review. The court shall act upon such a petition within 30 days of the receipt thereof. (d) In any case reviewed by it, the Court of Military Appeals may act only	necessary traveling expenses, and (2) his reasonable maintenance expenses, but not more than $15 a day, incurred while attending court or transacting official business outside the District of Columbia. (3) The incumbent judges on the Court of Military Appeals shall continue to serve the terms for which appointed. The terms of office for all successors appointed from civilian life shall expire fifteen years after the expiration of the terms for which their predecessors were appointed. The terms of the judges first appointed from among the commissioned officers of the armed forces after the effective date of this act shall expire, as designated by the President at the time of nomination on ---------- and ----------, respectively. The terms of office of their successors shall expire four years after the expiration of the terms for which their predecessors were appointed. Any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. (4) The Court of Military Appeals shall have power to prescribe its own rules of pro-	

with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the board of review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(f) After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the board of review for further review in accordance with the decision of the court. Otherwise, unless there is to

cedure and to determine the number of judges required to constitute a quorum. A vacancy in the Court shall not impair the right of the remaining judges to exercise all the powers of the court.

(5) Same as (3).

(6) Same as (4).

(b) No change.

(c) No change.

(d) In any case reviewed by it, the Court of Military Appeals shall act only with respect to the sentence as approved by the convening authority and the findings and sentence as affirmed or set aside as incorrect in law by the board of review. In a case which The Judge Advocate General orders forwarded to the Court of Military Appeals, the Court *shall take action with respect to the issues raised by him and need only take action with respect to such issues.* In a case reviewed upon petition of the accused, such action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(e) No change.

(f) After it has acted on a case, the Court of Military Appeals may direct The Judge Advocate General to return the record to the

(TENTATIVE DRAFT)—Continued

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 86th Congress, 1st Session.

Uniform Code of Military Justice	Committee amendments	Sectional analysis
be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges. (g) The Court of Military Appeals and the Judge Advocate General shall meet annually to make a comprehensive survey of the operation of this chapter and report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of the Treasury, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate.	board of review for further review in accordance with the decision of the court. *The Judge Advocate General may dismiss the charges whenever the Court of Military Appeals has ordered a rehearing and he finds a rehearing impracticable.* Otherwise, unless there is to be further action by the President or the Secretary concerned, The Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges. (g) No change. (TENTATIVE DRAFT)	

*References in the sectional analysis to the Department of Defense (DOD) Amendments means the amendments of Title 10, United States Code, as contained in H.R. 3387, 68th Congress, 1st Session.

I. Pending Legislation

DISCUSSION

General. In the course of its analysis of the Uniform Code of Military Justice and the military justice system the Committee has carefully weighed the merits of the two proposals for significant amendment to the Uniform Code of Military Justice now before the 86th Congress. These are HR 3387 (DOD Omnibus Amendments) and HR 3455 (American Legion bill). Each has been examined thoroughly for possible advantages it might have in improving effective operation of the Code or in promoting fair treatment of an accused. Operation and equity in peacetime have been considered, but, above all, the Committee has been concerned with the feasibility of the proposals in wartime. The Committee does not endorse any proposal unless it meets the needs of the military forces of the nation in time of war.

American Legion Bill. This proposal is based on the premise that drastic measures are needed to eliminate command influence from courts-martial. We are convinced that this premise is faulty. Our reasons are adequately stated in preceding sections of Part II of this report. They are documented by a thorough and up-to-date survey of the situation. We reject the proposal in this bill to put lawyers in summary and special courts-martial because it is not feasible. It is estimated that, at this time, such a move would require approximately 1,200 additional JAGC officers in the Army. There are approximately 1,000 JAGC officers on active duty. This additional requirement for lawyers cannot be supported, either in numbers or in experience. It should be noted that law officer qualification is proposed for a summary court-martial and a law officer is added to special courts-martial.

The proposed organization and control of all judge advocate officers through an entirely separate line of command would defeat the teamwork necessary between staff and command. The commander needs lawyers who are a part of the staff team. Even if the judge advocate were put in a separate and independent chain of command, the commander would need lawyers on his staff to advise him on legal matters, including staff advice on military justice. In addition, legal advice would be needed on claims, international law, contracts, personnel law, and officers and soldiers must have legal assistance in their personal affairs. As far as esprit de corps and morale are concerned, there is now a feeling that the judge advocate is part of the military team—that he shares responsibility. To put him in a completely different chain of command would divide him from his clients. It

would lessen the force of his advice. He would be regarded as no longer a member of the staff team. The Committee believes that the military community differs from the civilian community in this respect, and that the drafters of the American Legion bill were not sufficiently acquainted with the problem.

Limitation of courts-martial jurisdiction over soldiers to purely military offenses in time of peace is unnecessary and undesirable. Furthermore the manner in which this would be accomplished—request by civilian authorities terminating military jurisdiction—is ill-conceived. There has been for years a friendly cooperation between civilian and military authorities when the civilian authorities have requested the turnover of a soldier for trial in a civilian court. This cooperation is all that is needed. Further, as long as the military may be called upon to give support to the civil power in emergencies, there should be no flat manifesto requiring the armed forces to turn over enlisted men to local courts. It would lead to extreme variation in the treatment of offenders and would impair good order and discipline.

The Judge Advocate General opposes HR 3455 and the DOD has reported to Congress that it opposes nearly every provision of HR 3455. The Committee strongly supports those views. In fact, the Committee believes passage of the American Legion bill would be disastrous to good order and discipline.

Omnibus Amendments. The DOD proposals now before Congress are essentially the same proposals advanced by the services since 1953. They have the indorsement of the Judges of the Court of Military Appeals, of the Judge Advocates General of the Army, Navy, and Air Force and the General Counsel of the Treasury. They have been indorsed by the American Bar Association.

The Omnibus Amendments are discussed in detail and compared with recommendations of this Committee within the preceding topical subdivisions of Part II of this report. There is no need to repeat that discussion. In general, HR 3387 is directed toward increasing powers under Article 15, and improving procedures in processing general court-martial records through appellate review. It would give The Judge Advocate General more flexibility in dealing with orders for rehearings, petitions for new trials, and cases reviewed in OTJAG. It would reduce the number of trials by summary court and contribute to simplification of procedures. Each proposal contained in HR 3387 is a step in the right direction. The Committee has adopted some of the proposals outright.

Although HR 3387 has all of the good features mentioned, we do not feel, when we apply the test of whether it will be practicable in time of war, that it is adequate. We agree with the majority of commanders from whom comments were received that the Uniform Code of Military Justice will be ineffective to support good order and disci-

pline in time of war. Commanders do not have sufficient authority to dispose of offenses without trial. Trial and review procedures are cumbersome, results are uncertain, and the system is becoming less and less capable of decentralized operation. We do not believe that the proposals incorporated in HR 3387 will meet the requirements imposed by operations in wartime.

FINDINGS

1. The American Legion Bill (HR 3455):

a. Will create a requirement for more than twice the number of military lawyers now on active duty as judge advocates.

b. Will create a separate line of command for military lawyers.

c. Will require the use of lawyers in all courts-martial—summary, special and general.

d. Will severely limit military jurisdiction over officers and soldiers who commit civilian type offenses in the United States in peacetime.

e. Will not fulfill the need of the service for an effective military justice system either in peacetime or wartime.

2. The DOD Amendments (HR 3387):

a. Will increase Article 15 powers of battalion and higher commanders.

b. Will reduce the number of trials by summary court-martial.

c. Will achieve some economy in preparation of general court-martial records of trial.

d. Will simplify to some extent appellate review of general courts-martial cases.

e. Will give The Judge Advocate General desirable flexibility in dealing with orders for rehearings, petitions for new trial, and cases reviewed in OTJAG.

f. Will not fulfill the need of the service for an effective system of military justice in wartime.

RECOMMENDATIONS

1. That the Department of the Army continue to oppose HR 3455.

2. That the Department of the Army support legislation substantially as set forth in Section K of this report.

Tab A—HR 3387
Tab B—HR 3455

86TH CONGRESS
1ST SESSION

H. R. 3387

IN THE HOUSE OF REPRESENTATIVES

JANUARY 26, 1959

Mr. VINSON introduced the following bill; which was referred to the Committee on Armed Services

A BILL

To amend title 10, United States Code, as relates to the Uniform Code of Military Justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 10, United States Code, is amended as follows:

(1) Section 801 is amended by adding the following new clause at the end thereof:

"(13) 'Convening authority' includes, in addition to the person who convened the court, a commissioned officer commanding for the time being, a successor in command, or any officer exercising general court-martial jurisdiction."

(2) Section 812 is amended to read as follows:

I

TAB A

"§ 812. Art. 12. Confinement with enemy prisoners prohibited

"No member of the armed forces of the United States may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States, except that a member of the armed forces of the United States may be confined in United States confinement facilities with members of the armed forces of friendly foreign nations."

(3) Section 815 is amended—

(A) by striking out in subsection (a) (1) (C) the words "one month's pay" and inserting the words "his pay per month for a period of not more than two months" in place thereof;

(B) by striking out at the end of subsection (a) (2) (E) the word "or";

(C) by striking out the period at the end of subsection (a) (2) (F) and inserting a semicolon in place thereof; and

(D) by adding the following new clauses at the end of subsection (a) (2):

"(G) if imposed by an officer in the grade of major or lieutenant commander or above, forfeiture of not more than one-half of one month's pay; or

"(H) if imposed by an officer in the grade of

major or lieutenant commander or above, confinement for not more than seven consecutive days."

(4) Section 816 is amended by striking out the word "; and" in clause (2) and inserting the words "or only of a law officer who is certified to be qualified for duty as a single-officer special court-martial by the Judge Advocate General of the armed force of which he is a member if, before the court is convened, the accused, knowing the identity of the law officer, and upon advice of counsel, requests in writing a court composed only of a law officer and the convening authority has consented thereto; and" in place thereof.

(5) Sections 822 (b) and 823 (b) are each amended to read as follows:

"(b) If any person described in subsection (a), except the President of the United States, is an accuser, the court must be convened by a competent authority not subordinate in command or grade to the accuser, and may in any case be convened by a superior competent authority."

(6) Section 823 (a) is amended by adding the following new sentence at the end thereof: "However, to be eligible for appointment as a single-officer special court-martial, the officer must have the qualifications specified for a law officer in section 826 (a) of this title (article 26 (a)) and must be certified to be qualified for duty as a single-officer

special court-martial by the Judge Advocate General of the armed force of which he is a member."

(7) Section 837 is amended by striking out in the first sentence thereof the words "nor any other commanding officer" and inserting the words "or any other commanding officer, or any officer serving on the staffs thereof" in place thereof.

(8) Section 841(b) is amended by inserting after the words "law officer" the words "and an officer appointed as a single-officer special court-martial".

(9) Section 851 is amended—

(A) by striking out in the second sentence of subsection (b) the words "a motion for a finding of not guilty, or";

(B) by inserting in the third sentence of subsection (b) after the word "trial" the words "except a ruling on a motion for a finding of not guilty that was granted"; and

C) by adding the following new subsection:

"(d) Subsections (a), (b), and (c) of this section do not apply to a single-officer special court-martial. An officer who is appointed as a single-officer special court-martial shall determine all questions of law and fact arising during the trial and, if the accused is convicted, adjudge an appropriate sentence."

(10) Section 854 is amended to read as follows:

"§ 854. Art. 54. Record of trial

"(a) Each court-martial shall make a separate record of the proceedings of the trial of each case brought before it. A record of the proceedings of a trial in which the sentence adjudged includes a bad-conduct discharge or is more than that which could be adjudged by a special court-martial shall contain a complete verbatim account of the proceedings and testimony before the court, and shall be authenticated in such manner as the President may, by regulation, prescribe. All other records of trial shall contain such matter and be authenticated in such manner as the President may, by regulation, prescribe.

"(b) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as authenticated. If a verbatim record of trial by general court-martial is not required by subsection (a), the accused may buy such a record under such regulations as the President may prescribe."

(11) Section 857 is amended by adding the following new sentence at the end of subsection (a): "A sentence to death includes forfeiture of all pay and allowances and dishonorable discharge. The forfeiture may apply to all pay and allowances becoming due on or after the date on which the sentence is approved by the convening authority."

(12) Section 865 is amended—

(A) by amending subsection (a) to read as follows:

"(a) When the convening authority has taken final action in a general court-martial case and the sentence approved by him includes a bad-conduct discharge or is more than that which could have been adjudged by a special court-martial, he shall send the entire record, including his action thereon and the opinion of the staff judge advocate or legal officer, to the appropriate Judge Advocate General.";

(B) by striking out in subsection (b) the words "to be reviewed by a board of review" wherever they appear therein; and

(C) by amending subsection (c) to read as follows:

"(c) All other records of trial by court-martial shall be reviewed by—

"(1) a judge advocate of the Army or Air Force;

"(2) an officer of the Navy or Marine Corps on active duty who is a member of the bar of a Federal court or of the highest court of a State; or

"(3) in the Coast Guard, or the Department of the Treasury, a law specialist or member of the bar of a Federal court or of the highest court of a State."

(13) Section 866 is amended—

(A) by amending subsection (b) to read as follows:

"(b) The Judge Advocate General shall refer to a board of review each record of trial by court-martial in which the approved sentence—

"(1) extends to death;

"(2) affects a general or flag officer;

"(3) extends to the dismissal of a commissioned officer or a cadet or midshipman; or

"(4) includes a dishonorable or bad-conduct discharge, or confinement for one year or more, unless the accused pleaded guilty to each offense of which he was found guilty and has stated in writing, after the convening authority acted in his case, that he does not desire review by a board of review."; and

(B) by amending subsection (e) to read as follows:

"(e) The Judge Advocate General may dismiss the charges whenever the board of review has ordered a rehearing and he finds a rehearing impracticable. Otherwise, the Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, or the Court of Military Appeals, instruct the convening authority

to take action in accordance with the decision of the board of review. If the board of review has ordered a rehearing and the convening authority finds a rehearing impracticable, he may dismiss the charges."

(14) Section 867 is amended by inserting the following new sentence after the first sentence of subsection (f): "The Judge Advocate General may dismiss the charges whenever the Court of Military Appeals has ordered a rehearing and he finds a rehearing impracticable."

(15) Section 869 is amended to read as follows:

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

"Every record of trial by court-martial forwarded to the Judge Advocate General under section 865 of this title (article 65), the appellate review of which is not otherwise provided for by section 865 or 866 of this title (article 65 or 66), shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, the Judge Advocate General shall either refer the record to a board of review for review under section 866 of this title (article 66) or take such action in the case as a board of review may take under section 866 (c) and (d) of this title (article 66 (c) and (d)). If the record is reviewed by a board of review, there may be no further

review by the Court of Military Appeals, except under section 867 (b) (2) of this title (article 67 (b) (2))."

(16) Section 871 is amended—

(A) by striking out in subsection (b) the first sentence and inserting the following in place thereof: "That part of a sentence extending to the dismissal of a commissioned officer or a cadet or midshipman may not be executed until approved by the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by him.";

(B) by amending subsection (c) to read as follows: "(c) That part of a sentence extending to dishonorable or bad-conduct discharge may not be executed until approved by the Judge Advocate General or affirmed by a board of review, as the case may be, and, in cases reviewed by it, affirmed by the Court of Military Appeals."; and

(C) by inserting in subsection (d) after the words "court-martial sentences" the words "and parts of sentences".

(17) Section 873 is amended—

(A) by striking out in the first sentence after the word "within" the words "one year" and inserting the words "two years" in place thereof; and

(B) by striking out the last sentence and inserting the following in place thereof: "The board of review or the Court of Military Appeals, as the case may be, shall determine whether a new trial, in whole or in part, should be granted or shall take appropriate action under section 866 or 867 of this title (article 66 or 67), respectively. Otherwise, the Judge Advocate General may grant a new trial in whole or in part or may vacate or modify the findings and sentence in whole or in part."

(18) Section 895 is amended by striking out the words "custody or confinement" and inserting the words "physical restraint lawfully imposed" in place thereof.

(19) Subchapter X of chapter 47 is amended—

(A) by inserting the following new section after section 923:

"§ 923a. Art. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds

"Any person subject to this chapter who—

"(1) for the procurement of any article or thing of value, with intent to defraud; or

"(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for

the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section the word 'credit' means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order."; and

(B) by inserting the following new item in the analysis:

"923a. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds."

SEC. 2. This Act becomes effective on the first day of the tenth month following the month in which it is enacted.

86TH CONGRESS
1ST SESSION

H. R. 3387

A BILL

To amend title 10, United States Code, as relates to the Uniform Code of Military Justice.

By Mr. VINSON

JANUARY 26, 1959

Referred to the Committee on Armed Services

86TH CONGRESS
1ST SESSION

H. R. 3455

IN THE HOUSE OF REPRESENTATIVES

JANUARY 27, 1959

Mr. BROOKS of Louisiana introduced the following bill; which was referred to the Committee on Armed Services

A BILL

To amend title 10, United States Code, in order to improve the administration of justice and discipline in the armed forces, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 10, United States Code, is amended as follows:

(1) Section 801 is amended by inserting the words "or special" after the word "general" in clause (10).

(1a) Section 806 is amended by inserting after the first sentence of subsection (a) the following sentence: "Judge advocates of the Army and Air Force and law specialists of the Navy and Coast Guard, except when serving on a board of review, shall be rated for fitness, efficiency, and perform-

ance of duty only by the Judge Advocate General of the armed force of which they are members."

(2) Section 814(a) is amended to read as follows:

"(a) A member of the armed forces accused of an offense against the laws of the United States or of a State or of a Territory or of the District of Columbia shall, except in time of war, be delivered, upon proper request, to the civil authority for trial. No person shall, except in time of war, be tried for any offense committed within the United States punishable by sections 918–932 (articles 118–132), inclusive, if, prior to arraignment before a court-martial, the civil authority having jurisdiction to try him for a substantially similar offense under the laws of the United States or of a State or of a Territory or of the District of Columbia requests delivery of that person for trial."

(3) Section 816 is amended by inserting the words "a law officer and" after the words "consisting of" in clause (2) thereof.

(4) Section 819 is amended—

(A) by striking out the word "dishonorable" in the second sentence thereof; and

(B) by striking out the third sentence thereof.

(5) The first sentence of section 824(b) is amended to read as follows:

"(b) When only one commissioned officer is present

574052 O—60——15

with a command or detachment, summary courts-martial shall be convened by superior competent authority."

(6) Section 825 is amended—

(A) by striking out in subsection (a) the word "all" and inserting in place thereof the words "general and special".

(B) by striking out in the second sentence of clause (2) of subsection (d) the words "general or special".

(C) by adding the following subsection:

"(e) The authority convening a summary court-martial shall detail as summary court-martial a commissioned officer qualified to be detailed as the law officer of a general court-martial as provided in section 826 of this title (article 26)."

(7) Section 826 is amended—

(A) by inserting the words "or special" after the word "general" in subsection (a) thereof.

(B) by amending subsection (b) to read as follows:

"(b) The law officer may not consult with the members of the court except in the presence of the accused, trial counsel, defense counsel, and the reporter, if any, nor may he vote with the members of the court."; and

(C) by adding the following subsection at the end thereof:

"(c) The law officer shall preside over all proceedings

of general and special courts-martial except when closed for deliberation or voting by the members and shall control, direct, and regulate the conduct of all proceedings before the court."

(8) Section 827 is amended by inserting after the first sentence of subsection (a) the sentence: "Upon request of the accused, the authority convening a summary court-martial shall detail a defense counsel."

(8a) Section 829 (c) is amended by inserting the words "the law officer," after the words "presence of".

(9) Section 836 is amended to read as follows:

"§ 836. Art. 36. Procedure and rules of procedure

"(a) The rules of procedure in cases before courts-martial may be prescribed by the Court of Military Appeals. The rules of procedure in cases before courts-martial shall apply the principles of law and the rules of evidence applicable to the trial of criminal cases in the United States District Court for the District of Columbia, except as such principles and rules are contrary to or inconsistent with this chapter. No rule or regulation applicable to courts-martial shall define, interpret, or set forth the elements of any offense under this chapter except an offense not defined in this chapter and arising only in military service, in which

case the Judge Advocates General may jointly prescribe such rules.

"(b) No rule or regulation applicable to courts-martial is effective until adopted by formal order of the Court of Military Appeals and approved by the President.

"(c) The procedure, including modes of proof, in cases before courts of inquiry, military commissions, and other military tribunals except courts-martial may be prescribed by the President by regulations which shall, insofar as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

"(d) All rules and regulations applicable to courts-martial, courts of inquiry, military commissions, and other military tribunals shall be uniform insofar as practicable and shall be reported to the Congress.

"(e) The provisions of this chapter shall be construed and interpreted in accordance with the rules of statutory construction applied in the Federal courts. Except where contrary to or inconsistent with the provisions of this chapter, all questions of evidence in courts-martial shall be

decided in accordance with the rules applied in the trial of criminal cases in the United States district courts."

(10) The analysis of subchapter VII of chapter 47, title 10, United States Code, is amended by striking out

"836. 36. President may prescribe rules"

and inserting in place thereof the following:

"836. 36. Procedure and rules of procedure".

(11) Section 838 is amended—

(A) by striking out in subsection (a) the words "of the court" and inserting in place thereof the words "of the law officer";

(B) by striking out in the first sentence of subsection (b) the words "general or special"; and

(C) by amending the second sentence of subsection (b) to read as follows: "Should the accused have counsel of his own selection, the defense counsel, and assistant defense counsel, if any, who were detailed, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the law officer or summary court-martial."

(12) Section 839 is amended—

(A) by striking out the second sentence thereof;

(B) by striking out in the third sentence thereof the words "any other" and inserting in place thereof the word "any"; and

(C) by striking out in the third sentence the words "in general court-martial cases,".

(12a) Section 840 is amended—

(A) by striking out the word "court-martial" and inserting in place thereof the words "law officer or summary court-martial".

(12b) Section 841 is amended—

(A) by striking out after the words "officer of a" in the first sentence of subsection (a) the word "general";

(B) by striking out in the second sentence of subsection (a) the word "court" and inserting in place thereof the words "law officer".

(13) Section 851 is amended—

(A) by amending subsection (a) to read as follows:

"(a) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the senior member, who shall forthwith announce the result of the ballot in open court.";

(B) by amending subsection (b) to read as follows:

"(b) The law officer of a general or special court-martial shall rule upon all interlocutory questions arising during the proceedings. Any such ruling made by the law officer upon any interlocutory question other than the question of the

accused's sanity is final and constitutes the ruling of the court. However, the law officer may change his ruling at any time during the trial except a ruling on a motion for a finding of not guilty that was granted. If any member objects to a ruling of the law officer on the question of the accused's sanity, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.": and

(C) by striking out in subsection (c) the words "court-martial and the president of a" and inserting in place thereof the word "or".

(13a) Section 852(c) is amended to read as follows:

"(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote. A tie vote on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused."

(15) Section 854 is amended—

(A) by inserting after the word "general" in the first sentence of subsection (a) the words "and special";

(B) by striking out in the first and second sentences of subsection (a) the word "president" and inserting in place thereof the words "senior member";

(C) by striking out in the third sentence of subsection (a) the word "president" and inserting in place thereof the words "the senior member present at the trial"; and

(D) by striking out in subsection (b) the words "special and".

(15) Section 865 is amended—

(A) by striking out subsection (b);

(B) by striking out in subsection (c) the word "other"; and

(C) by redesignating subsection (c), as amended hereby, as subsection (b).

(16) Section 866 (a) is amended to read as follows:

"(a) The Secretary of Defense shall constitute one or more boards of review for the armed forces, except that when the Coast Guard is not operating as a service in the Navy, the Secretary of the Treasury shall constitute one or more boards of review for the Coast Guard. Each board of review shall be composed of not less than three commissioned officers or civilians, each of whom must be a member of the bar of a Federal court or of the highest court of a State. A commissioned officer detailed to serve on a board of review shall serve thereon until relieved therefrom by the Secretary who constituted the board of review, and is exempt

from the provisions of sections 3031 (c), 3031 (d), 8031 (c) and 8031 (d) of this title. An officer of the Navy or Marine Corps serving on a board of review shall be eligible for promotion without regard to the requirements for sea duty or foreign service. The Secretary, however, may establish boards of review within or without the United States. A commissioned officer serving on a board of review shall be rated for fitness, efficiency, and performance of duty only by the Secretary who constituted the board of review."

(17) Section 867 is amended by striking out the fourth sentence of subsection (d) and inserting in place thereof: "The Court of Military Appeals may affirm only such findings of guilty as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

(18) Section 918 is amended by adding the following sentence at the end thereof: "No person shall be tried by court-martial for murder committed in the United States in time of peace."

(19) Section 920 is amended by adding the following sentence at the end of subsection (a): "No person shall

be tried by court-martial for rape committed in the United States in time of peace."

(20) Clause (1) of section 936(b) is amended to read as follows:

"(1) The law officer, trial counsel, and assistant trial counsel for all general and special courts-martial."

(20a) Section 898 is amended by inserting the word "or" at the end of clause (2) thereof and adding the following new clause:

"(3) refuses or willfully neglects to enforce or comply with the provisions of section 814(a) of this title;".

(21) Section 3036(a) is amended by striking out

"(10) Judge Advocate General.

"(11) Chief of Chaplains."

and by inserting in place thereof:

"(10) Chief of Chaplains."

(22) Section 3036(b) is amended—

(A) by striking out the words ", except the Judge Advocate General,"; and

(B) by striking out the second sentence of clause (2) thereof.

(23) Section 3037 is amended—

(A) by adding the following sentence at the end

of subsection (a): "The Judge Advocate General shall have, in addition to the Assistant Judge Advocate General, such deputies and assistants as the Secretary of the Army may prescribe.";

(B) by striking out the word "and" at the end of clause (2) of subsection (c);

(C) by striking out the period at the end of clause (3) of subsection (c) and inserting in place thereof a semicolon and the word "and";

(D) by adding the following clause at the end of subsection (c):

"(4) shall perform other duties prescribed by the Secretary of the Army"; and

(E) by adding the following subsections at the end thereof:

"(d) The Judge Advocate General is not a member of the Army Staff and the duties of the Chief of Staff do not include supervision, direction, control, or command of the Judge Advocate General or of the Judge Advocate General's Corps.

"(e) The Judge Advocate General and officers of the Judge Advocate General's Corps are subject to the supervision of and are responsible to the General Counsel of the

Department of Defense with respect to the performance of their professional duties.

"(f) Officers of the Judge Advocate General's Corps are under the sole command of the Judge Advocate General of the Army and of superior officers of the Judge Advocate General's Corps as the Secretary of the Army may prescribe."

(24) Section 3040(a) is amended by striking out the words "and by section 3037 of this title".

(25) Section 3296(b) is amended by adding the following clause at the end thereof:

"(4) The Judge Advocate General's Corps."

(26) Section 3297(a) is amended by adding the following sentence at the end thereof: "A selection board considering promotion-list officers of the Judge Advocate General's Corps shall be composed of officers of the Regular Army who hold a regular or temporary grade above lieutenant colonel, are senior in regular grade to, and who outrank, any officer considered by that board, and are members of that Corps, except that where required, officers of the Regular Army who are not members of the Judge Advocate General's Corps may sit on that board."

(27) Chapter 347 is amended—

(A) by adding the following section:

"§ 3613. Insignia of Judge Advocate General's Corps

"The President shall prescribe a distinctive insignia to be worn by officers of the Judge Advocate General's Corps."; and

(B) By adding at the end of the analysis thereof:

"3613. Insignia of Judge Advocate General's Corps."

(28) Section 5148 is amended—

(A) by inserting after the word "Territory" the words ", who are designated for special duty (law),";

(B) by inserting after the word "him" in clauses (1) and (4) of subsection (c) the words "by the Secretary of the Navy"; and

(C) by adding the following subsections at the end thereof:

"(d) The Judge Advocate General of the Navy and officers designated for special duty (law) are not subject to the supervision, direction, control, or command of the Chief of Naval Operations.

"(e) The Judge Advocate General of the Navy and officers designated for special duty (law) are subject to the supervision of and are responsible to the General Counsel

of the Department of Defense with respect to performance of their professional duties.

"(f) Officers of the Navy designated for special duty (law) are under the sole command of the Judge Advocate General of the Navy and superior officers designated for special duty (law) as the Secretary of the Navy may prescribe."

(29) Section 5149(a) is amended—

(A) by inserting after the words "line of the Navy" the words "designated for special duty (law)"; and

(B) by inserting after the words "Marine Corps" the words "who is a member of the bar of a Federal court or the highest court of a State or Territory".

(30) Section 5587 is amended—

(A) by striking out in the second sentence of subsection (a) the word "Each" and inserting in place thereof the words "Subject to subsection (e), each"; and

(B) by adding the following subsection:

"(e) Any officer on the active list of the Marine Corps in a grade not above colonel who is a member of the bar of a Federal court or the highest court of a State or Territory may be appointed to the active list in the line of the Navy

as an officer designated for special duty (law). An officer so appointed shall be appointed in the grade indicated in the following table and holds the lineal position which the Secretary of the Navy assigns:

Marine Corps Grade	Grade of Appointment
Colonel	Captain.
Lieutenant colonel	Commander.
Major	Lieutenant commander.
Captain	Lieutenant.
First lieutenant	Lieutenant (junior grade).
Second lieutenant	Lieutenant (junior grade).

"(f) No officer on the active list of the line of the Navy as an officer designated for special duty (law) shall be removed from that designation without his consent. Any officer removed from that designation after January 1, 1960, may not thereafter be again so designated."

(31) Section 5701 (c) is amended—

(A) by inserting after "(c)" the figure "(1)";

(B) by inserting in the first sentence thereof after the words "special duty" the words "other than in law"; and

(C) by adding the following clause at the end thereof:

"(2) When officers designated for special duty (law) are eligible for consideration by a selection board under subsection (a), the Secretary shall appoint an alternate board consisting of five officers designated for special duty (law) on the active list or officers on the

retired list who have served in that designation on the active list. The alternate board shall act on all cases of officers designated for special duty (law). If sufficient numbers of officers designated for special duty (law) of the grade specified in subsection (a) are not available, the Secretary shall, to the extent necessary, appoint other retired officers to serve on the alternate board."

(32) Section 5862 is amended—

(A) by striking out in subsection (d) the word "Each" and inserting in place thereof the words "Except as provided in subsection (e), each"; and

(B) by adding the following sentence at the end of subsection (e): "Each examining board considering officers on the active list in the line of the Navy designated for special duty (law) shall be composed of officers in that designation or retired officers who have served in that designation on the active list."

(33) Chapter 555 is amended—

(A) by adding the following section at the end thereof:

"§ 6035. Insignia of law specialists.

The President shall prescribe a distinctive insignia to be worn by officers of the Navy designated for special duty (law).."; and

(B) by adding at the end of the analysis thereof:

"6035. Insignia of law specialists."

(34) Section 8072 is amended—

(A) by inserting in the first sentence of subsection (a) after the words "officers of the Air Force" the words "designated as judge advocates";

(B) by striking out in clause (2) of subsection (c) the word "legal"; and

(C) by adding the following subsections at the end thereof:

"(d) The Judge Advocate General is not a member of the Air Staff and the duties of the Chief of Staff do not include supervision, direction, control, or command of the Judge Advocate General or of judge advocates of the Air Force.

"(e) The Judge Advocate General and Judge advocates of the Air Force are subject to the supervision of and are responsible to the General Counsel of the Department of Defense with respect to the performance of their professional duties.

"(f) Officers of the Air Force designated as judge advocates are under the sole command of the Judge Advocate General of the Air Force and superior officers designated as judge advocates as the Secretary of the Air Force may prescribe."

574052 O—60——16

(35) Section 8296 (b) is amended to read as follows:

"(b) (1) A separate promotion list may be maintained for commissioned officers of the Regular Air Force in each of the following categories:

i. Chaplains.

ii. Medical Officers.

iii. Dental Officers.

iv. Veterinary Officers.

v. Medical Service Officers.

vi. Air Force Nurses.

vii. Women Medical Specialists.

viii. Any category established by the Secretary of the Air Force under section 8067 (i) of this title.

"(2) A separate promotion list must be maintained for commissioned officers of the Regular Air Force designated as judge advocates."

(36) Section 8297 is amended—

(A) by striking out in subsection (a) the word "and" at the end of the clause (1);

(B) by striking out in subsection (a) the period at the end thereof and inserting in its place a semicolon and the word "and"; and

(C) by adding the following clause at the end of subsection (a):

"(3) Promotion-list officers designated as judge

advocates shall be composed of promotion-list officers who hold a regular or temporary grade above lieutenant colonel, senior in regular grade to, and who outrank, any officer considered by that board and are designated as judge advocates except that where required, promotion-list officers who are not so designated may sit on that board."

(37) Chapter 847 is amended—

(A) by adding the following new section:

"§ 8613. Insignia of judge advocates.

"The President shall prescribe a distinctive insignia to be worn by officers of the Air Force designated as judge advocates"; and

(B) by adding at the end of the analysis thereof:

"8613. Insignia of judge advocates."

SEC. 2. (a) Title 18, United States Code, is amended by inserting after section 1508 thereof the following section:

"§ 1509. Influencing military tribunal or board, or member, law officer or counsel thereof.

"Whoever censures, reprimands, admonishes, or endeavors to coerce or improperly influence, directly or indirectly, any court-martial, court of inquiry, military commission, or any other military tribunal or board or reviewing authority, or any member, law officer, or counsel thereof with

respect to the due and proper performance of its or his official duties or functions shall be fined not more than $5,000 or imprisoned for not more than five years, or both."

(b) The analysis of chapter 73, title 18, United States Code, is amended by adding at the end thereof:

"1509. Influencing military tribunal or board, or member, or law officer or counsel thereof."

SEC. 3. All offenses committed and all penalties, forfeitures, fines or liabilities incurred prior to the effective date of a provision of this Act under any law embraced in or modified, changed, or repealed by that provision may be prosecuted, punished, and enforced and action thereon may be completed, in the same manner and with the same effect as if that provision had not become law.

SEC. 4. (a) Except as provided in subsection (b), the provisions of this Act are effective on the first day of the twelfth month following the month in which this Act is approved.

(b) The provisions of clauses (2), (4), (17), (18), (19), (20a), (27), (30), (33) and (38) of section 1, and sections 2, 3, and 4 of this Act are effective upon enactment.

86TH CONGRESS
1ST SESSION

H. R. 3455

A BILL

To amend title 10, United States Code, in order to improve the administration of justice and discipline in the armed forces, and for other purposes.

By Mr. BROOKS of Louisiana

JANUARY 27, 1959

Referred to the Committee on Armed Services

J. Related Problems

DISCUSSION

Supply of Judge Advocates. As a part of its study the Committee has checked, with respect to each legislative proposal, requirements for Judge Advocate General's Corps officers against resources. For HR 3455 the requirements could not be supported, since even for the Uniform Code of Military Justice support is barely adequate.

The JAGC is losing experienced officers faster than it can replace them. First lieutenants serving an obligated tour constitute about 40% of the Corps' active strength. Very few of these officers remain in service beyond their required two or three years. If present trends continue, by 1964 50% of the Corps will be obligated tour first lieutenants. During the period 1960–1964 a large number of experienced career Judge Advocate General reserve officers will be lost through mandatory retirement.

It is desirable that not more than 12–14% of the Corps be first lieutenants. The imbalance caused by too many officers who cannot adequately fill positions of responsibility is affecting the Corps' ability to perform its mission.

Senior line officers have urged resumption of legal education of Regular Army officers. The Committee agrees that this program provides an extremely valuable combination—line experience with legal training—and the officers possessing these qualifications are unusually competent judge advocates. The Committee recommends urgent efforts to restore the program of legal education for Regular Army officers and recommends all efforts be made to assist The Judge Advocate General to meet personnel requirements.

Isolated Units. The Committee has discussed, within the limits of available time, unusual problems that might arise in the event of nuclear warfare. Large or small units may become isolated and out of touch with parent units. We recommend that The Judge Advocate General study this problem further with a view to preparing any emergency legislation necessary to provide commanders of detached or isolated units with needed disciplinary powers. The Judge Advocate General already has prepared emergency legislation permitting establishment of branches of the Court of Military Appeals during wartime in areas served by branch offices of The Judge Advocate General's Office.

Military Justice Orientation. It has been suggested that whenever practicable young line officers act as assistants to trial counsel and defense counsel of general courts-martial. It is understood that a line officer could not take an active part in trial proceedings but he

could assist in other ways and observe the court-martial. We believe there is no better way for a young officer to acquire an understanding of procedure and appreciation of military justice. We recommend that this practice be encouraged if the recommendations for elimination of summary and special courts-martial are implemented.

FINDINGS

1. The Judge Advocate General's Corps is losing experienced officers faster than they can be replaced.
2. Judge Advocates with a background of line experience are needed.
3. The active duty strength of the Judge Advocate General's Corps is marginal for the performance of military justice functions under the Uniform Code of Military Justice.
4. There is a need for study of the military justice problems that might face isolated or detached units.
5. Young line officers would benefit from acting as assistants to trial counsel or defense counsel of a general court-martial.

RECOMMENDATIONS

1. That Department of the Army urge resumption of a program for sending selected Regular Army officers to law school with a view to later transfer to the Judge Advocate General's Corps.
2. That Department of the Army study ways of making a career in the Judge Advocate General's Corps more attractive.
3. That The Judge Advocate General study and prepare emergency legislation to assure military justice support in the event of hostilities.
4. That the practice of having young line officers act as assistants to a trial or defense counsel of a general court-martial be encouraged if our plan for eliminating summary and special courts-martial is implemented.

The committee concurs unanimously in the report, the findings, and the recommendations.

HERBERT B. POWELL
Lieutenant General, USA
President

GEORGE E. BUSH
Major General, USA

HUGH P. HARRIS
Major General, USA

GEORGE W. HICKMAN, JR.
Major General, USA

RUSH B. LINCOLN, JR.
Major General, USA

WILLIAM C. WESTMORELAND
Major General, USA

BRUCE EASLEY
Major General, USA

HOWARD M. HOBSON
Brigadier General, USA

CHARLES L. DECKER
Brigadier General, USA

PART III. OPERATIONS OF THE COMMITTEE

A. Activities

1. Pursuant to Letter of Instructions, AGPA–O (6 October 59) DCSPER, dated 7 October 1959 (Incl 1), the Committee was in session from 7 October 1959 to 15 January 1960. Plenary meetings were held 15 and 16 October 1959, 23–24 November 1959, 1–4 December 1959, 5–8 and 12–15 January 1960. The plenary meetings were devoted to briefings, study of documentary material, analysis of surveys and resolution of problems disclosed. In addition, the Committee, as a whole, attended argument of cases before the United States Court of Military Appeals and a board of review at Washington, D.C., and a trial by general court-martial at Fort George G. Meade, Maryland.

2. Individual Activities.

a. Personal study by each member between plenary sessions of the documentary material presented during those sessions.

b. Major General William C. Westmoreland conducted a test of proposed Commanders' Corrective Powers (Tab D, Sec B, Part II) and the proposed alternate method of conducting Article 32 investigations within the 101st Airborne Division, Fort Campbell, Kentucky. (Tab A, Sec C, Part II.)

c. Brigadier General Charles L. Decker performed temporary duty at Ottawa, Canada from 13 December to 17 December 1959 to study the operation of the Canadian military justice system with particular reference to the proposed Commanders' Corrective Powers. (Tab B, Sec B, Part II.)

B. Sources of Information

To supplement the combined experience of the Committee members and the efforts of individual members on behalf of the Committee, the Committee secured professional assistance for detailed examination of the content of the Uniform Code of Military Justice and review of the interpretations of the Uniform Code of Military Justice by the United States Court of Military Appeals in problem areas. In addition, the Committee heard professional presentations, studied significant documentary material and secured the comments and recommendations of a wide cross-section of persons concerned with the operation of the Uniform Code of Military Justice.

1. Surveys.

a. Comments and recommendations of all the officers exercising general-court martial jurisdiction in the Army (96) were received and studied.

b. Comments of heads of Department of Army agencies were received and studied.

c. Comments of more than one hundred and fifty (150) judge advocates were considered.

d. Comments of fifty (50) military defense counsel were considered.

e. A survey of the attitudes and opinions of almost 2,000 Army enlisted men was completed and studied.

f. A survey of the attitudes and opinions of one hundred (100) company, battalion and battle group commanders was completed and considered.

2. Presentations.

a. For technical explanation of statutes, legislative history, personnel experience factors, court decisions and proposed legislation the Committee had the benefit of presentations on the following subjects by the persons indicated:

(1) Incidence of courts-martial (Incl 2) and other than honorable discharges—Lt Col Robert E. Miller, JAGC.

(2) Comparison of Article 15, Uniform Code of Military Justice, with summary punishment in the armed forces of the United Kingdom, Canada, Germany, Italy, France, and the Netherlands—Col Ralph K. Johnson, JAGC (Tab A, Sec B, Part II).

(3) Methods for expediting trials by general courts-martial—Col Walter T. Tsukamoto, JAGC.

(4) Analysis of interpretations of Article 37, Uniform Code of Military Justice—Lt Col Peter C. Manson, JAGC (Incl 3).

(5) Legislative history concerning the size and composition of the United States Court of Military Appeals—Lt Col Paul J. Kovar, JAGC (Incl 4).

(6) The Uniform Code of Military Justice and proposed amendments (HR 3387, 86th Congress; HR 3455, 86th Congress)—Lt Col Harold E. Parker, JAGC.

(7) The President's power as Commander in Chief to issue regulations pertaining to military justice—Lt Col James E. Johnson, JAGC.

(8) Benefits of the indeterminate sentence and methods for adapting it to military use—Col Richard B. Tibbs, JAGC.

(9) Protection against self-incrimination (Article 31, Uniform Code of Military Justice)—Col Harold D. Shrader, JAGC.

(10) Personnel resources of the Judge Advocate General's Corps—Col Kenneth J. Hodson, JAGC (Incl 5)

(11) The history, content and operation of the Federal Youth Correction Act—Capt Dennis A. York, JAGC.

(12) Rule for determining mental responsibility of accused persons—Col Albert J. Glass, MC.

(13) Definition of the crime of sodomy—Lt Col Joseph H. Rouse, JAGC.

(14) Psychiatric programs to identify soldiers who ought to be discharged and to assist in early rehabilitation of military offenders—Col Albert J. Glass, MC (Incl 6).

b. In addition to the foregoing professional presentations, senior staff officers, including The Provost Marshal General, appeared before the Committee to give their views.

3. Studies.

The Committee studied the following significant documentary material:

a. The Uniform Code of Military Justice, Manual for Courts-Martial, United States, 1951 and implementing Army regulations and policies.

b. "*The Background of the Uniform Code of Military Justice*", prepared by The Judge Advocate General's School.

c. HR 3387, 86th Congress—Amendments to Uniform Code of Military Justice (Tab A, Sec I, Part II).

d. HR 3455, 86th Congress (American Legion proposal to amend Uniform Code of Military Justice) (Tab B, Sec I, Part II).

e. Fratcher, William F., "*Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*", 34 NYU Law Rev. 861.

f. Report of the Working Group Appointed by the Members of the Code Committee to Study and Report on Suggested Amendments to the Uniform Code of Military Justice.

g. Condensed descriptions of the military justice systems of the following foreign countries by the persons indicated:

(1) United Kingdom—Major Donald L. Shaneyfelt, JAGC

(2) Canada—Major Donald L. Shaneyfelt, JAGC

(3) Germany (Pre World War II)—Lt Col John Wolff, JAGC

(4) Italy—1st Lt Bernard G. Heinzen, JAGC

(5) France—Mr. Albert J. Esgain, OTJAG

(6) The Netherlands—Major J. Schurmans, Netherlands Army

(7) Russia—Col G. I. A. D. Draper, Faculty of Laws, University of London, London, England.

h. Changes in the Uniform Code of Military Justice Necessary to make it Workable in Time of War—Col Archibald King, JAGC, USA (Ret).

i. Briefing on Landmark Cases Decided by the United States Court of Military Appeals—Government Appellate Division, Office of The Judge Advocate General.

j. A Supplement to the Survey of Military Justice by 1st Lt Wade H. Sides, Jr., JAGC, and 1st Lt Jay D. Fischer, JAGC.

k. Taylor, Edward J., Captain USN, "*A Plot of the Rocks and Shoals in the Manual for Courts-Martial, 1951.*" The JAG Journal (Navy) Oct–Nov 1958.

l. Observations on the Propriety of Increased Jurisdiction under Article 15—Col Franklin H. Berry, JAGC, USAR.

m. Records of complaints by senior commanders concerning operation of the Uniform Code of Military Justice.

n. Confinement rates for Army personnel 1949–1959 (Incl 7).

o. Statistics concerning time required for steps in appellate review of general courts-martial (Incl 8).

ptd/csb

HEADQUARTERS

DEPARTMENT OF THE ARMY

Office of The Adjutant General

Washington 25, D.C.

AGPA-O (6 Oct 59) DCSPER 7 October 1959

SUBJECT: Letter of Instructions

TO: Lieutenant General Herbert B. Powell, President

1. At the direction of the Secretary of the Army, an ad hoc committee consisting of yourself as President and the following members is hereby appointed:

MAJ GEN WILLIAM C. WESTMORELAND
MAJ GEN HUGH P. HARRIS
MAJ GEN GEORGE E. BUSH
MAJ GEN GEORGE W. HICKMAN, Jr
MAJ GEN BRUCE EASLEY
MAJ GEN RUSH B. LINCOLN
BRIG GEN HOWARD M. HOBSON
BRIG GEN CHARLES L. DECKER
LT COL HAROLD E. PARKER (JAGC)
(Recorder without vote)

2. The Uniform Code of Military Justice has been in operation since May 1951 as a result of legislation that was passed by the Congress in 1950. During these past eight years sufficient time has elapsed to provide a wide range of judicial actions based upon the Uniform Code of Military Justice. This period of time and the experience gained warrant a comprehensive survey of the effectiveness and the equity of the Code in the application of military justice within the Department of the Army.

3. Therefore, the committee will undertake a searching study on the effectiveness and operation of the Uniform Code of Military Justice and its bearing on good order and discipline within the Army. The committee should inquire into any improvements that should be made in the Code, either by legislation or otherwise. The committee's survey should analyze any inequities or injustices that accrue to the Government or to the individuals that exist in the practical application of the Code or the judicial decisions stemming therefrom.

4. The committee shall meet at the Pentagon, Washington, D.C., at the call of the President.

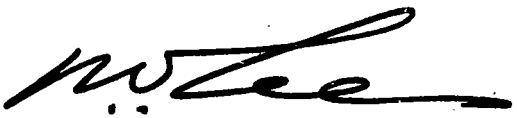
Incl. 1

AGPA-O (6 Oct 59) DCSPER 7 October 1959

SUBJECT: Letter of Instructions

5. The Committee shall submit an interim report by 10 December 1959, and a final report by 31 January 1960. These reports, classified "Confidential", shall be addressed to the Secretary of the Army through the Chief of Staff.

By Order of Wilber M. Brucker, Secretary of the Army:



R. V. LEE
Major General, USA
The Adjutant General

DISTR:
Recorder—25
GOAB, DCSPER—5
Ea Off—5

NUMBERS OF COURTS-MARTIAL BY TYPE FOR FISCAL YEARS SHOWN

Fiscal year	Average Str (Total Army)	General Courts-Martial			Special Courts-Martial			Summary Courts-Martial			All Courts-Martial		
		Convicted	Acquitted	Total	Convicted	Acquitted	Total	Convicted	Acquitted	Total	Convicted	Acquitted	Total
1917		7,155	582	7,737	3,604	338	3,942	75,509	3,588	79,097	86,268	4,508	90,776
1918		10,348	2,009	12,357	13,294	1,440	14,734	202,173	9,740	211,913	225,815	13,183	239,004
1919		14,184	2,363	16,547	21,307	3,145	24,452	197,585	11,860	209,445	233,076	17,368	250,444
1920		5,994	775	6,769	5,116	722	5,838	54,198	5,763	59,961	65,308	7,260	72,568
1921		6,660	1,245	7,905	6,717	693	7,410	39,004	1,774	40,778	52,381	3,712	56,093
1922		5,577	891	6,468	7,863	682	8,545	20,639	723	21,362	34,079	2,296	36,375
1923		3,839	471	4,310	6,550	589	7,139	16,194	618	16,812	26,583	1,678	28,261
1924		4,379	292	4,671	6,022	514	6,536	13,091	465	13,556	23,492	1,271	24,763
1925		5,170	305	5,475	6,948	569	7,517	13,656	473	14,129	25,774	1,347	27,121
1926		5,196	297	5,493	5,751	677	6,428	13,129	437	13,566	24,076	1,411	25,487
1927		4,983	256	5,239	4,804	687	5,491	10,540	1,258	11,798	20,327	2,201	22,528
1928		5,465	278	5,743	5,760	416	6,176	12,470	436	12,906	23,695	1,130	24,825
1929		4,638	223	4,861	5,410	334	5,744	12,417	333	12,750	22,465	890	23,355
1930		4,701	208	4,909	5,301	349	5,650	12,554	352	12,906	22,556	909	23,465
1931		3,656	396	4,052	5,461	344	5,805	12,763	309	13,072	21,880	1,049	22,929
1932		2,783	171	2,954	4,719	264	4,983	12,115	216	12,331	19,617	651	20,268
1933		1,580	101	1,681			4,138			10,350			16,169
1934		1,481	109	1,590									
1935		1,316	91	1,407									
1936		1,643	99	1,742									
1937		2,062	161	2,223									
1938		2,579	120	2,699									
1939		1,959	87	2,046			4,016			9,596			15,658
1940		1,776	75	1,851	4,208	223	4,431	10,000	141	10,141	15,984	439	16,423
1941	755,000	3,187	201	3,388	9,473	453	9,926	23,481	340	23,821	36,141	994	37,135
1942	1,992,000	3,225	500	3,725	36,650	1,768	38,418	63,923	1,996	65,919	103,798	4,264	108,062
1943	5,224,000	13,836	946	14,782	113,386	4,311	117,697	187,875	2,795	190,670	315,097	8,052	323,149
1944	7,507,000	21,547	1,268	22,815			204,123			292,172			519,110
1945	8,131,000	24,102	1,569	25,671	168,675	6,916	175,591	272,163	6,983	279,146	464,940	15,468	480,408
1946	4,816,000	32,657	3,320	35,977	48,027	2,375	50,402	98,707	2,918	101,625	179,391	8,613	188,004
1947	1,417,000	9,382	595	9,977			44,130			97,104			151,211
1948	585,000	8,928	633	9,561			36,971			181,794			128,326

NUMBERS OF COURTS-MARTIAL BY TYPE FOR FISCAL YEARS SHOWN—Continued

Fiscal year	Average Str (Total Army)	General Courts-Martial			Special Courts-Martial			Summary Courts-Martial			All Courts-Martial		
		Convicted	Acquitted	Total	Convicted	Acquitted	Total	Convicted	Acquitted	Total	Convicted	Acquitted	Total
1949	657,000	5,130	402	5,532	----------	----------	25,119	----------	----------	52,597	----------	----------	83,246
1950	632,000	4,736	354	5,090	----------	----------	30,359	----------	----------	68,128	----------	----------	103,577
1951	1,090,000	4,819	387	5,206	25,484	1,920	27,404	----------	----------	79,226	----------	----------	111,836
1952	1,597,000	7,376	661	8,037	50,335	3,148	53,483	88,564	2,386	90,950	146,275	6,195	152,470
1953	1,536,000	10,444	724	11,168	62,079	3,468	65,547	97,266	3,615	100,881	169,789	7,807	177,596
1954	1,477,000	9,642	507	10,149	50,995	3,149	54,144	76,922	2,576	79,493	137,559	6,232	143,791
1955	1,311,000	9,359	525	9,884	43,030	2,822	45,852	60,615	1,998	62,613	113,004	5,345	118,349
1956	1,083,000	7,404	346	7,750	34,203	2,248	36,451	48,857	1,845	50,702	90,464	4,439	94,903
1957	1,004,000	5,308	278	5,586	32,594	2,167	34,761	49,907	2,071	51,978	87,809	4,516	92,325
1958	939,000	3,560	207	3,767	26,424	1,701	28,125	43,368	1,788	45,156	73,352	3,696	77,048
1959	889,000	2,251	125	2,376	19,075	1,212	20,287	34,875	1,349	36,224	56,201	2,686	58,887

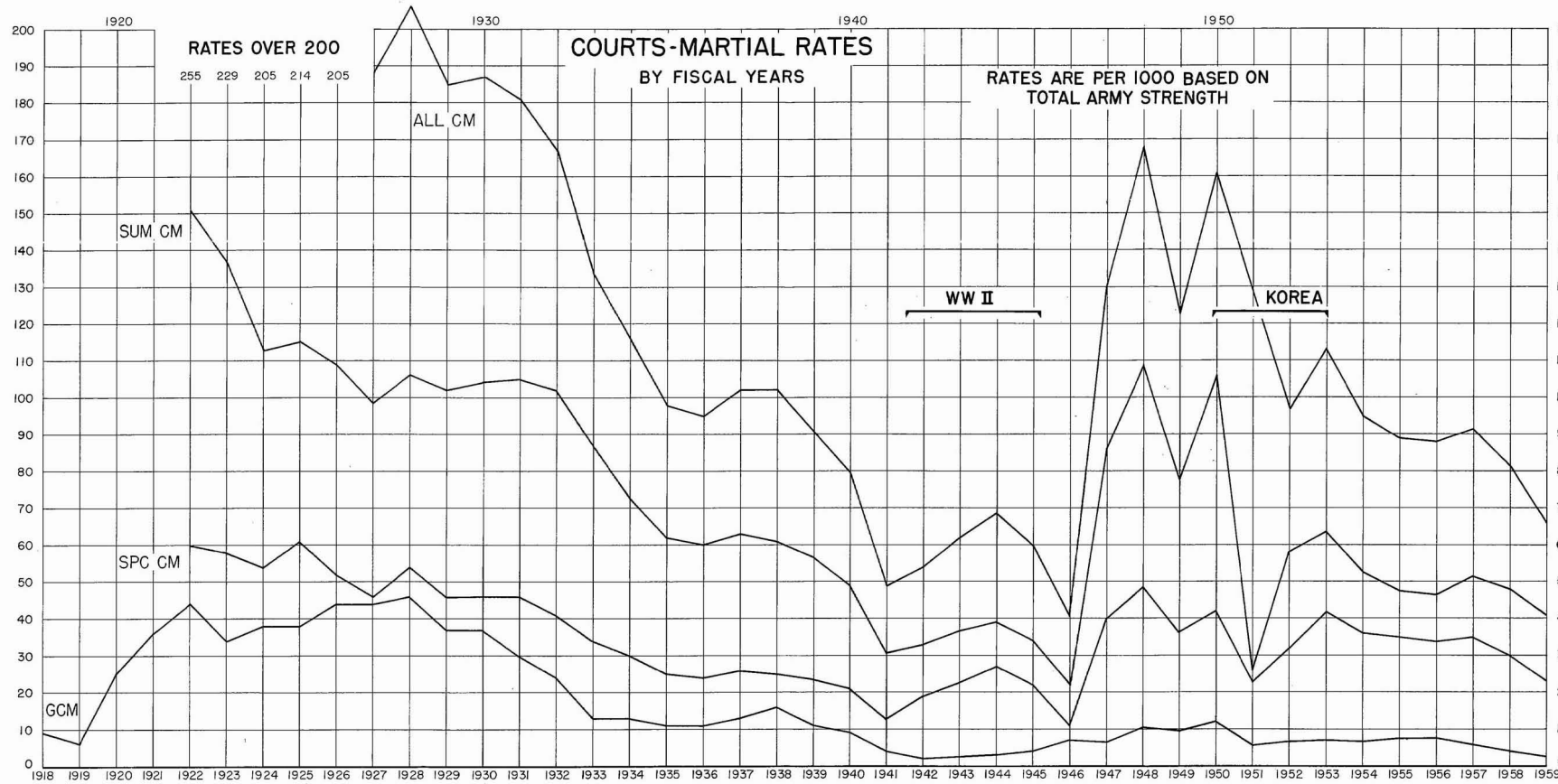


Figure 1.

574052 O - 60 (Face p. 252)

Case	Held	USCMA Positions			Who Gave the Instructions	To Whom Were They Given	When Were They Given	Nature of Instructions	Principal Comments by Court
		Maj Opn	Com Opn	Dissent Opn					
LITTRICE 3 USCMA 487 13 CMR 43 (ARMY)	Prej	L	B Q C/R w/o opn.	(Sep C/O)	CO of subordinate unit—not GCM auth. Given in conjunction w/remarks on USAREUR letter. Personal lecture.	All members of a GCM apptd by higher auth. to hear a particular case.	Just prior to trial.	(1) Ct. members should not usurp C/A's prerogative. (2) Cases thoroughly reviewed before trial. (3) Appropriate notations made in efficiency reports. (4) Retention of thieves in Army.	(1) Reference to efficiency reports. (These remarks and references were prejudicial.) (2) Personal remarks of CO to ct. members immediately before trial of a case where remarks are relevant.
HUNTER 3 USCMA 497 13 CMR 53 (NAVY)	Prej	Per Curiam.	Per Curiam.		SpCM convening authority personally.	3 court members who sat on case.	Pre-trial conference.	(1) Discussed prior derelictions of accused. (2) CA said prior court had given "too meagre" a sentence.	(1) Discussion of derelictions of accused. (2) Possibility he was recommending what verdict should be given (Court member indicated he felt CO was doing this.)

Case	Held	USCMA Positions			Who Gave the Instructions	To Whom Were They Given	When Were They Given	Nature of Instructions	Principal Comments by Court
		Maj Opn	Com Opn	Dissent Opn					
ISBELL 3 USCMA 782 14 CMR 200 (ARMY)	Not prej	Q	L Sep opn notes voir dire.	B-P/O not worried re admin prob	USAREUR letter as in LITTRICE. Republished in SJA bulletin of subordinate command (1st Inf Div). Also add'l SJA comments on cases in command.	All officers of command.	Sometime prior to the time offense committed.	(1) Higher headquarters letter concerning retention of thieves. (2) Written comments critiquing prior cases in the command.	(1) Court did not feel that efficiency report remark or reference was close enough to affect case.
NAVARRE 5 USCMA 32 17 CMR 32 (ARMY)	Not prej	Q	L S/C/O	B C&D Evid suff but cmd infl present.	Depot commander not a GCM conv auth.	Members of his command.	3 months prior to time 3 of these officers sat on GCM (apptd by higher auth) of PFC.	(1) Presented statistics for prior year showing that the higher the rank the less CM sentence given. (2) Mentioned case of CO who gave lower efficiency reports for poor CM performance.	(1) Majority felt remarks were justified and reference to efficiency report was all right since CO adjured members to conform to own standards "Equal justice under the law."

FERGUSON 5 USCMA 68 17 CMR 68 (ARMY)	Prej	L	Q Sep C/O B Sep C/O.		Staff Judge Advocate.	Court members at pretrial conference CA, Chief of Staff & LO were present.	Day before trial for mutiny in stockade.	(1) CM member duties generally. (2) Discussion of offenses prevalent in command. (3) Dissident elements in stockade-must act firmly	(1) Remarks hit too close to home on case about to be tried—suggested heavy sentence necessary to deter others.
ZAGAR 5 USCMA 410 18 CMR 34 (ARMY)	Prej	B	Q w/o opn.	L says voir dire reply cures.	Staff Judge Advocate.	All members of GCM.	Day before trial.	(1) Not to consider extenuating matters prior to findings. (2) Deal w/facts—not law. (3) Careful pretrial invest. results in likelihood that person brought to trial committed the offense.	(1) Remarks (1) and (2) *are* correct but (2) Remark (3) is prejudicial. Saps public confidence in MJ and prejudices accused.
HAWTHORNE 7 USCMA 293 22 CMR 83 (ARMY)	Prej	Q	F L (Sep opn) C/R.		CG 4th Army in policy declaration (Note: SpCM auth fwd'd w/GCM recommendation in view of policy.)	Disseminated generally in command. To be brought to attn of every member of every GCM.	Approx 9 mo before trial—not shown when brought to attn of members—if at all.	(1) 38% of strength (RA) commit 64% of offenses. (2) Generally RA soldier w/2 prior convictions should get punitive discharge.	(1) Affected fwd'g officer's decision. (2) Affected CM members. (3) Appearance of improp. (4) Curb on subordination. (5) Need in CA broad regulatory auth.

Case	Held	USCMA Positions			Who Gave the Instructions	To Whom Were They Given	When Were They Given	Nature of Instructions	Principal Comments by Court
		Maj Opn	Com Opn	Dissent Opn					
WALINCH 8 USCMA 3 23 CMR 227 (NAVY)	Prej	Q	F w/o L opn		Secretary of the Navy.	Navy-wide	Sometime prior to trial—not directed to this case.	(1) Promulgated procedures for disposition of "homosexuals"—to be followed without exception. (2) Class II to be confronted with charges and informed they will be tried by GCM unless agree to undesirable disch to avoid GCM. (3) Discounts materiality of medical and expert testimony.	(1) Danger of using admin standards in judicial proceeding. (2) Remarks on materiality is Q. of law for LO. (3) Cmd infl re disposition of offenders—impress court.
McCANN 8 USCMA 675 25 CMR 179 (AIR FORCE)	Prej	Q	F	L	Staff Judge Advocate	Military Justice Lecture to members of command, some of whom were on GCM of this accused.	After trial began but before arraignment and during a continuuance: Trial began 5 Apr Lecture 9 Apr	(1) Discussion of acts of misconduct more reprehensible in military than civilian community. Example: Ground Control approach operator who incapacitates self for	(1) Improper command influence in regard to a case on which they were sitting. Latimer in dissent says not directed at CM members but was merely a general make-up lecture

							Trial con't 11 Apr.	duty by drinking. (That is what this accused was being tried for.)	and the cited reference was just one of several made in passing.
SHEPHERD 9 USCMA 90 25 CMR 352	None	Q	F) Sep opn L) concurred in by F.		Convening Authority.	Members of the command—public generally.	Prior to trial and continuing.	(1) CA formulated, administered and ruthlessly enforced a weight reduction program. Stated he would punish all violators and would brook no interference with his program.	(1) Latimer in concurring opinion discussed problem not raised in majority opinion; stated CM not a free agent, knew CA wanted a conviction; CA's interest was personal rather than official.
WEBSTER 9 USCMA 615 26 CMR 395	Not prej	L	Q	F	Sec Navy Instruction.	Convening Authority.	Prior to case.	(1) Policy declaration requiring in CA's action on guilty plea cases a statement of facts and circumstances of case in amplification of information in specification.	(1) Accused not deprived of impartial review; such requirement not a suggestion by a superior that he desires a particular result.
HURT 9 USCMA 735 27 CMR 3	Not prej	Q	L	F (but not specifically on cmd control ques)	CA-SJA	Press, public in general, staff and commanders.	After offense, before trial.	(1) Stated abhorrence of rape-murder, extended sympathy to victim's family, outlined American legal procedures and measures to prevent future incidents.	(1) CA's remarks showed no determination to convict accused regardless of evidence, in fact he insisted on fair trial.

Case	Held	USCMA Positions			Who Gave the Instructions	To Whom Were They Given	When Were They Given	Nature of Instructions	Principal Comments by Court
		Maj Opn	Com Opn	Dissent Opn					
RELATED BUT MORE REMOTE SITUATIONS									
GUEST 3 USCMA 147 11 CMR 147	Prej	L	B Q		SJA and President of GCM	President of GCM, LO, and members of GCM.	During trial recess and after ruling on defense motion.	(1) DC had made motion for finding of NG. SJA showed Pres. dissenting opinion written while on a B/R. LO granted motion; Pres. ordered LO to read SJA's opinion to ct. members; ct. overruled LO's ruling on motion.	(1) SJA can't intervene in actual trial process. If he attempts to influence the pres. of a ct. during trial as to proper law, this is fatal error.
WHITLEY 5 USCMA 786 19 CMR 82	Prej	L	Q B		Convening Authority	President of Special C-M replaced.	During course of trial when president of SpCM refused to admit certain government evidence.	(1) In effect, that the CA would brook no interference with the prosecution by a president who ruled against the government.	
FOWLE 7 USCMA 349 22 CMR 139 (NAVY)	Prej	F	Q, L } concur in result		Trial Counsel in court—based on Sec Navy instr.	Members of CM.	Argument on sentence—after findings.	(1) TC called attn of ct. to Sec Navy instruction setting out policy on re-	(1) Sec Nav instruction more persuasive than command directive.

								taining people convicted of offenses involving moral turpitude (Larceny . . .).	(2) TC mentioning is prej. and not removed by instructions to disregard.
ESTRADA 7 USCMA 635 23 CMR 99 (NAVY)	Prej	F	Q	L	Trial Counsel argument on sentence—based on Sec Nav instr. See *Fowle supra.*	Members of CM.	Argument on sentence—after findings.	(1) TC called attn of ct. to Sec Navy instruction setting out policy on retaining people convicted of offenses involving moral turpitude (Larceny . . .).	(1) Trial court to be unencumbered by powerful outside influences.
HOLMES 7 USCMA 642 23 CMR 106 (NAVY) (Same as Estrada).	Prej	F	Q	L Sep opn	Trial Counsel argument on sentence—based on Sec Nav instr. See *Fowle supra.*	Members of CM.	Argument on sentence—after findings.	(1) TC called attn of ct. to Sec Navy instruction setting out policy on retaining people convicted of offenses involving moral turpitude (Larceny . . .).	(1) Trial court to be unencumbered by powerful outside influences.
RODEN CM 397010 24 CMR 451 (ARMY)	Prej	BR case action was to order rehear. and say this not good (Sent). No waiver.			Staff Judge Advocate in his reviews.	Members of CM.	Prior to trial over period of months.	(1) Copies of each SJA review sent to *all* court members. Included cases these members had decided and expressed opinions on leniency of sentences.	(1) Is exposing CM members to CA and SJA views on sentence—command influence shown by severe sentence in this case.

Case	Held	USCMA Positions			Who Gave the Instructions	To Whom Were They Given	When Were They Given	Nature of Instructions	Principal Comments by Court
		Maj Opn	Com Opn	Dissent Opn					
RELATED BUT MORE REMOTE SITUATIONS—Continued									
DOHERTY 5 USCMA 287 17 CMR 287 (NAVY)	Sent. only prej.	L	B w/o opn	Q Dissent: ct not realize freedom—would have revisions or rehearing.	Sec Nav instr re elim of sex perverts. CA indicated he felt bound. People involved were aware of policy—that's OK but not to feel *BOUND.*				
SCHULTZ 8 USCMA 129 23 CMR 353 (NAVY)	Prej as to sent.	F	Q L sep opn		Sec Nav instr re eliminating men convicted of moral turpitude offenses.	After sent. ct. president gave this as reason for giving punitive discharge.	In court	(1) For info of CA, ct gave sentence because sentence is in keeping w/expressed policy of the Navy.	(1) Rev as to sentence based on prior cases.
LACKEY 8 USCMA 718 25 CMR 222	Prej.	L	Q F		Trial Counsel	Court members.	Argument on sentence.	(1) TC stated that it was undoubtedly the thought of the CA that accused should be separated from service with punitive discharge & confine-	(1) No waiver where command control is interjected into a trial.

								ment commensurate with offense. LO took no action.	
CARTER 9 USCMA 108 25 CMR 370	No prej	L	Q } w/o F } opn		COMINCH USAREUR	At cmdr's conf.—Ambassador—Army—Attchd to 7A ltr to all subord. cmdrs— to bring to attn of all.	After offense		
CHOATE 7 USCMA 680 26 CMR 460 (citing *Fowle*)	Prej	Q	F	L	Naval Supplement, MCM thru Law Officer.	Court members.	Before court retired to deliberate on sentence.	(1) That it was Navy Dept. *policy* that an accused sentenced to more than 3 months' confinement or to a punitive discharge should also be sentenced to a reduction in pay grade.	
COFFIELD 10 USCMA 77 27 CMR 151	Prej	F	Q L		TC	Court members—on rehearing.	Before sentencing.	(1) Entry in accused's service record of admissible previous conviction showing that CA had criticized action of previous court in not including a punitive discharge in its sentence.	(1) A statement by CA which is critical of a prior court for failing to impose a punitive discharge would have a tendancy to coerce members of a subsequent court to mete out such a discharge.

HISTORY OF THE ORIGIN OF THE UNITED STATES COURT OF MILITARY APPEALS

The earliest legislative reference to a Court of Military Appeals appears in Senate 64, a Bill "To establish military justice," introduced by Senator Chamberlain in the 66th Congress, 1st Session (1919). Article 52 of the proposed Bill provided for the creation of a court of military appeals consisting of three judges appointed by the President (Tab A). The amended Bill, as reported out of committee and enacted into law and known as the 1920 Articles of War (c. II, 41 Stat. 787), did not contain the provision for a Court of Military Appeals. However, statutory authority for the appointment of Boards of Review in the Office of The Judge Advocate General was provided by Article 50½ (Tab B).

In March 1946 the Secretary of War appointed the War Department's Advisory Committee on Military Justice, commonly known as the Vanderbilt Committee, which, in December 1946 recommended that:

"A. *The checking of command control*

* * * * * * *

5. The final review of all general court-martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by The Judge Advocate General or by the Assistant Judge Advocate General for a theater of operations, or by such a board or boards as shall be designated by The Judge Advocate General or the Assistant. The reviewing authority shall have the power to review every case as to the weight of the evidence, to pass upon the legal sufficiency of the record and to mitigate, or set aside, the sentence and to order a new trial. This recommendation relates not only to checking command control but also importantly to the correction of excessive and fantastic sentences and to the correction of disparity between sentences.

In order to make this recommendation effective, Article of War 50½ should be amended. In its present form it is almost unintelligible. It should be rewritten and the procedure prescribed should be made clear and more definite. There seems to be no good reason why cases in which dishonorable discharge is suspended should not be reviewed in the same way as are cases in which it is not suspended."

* * * * * * *

The Elston Bill, which was enacted in 1948 as amendments to the Articles of War (62 Stat. 627) repealed Article 50½; provided for review of all courts-martial cases involving a general officer or sentences of death, dismissal, dishonorable, or bad-conduct discharge. Provision was made in Article 50 for a Judicial Council composed of three General officers of the Judge Advocate General's Corps (Tab C).

Incl. 4

At the time of the enactment of the Elston Bill there was considerable activity and agitation by veterans' organizations and bar associations for Congress to take some action to preclude "Command control" in courts-martial proceedings.

In June 1948 the Secretary of Defense appointed a committee on a Uniform Code of Military Justice, with Professor Edmund M. Morgan, Jr. as chairman. It should be noted that Professor Morgan had in 1919 testified before the Senate Subcommittee on Military Affairs which was considering S. 64, a Bill "To establish military justice." In his testimony he was in favor of and recommended the passage of Article 52 establishing a Court of Military Appeals. At that time he had strong feelings that such a court should be separate and apart from the military. (Hearings before the Subcommittee of the Committee on Military Affairs United States Senate, 66th Cong., 1st Sess. on S. 64, p 1381 (1919).)

The Morgan Committee in its recommendations for a Uniform Code of Military Justice, which was submitted to Congress by the Department of Defense on 4 February 1949 provided for a Judicial Council within the National Military Establishment of not less than three members appointed by the President from civilian life (Tab D). The Uniform Code of Military Justice, act of 5 May 1950, as amended, and now codified in title 10, United States Code, provides for a Court of Military Appeals, located for administrative purposes in the Department of Defense, and composed of three members appointed from civil life (10 U.S.C. 867) (Tab E).

During both the Senate and House hearings on the proposed Bill there was considerable discussion as to (1) The number of persons to be appointed to the Judicial Council (later amended to read Court of Military Appeals) and, (2) Whether there should be a requirement that the members have had military experience.

The following are extracts from the hearings held by the House of Representatives, Committee on Armed Services, Subcommittee No. 1, 4 April 1949:

Starting at page 1271:

"MR. SMART. It has been pointed out, or course, by Justice McGuire, that this is not a constitutional court. I am not out of order, I think, in saying that it was originally planned to have each of the Secretaries appoint one-third of the members of the Council. There were subsequently some disagreements on that. Then it was felt to be advisable to leave the appointments to the President. Now, they did not go further and make it a constitutional court, that is appointed by the President, by and with the advice and consent of the Senate for life, subject only to good behavior.

"MR. RIVERS. I think the tenure, if it should be decided for any term of years, should be staggered so as to always have a man on Judicial Council who knows about the make-up of the court.

"MR. BROOKS. I feel that way, too. I feel very strongly that the success or the failure of the whole thing is going to lie in the Judicial Council, and it seems to me you ought to have a strong court, whether you call it a Judicial

Council or otherwise makes no difference. But it has been going through my mind that we ought to write in there some tenure. My thought was to put in 'during good behavior,' and that they ought to be confirmed by the Senate. . . .

"MR. RIVERS. Don't let us put it in, then. Let us have some reason for going to conference.

"MR. BROOKS. Well, that might be a good reason. But it ought to be a strong court, because it is going to have control of the whole system and is going to make recommendations to the Congress from time to time; and, unless it is a strong court, your system is not going to be responsive to the recommendations.

"MR. RIVERS. I feel, though that this Judicial Council shouldn't be closed up. Of course, good behavior takes them away from any political aspect or any pressure. That is always a laudable suggestion as a theory underlying our courts of last resort and our courts of inferior jurisdiction to the Supreme Court."

Starting at page 1273:

"MR. ANDERSON. And I would like to ask one more question, if I may. I note it says 'The Judicial Council shall be composed of not less than three members.' Should there not be also a 'not more' in there some place, so there wouldn't be more than five or more than seven? Shouldn't there be some limitation? You might get another packed court.

"MR. SMART. I think you must keep in mind, gentlemen, that again we are operating on a peacetime basis, but who knows when war is coming and certainly when it does come I think we should anticipate whether or not it will be possible to make temporary appointments to the Judicial Council or whatever you want to call it. I think the committee should receive a little more testimony here as to who is going to help administer this court. Are commissioners anticipated? What is the probable case load? I think the committee ought to receive some figures here.

"MR. BROOKS. Yes. I think we ought to have some figures, too.

"MR. ANDERSON. I think that is a good idea.

"MR. SMART. We don't even know whether this Council can do the job.

"MR. BROOKS. If we make the tenure in good behavior, you can't have temporary appointments

"MR. SMART. I understand that. But I don't believe you want to leave it so you have the situation where in war time you may get a nine-man Judicial Council and during the ensuing peace you have the top-heavy structure of a nine-man council which you don't need.

"MR. ELSTON. Wouldn't the better way be to pick a definite number and if there is an emergency let Congress take care of the emergency function? . . .

* * * * * * *

"MR. ELSTON. So Congress can make emergency provision to take care of an unusual work load. I think we have such a provision in 68 (b), where we say:

In time of emergency, the President may direct that one or more temporary judicial councils be established for the period of the emergency, each of which shall be under the general supervision of the Judicial Council.

"MR. SMART. That is right.

"MR. LARKIN. We left 67 as not less than three, which leaves it with an open end on the top, because we just cannot accurately judge whether three will be sufficient for normal times. We anticipate it will, but it may be that there would be the necessity even in normal times of adding one or two more.

In the event that you come upon an emergency, however, or you are in war and the case load increases tremendously, why we already have a provision for these temporary wartime—

"MR. ANDERSON. As long as you have that, why shouldn't there be a limitation?

"MR. LARKIN. Because as I say, we cannot at this minute guarantee, if you will, that the three-man court will be able to carry the work load in normal times. We anticipate they will, but it is a little difficult, based on the court-martial figures that we have, to say with assurance that there will be no trouble in the three handling it. Now you could say 'no less than three nor more than five.'

"MR. RIVERS. That is right.

"MR. LARKIN. And then for the time of the emergency, keep this other provision for wartime.

"MR. RIVERS. That is right.

"MR. LARKIN. Where you might have to have, in other words, what amounts to branch offices or subsidiary panels, if you will—something the way the Tax Court works."

Starting at page 1275:

"MR. RIVERS. What about this? We also want to consider this, about whether or not you want any retired Government official holding on. Now some people might not like the retired Judge Advocate General, with all deference to the one present. But somebody may object to that.

"MR. LARKIN. Well, I think the way the provision is incorporated in the article now, it is all right. It says, 'from civilian life,' which would exclude officers of the Regular components and retired Regulars. A retired Regular, I should say, would be eligible if he resigned. If he just retired, he wouldn't be.

"MR. RIVERS. I don't know why you should exclude him.

"MR. LARKIN. Well, the notion specifically was to make this as civilian as possible, otherwise perhaps the court would consist of nothing but Regular officers who have resigned for the purpose of taking the job and in effect you would have it more military than civilian.

"MR. RIVERS. Of course it could work the other way, too. You could appoint a Reserve who would have animus toward the Regular.

"MR. LARKIN. Yes. That is the way it was designed: from civilian life, but not as it is designed under the National Security Act, which provides that the Secretaries, or the Secretary of Defense, for instance, cannot have served within the previous 10 years in a Regular component. It is not as strict as that and I don't think it should be.

"MR. RIVERS. What about that, Charlie?

"MR. ELSTON. Well, you probably would have to have some such provision if you were going to keep it strictly civilian.

"MR. LARKIN. I think the way it is provided just carries out what I point out: from civilian life, which means a civilian as distinguished from a military officer who is either on Regular service now or is a retired Regular who is still, of course, an officer of the United States. But it would not exclude a Reserve on inactive duty, or would not exclude anybody who has military service, of course.

* * * * * * *

"MR. RIVERS. You could conceive of a situation where there would be a marked feeling between Reserves and Regulars. It happened in many quarters after this war, as testimony before this committee will demonstrate and prove. And we sure don't want to get anybody on this court who has any feeling toward

any segment of our active or inactive force. That is what we ought to try to guard against."

* * * * * * *

Starting at page 1276:

"MR. SMART. Well, of course, I don't think that the committee should adopt the term 'Judicial Council' purely because we had it in H.R. 2575. In that case it applied to only one service, and also the members of the Judicial Council were to be general officers unless they were serving for temporary periods of 60 days or less, in which event they could be of lesser grade than general officers. Now here you are creating a court equally applicable, for purpose of review, to all of the services. They are civilians, not officers. I think you should adopt some judicial terminology and get away from this 'Council,' which suggests to me one of the usual basement operations here in Washington.

"MR. ELSTON. How about 'Supreme Court of Military Appeals,' or 'Court of Military Appeals'?

* * * * * * *

"MR. BROOKS. Now, 'The Court of Military Appeals'—how would that impress the Navy?

"MR. LARKIN. We define military and have used it—we have called this a uniform code of military justice—to include the naval service.

* * * * * * *

"MR. ELSTON. . . . But we ought to have something that would be different than 'Judicial Council.' That sounds too much like a city council.

"MR. LARKIN. It sounds like a round table, instead of a court.

"MR. ANDERSON. Why don't you move it?

"MR. BROOKS. It seems to me it would give strength to the whole idea there.

"MR. ANDERSON. I think so, too.

"MR. BROOKS. Admiral Russell is here. I am wondering, would you make a suggestion, or do you have one, sir?

"ADMIRAL RUSSELL. 'The Court of Military Appeals' seems all right to me.

"MR. ANDERSON. You mean leave out the 'Supreme'.

"ADMIRAL RUSSELL. I wouldn't think you need that. You are not comparing it with any other appellate courts. The only appellate court there is is in the service.

"MR. BROOKS. I think perhaps that thought is good, too, because, after all, while this is supposed to be the supreme body, there is a way to go higher than that, and that is to the President; is there not?

"MR. LARKIN. Of course. And there is still a way to go to the Supreme Court of the United States, actually, and that is by habeas corpus.

* * * * * * *

"MR. LARKIN. We would accept the 'Military Court of Appeals.'

"MR. BROOKS. Make a suggestion to leave off the word 'Supreme.'

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

Starting at page 1278:

"MR. ANDERSON. Mr. Chairman, I would like to bring that limitation to a head by offering a motion, if I may.

On page 54, line 20, after the word 'three'—

"MR. BROOKS. What article?

"MR. LARKIN. 67(a).

"MR. ANDERSON. Article 67, page 54.

"MR. BROOKS. Yes.

"MR. ANDERSON. Line 20, after the word 'three' insert 'nor more than five.' I think with the provision in 68(b) for the appointment of additional members of the Judicial Council in the event of an emergency, that that gives us a desirable limitation in time of peace.

"MR. RIVERS. After the word 'member,' put 'no more than five'.

"MR. BROOKS. After 'three'—

"MR. ANDERSON. It will read, then, 'The Judicial Council shall be composed of not less than three, nor more than five members.' I would like to have the service comment on that before we proceed.

"MR. BROOKS. Let us see what the comments are. Would it be better to have seven or five there? How would that work in reference to two panels?

* * * * * * *

"MR. BROOKS. If you have three and not more than five, you are going to have three constituting a court and then you will have two left. Now, how that two actually will help a great deal I don't know.

"MR. ELSTON. The thought that occurs to me, Mr. Chairman, is this: If the appointments are made they are going to be for life. Now if you have a period of emergency and you appoint five, and they are for life, they are going to stay on the court until they die or retire, whereas if you have a definite number plus this provision that allows emergency appointments, the emergency appointees would remain only until the close of the emergency and the President would then have the right to remove them. Suppose you said 'less than three nor more than five' and the law went into effect immediately. There would probably be enough cases to justify five at the present time. Now that means five from here on in.

* * * * * * *

"MR. LARKIN. Perhaps you could do it this way, Mr. Elston. If you desire to limit it to three as the permanent ones, then in 68(b) you could modify it so that in time of emergency the President could appoint one or more courts of three—

"MR. BROOKS. Panels."

* * * * * * *

Starting at page 1280:

"MR. ANDERSON. I thoroughly agree with the idea expressed by Mr. Elston that we limit it to three members and make that line read, 'The Judicial Council shall be composed of three members, period.'

"MR. BROOKS. Mr. Anderson withdraws his motion and now moves that the court be limited to three members; is that right?

* * * * * * *

"MR. BROOKS. Now, how far do we want to go toward making this a Federal court?

"MR. SMART. Well, it becomes a specialized Federal court.

"MR. BROOKS. What is the pleasure of the committee? It seems to me it makes very little difference there."

The committee in reporting the Bill to the House made the following comments pertaining to The Court of Military Appeals in House Report No. 491, 81st Congress, 1st Session (1949).

Starting at page 6:

"Article 67 contains the most revolutionary changes which have ever been incorporated in our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in

widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice. Every Member of Congress both present and past, is well aware of the validity of this statement. The original bill provided for the establishment of a judicial council to be composed of at least three members. In view of the fact that this is to be a judicial tribunal and to be the court of last resort for court-martial cases, except for the constitutional right of habeas corpus, we concluded that it should be designated by a more appropriate name. We likewise questioned the number of members to be provided. As a consequence we have substituted a new subdivision (a) which establishes the Court of Military Appeals, consisting of three members who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate. Such appointees must be members of a State or Federal bar, shall hold office during good behavior and receive the same compensation, allowances, and retirement benefits as judges of the United States courts of appeals. We must frankly admit that it is impossible to ascertain with any degree of accuracy the case load which this tribunal must consider. . . . Rather than provide for a greater number of members than three for the Court of Military Appeals, we have concluded that it would be sounder to limit the number to three until such time as the facts may warrant an increase in the number. The article as presently written embodies those conclusions."

Starting at page 32:

"*Article 67. Review by the Court of Military Appeals*

"This article is new although the concept of a final appellate tribunal is not. Proposed AGN, article 39(g) provides for a board of appeals while AW 50(a) provides for a judicial council. Both of these tribunals, however, are within the Department. The Court of Military Appeals provided for in this article is established in the National Military Establishment and is to review cases from the armed forces. The members are to be highly qualified civilians and the compensation has been set to attract such persons. '

Comments made on the floor of the House of Representatives pertaining to the qualifications of members of and the composition of the Court of Military Appeals appear in the Congressional Record of 5 May 1949 and are extracted as follows:

Starting at page 5825:

"MR. PHILBIN. . . . After considerable discussion and protracted debate and consideration, recognizing the desirability insofar as is practicable and consistent with the national defense and the exigencies of wartime, of the separation from strictly military control of the final determination of the legal cases in the armed services, we have set up and established in this bill a court of military appeals. This court is in effect a court of last resort similar to the United States circuit court of appeals. It consists of three civilian judges appointed by the President and confirmed by the Senate and having permanent tenure just as our high ranking Federal civilian judges. This court will be completely detached from the military in every way. It is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over

court-martial cases and civilian review of the judicial proceedings and decisions of the military."

Starting at page 5827:

"MR. GROSS. Can the gentleman tell me whether this appeals board that is to be set up, or appeals court, is to have at least one member of the court a former enlisted man?

"MR. FURCOLO. I see Mr. Brooks on his feet. Perhaps he would prefer to answer that as he is a member of the committee and I am not.

"MR. BROOKS. If the gentleman will yield, I think 'board' is the wrong terminology to use. What we want to build up there is not a board at all but a court, that will have the prestige and the background and the influence and the ability of the United States Court of Appeals. We hope that will happen, and we put in this bill as requirements for the members of this court the same requirements as for judges of the United States Court of Appeals. That is important in this respect, that perhaps you may want to go to the United States Court of Appeals to get a judge, and he would be available.

"MR. GROSS. You do not require that a former enlisted man serve on that court?

"MR. BROOKS. No.

"MR. VINSON. Mr. Chairman, I yield myself 1 minute to answer the gentleman.

Of course, the President has the right to appoint any type of man he sees fit to appoint. He can appoint a former enlisted man. He can appoint any lawyer, even though he has never had any military experience. It is entirely up to the President to select the type of man, just as he selects any other lawyer for appointment to a court. However, military service may be a factor in selecting him."

The Senate in its hearings before a Subcommittee of the Committee on Armed Services on the proposed Uniform Code of Military Justice also considered the qualifications of members of the Court of Military Appeals and the composition of the court to include length of terms.

The following are extracts from the hearings before the Senate Subcommittee of the Committee on Armed Services held 27 May 1949:

Starting at page 311:

"SENATOR KEFAUVER. And we will pass to 67, the Court of Military Appeals.

"PROFESSOR MORGAN. The Court of Military Appeals; yes.

"SENATOR SALTONSTALL. That is the civilian court.

"PROFESSOR MORGAN. That is the civilian court.

"SENATOR KEFAUVER. There are several suggestions made about that. In the first place there has been a suggestion that they are going to have a court composed of 'lame ducks,' and that there should be a requirement that they should have had experience in military justice, and that sort of thing.

"PROFESSOR MORGAN. Well, I ask you, after you saw Colonel Weiner here, he is a civilian, would you like to have him on a court of military appeals?

(Discussion off the record.)

"SENATOR SALTONSTALL. Mr. Chairman, I would say that if we are working for a decision, if you do not agree with me, we can discuss it; we discussed it a little before you came in, and my feeling would be to establish this civilian court, but not give them life tenure on good behavior, but make it for a period of years, perhaps starting the thing off with 3, 5, and 7 years, so that they would not come into a presidential year; try to work it out that way, anyway.

"SENATOR KEFAUVER. Yes; I have thought about that a good deal, too.

"SENATOR SALTONSTALL. I think we have got to gamble that the President is going to appoint good men. That is always a gamble and there will be some good and some bad.

As I understand it, it is a court of law; it is the court which will try legal questions.

"PROFESSOR MORGAN. Absolutely.

"SENATOR SALTONSTALL. With no questions on sentences?

"PROFESSOR MORGAN. No questions of fact; it is law.

"MR. LARKIN. No sentences.

"SENATOR SALTONSTALL. My vote would be in favor of it.

"SENATOR KEFAUVER. In favor of no requirement of having had military justice experience?

"SENATOR SALTONSTALL. It would leave it wide open.

"PROFESSOR MORGAN. Leave it wide open.

"SENATOR SALTONSTALL. For the President, but make it for a term of years.

* * * * * * *

"SENATOR KEFAUVER. I have thought that your suggestion that you made earlier and on which I had not expressed myself, but we want to see how this court is going to operate and what kind of personnel we are going to get, and it may be that experience will show that we should have a man with military experience.

"PROFESSOR MORGAN. It might."

The committee in reporting the Act to the Senate made the following comments pertaining to the Court of Military Appeals in Senate report No. 486, 81st Congress, 1st Session (1949):

Starting at page 6:

"Article 67 of the Uniform Code provides for a court of military appeals, which is an entirely new concept in the field of military law. This court, composed of three civilians, appointed by the President and confirmed by and with the advice and consent of the Senate, will be the supreme authority on the law and assure uniform interpretation of substantive and procedural law. The committee believed it desirable to have the judges of the court of military appeals serve for a term of 8 years rather than hold office during good behavior. Provision is made for staggering the expiration of terms of the judges."

Starting at page 28:

"*Article 67. Review by the Court of Military Appeals*

"This article is new although the concept of a final appellate tribunal is not. Proposed AGN, Article 39 (g) provides for a board of appeals while AW 50 (a) provides for a judicial council. Both of these tribunals, however, are within the Department. The Court of Military Appeals provided for in this article is established in the National Military Establishment for the purpose of administration only, and will not be subject to the authority, direction, or control of the Secretary of Defense. The terms of the judges are fixed at 8 years. The judges are to be highly qualified civilians and for this reason the compensation has been made the same as that of a judge of the United States Court of Appeals.

"Paragraph (2) of subdivision (a) provides for the staggering of the terms of the judges.

"Paragraph (3) provides for removal of a judge for cause. Grounds for removal are generally similar to those available against a judge of the Tax Court, except that mental or physical disability is made a ground for removal. (See 26 U.S.C. 1102.)

"Paragraph (4) follows the retirement provisions applicable to judges of courts in Territories and possessions. (See 28 U.S.C. 373.)

"Paragraph (5) provides authority for the President to assign a United States Court of Appeals judge on a temporary basis to fill any vacancy caused by the illness or disability of a judge of the Court of Military Appeals. The provision is adopted so that statutory authority will exist to keep the Court of Military Appeals at full strength during periods when the case load is very heavy. Such authority is desirable because of the provision in subdivision (c) requiring that the Court of Military Appeals act upon a petition for review within 30 days of its receipt."

Comments pertaining to the Court of Military Appeals made on the floor of the Senate appear in the Congressional Record of 2 February 1950 and are extracted as follows:

Starting at page 1390:

"MR. KEFAUVER. . . . Following this review [by a Board of Review], there is a review for errors of law by a single Court of Military Appeals composed of three civilians. It is apparent that such a tribunal is necessary to insure uniformity of interpretation and administration throughout the armed services. Moreover, it is consistent with the principle of civilian control of the armed forces that a court of final appeal on the law should be composed of civilians.

"The result of this pattern for an appellate system will be that the appellate procedure will be strengthened by a greater centralization of authority in tribunals, rather than in individuals as at present. This appellate system also has the virtue of being less complex than the present systems and should result in greater protection for an accused. In general, it is patterned after the appellate system of the Federal courts, with the court of military appeals closely following the procedures of the Supreme Court of the United States.

"While some differences of opinion were expressed by the witnesses on the merits of the court of military appeals, the preponderance of opinion was favorable. Several individuals and some of the reserve associations criticized the court as too civilian in nature and as accomplishing an unnecessary amount of unification. There was also a difference of opinion between the Services themselves, with the Department of the Army registering a dissent to this type of court. On the other hand, the Navy, the Air Force, Professor Morgan, the bar associations, the AMVETS, the American Veterans Committee and a number of other witnesses strongly favor such a supreme civilian court of military law. The position of the proponents of this court is that it is necessary if the substantive and procedural law of the uniform code—which applies to all persons in the Service—is to be uniformly interpreted. In addition, they see a need for a final authority on the law and feel that the present system—whereby the Secretaries of the Departments or the President are called upon to decide questions of law—is completely inadequate. In addition, they believe that a court of this character, with the prestige of a United States Court of Appeals, will do a great deal to insure public confidence in the fairness of military justice. The House committee and our committee feel that a court of this character will result in major improvements in the trial of courts-martial.

"As originally drafted, the judges of this court were to be appointed by the President, after confirmation by the Senate for life. Our committee carefully considered this provision and felt that, since the court represents a new concept in military law, it was advisable to provide the appointment of the judges for a term of years, rather than for life. Accordingly, our committee amended the provisions relating to tenure and has made them similar to the tax court of the United States and some of the Territorial courts."

Starting at page 1391:

"MR. KEM. I should like to ask the Senator whether his committee has made a study of the business which would come before the Court of Military Appeals which is established by the bill, as provided at page 161.

"MR. KEFAUVER. Yes; the committee has considered that problem and has made some study of it.

"MR. KEM. In the course of a normal year in time of peace, how many cases would the court have to consider?

* * * * * * *

"MR. KEFAUVER. Considering the number of courts martial, the witnesses who testified before our committee, the Morgan committee, and the House committee, including those representing the three armed services, as I understand, were of the opinion that this court would be sufficient to handle cases which would come before it.

"MR. KEM. I had no doubt that it would be sufficient; but my question was predicated on whether the court would have enough to do to keep its members busy, whether the bill would give the court jurisdiction sufficiently broad to keep three men busy throughout the year, in time of peace.

"MR. KEFAUVER. I may say that was one of the questions which arose and which caused the Senate committee to recommend that the terms of the three judges be not for life, but for a certain number of years, the idea being that after a certain amount of experience we would know fairly well whether there should be additional judges or fewer judges.

But the general feeling was that there would be sufficient work, or perhaps a little more than sufficient, for them to do, to keep them very busy; that probably 2,000 or 3,000 cases a year would come to them.

"MR. KEM. Of course, there is no way to estimate the number of writs of certiorari which would be granted.

"MR. KEFAUVER. . . . Mr. President, one very worth-while section of the proposed code is that which requires the Court of Military Appeals to make to the Congress an annual report in which it will state the number of cases it has tried, the disposition of the cases and its recommendations for improvement of the system. At the present time Congress does not receive annual recommendations or reports about military justice."

Starting at page 1469:

"MR. MORSE. . . . The purpose of House bill 4080 which is now before the Senate is, of course, to create a Uniform Code of Military Justice for all the services. While there is common agreement upon the need for uniformity in the administration of the judicial system of the armed forces, there is considerable divergence of opinion concerning the propriety of bringing to military justice certain of the concepts of civilian justice, and an even greater difference of opinion as to the advisability of creating a court of appeals for the Military Establishment, the members of which shall be appointed from civilian life. I refer, of course, to article 67 of the pending bill which creates a Court of Military Appeals consisting of three judges appointed from civilian life by the President, by and with the consent of the Senate, located for administrative purposes in the National Military Establishment.

This court is a direct outgrowth of the Judicial Council constituted by section 226 of the Elston Act, Public Law 759, in the Office of the Judge Advocate General of the Army. . ."

Starting at page 1470:

"MR. MORSE. . . . Two objections have been interposed to the enactment of article 67. The first is that it places final appellate power of cases tried by military courts in a civilian body, the members of which are not familiar with problems peculiar to the maintenance of discipline in the armed services. The powers of review of the proposed court of military appeals are limited to matters of law. It would seem therefore, that the court would not be required to pass upon questions which involve technical military knowledge. . . ."

The report of the Senate and House Conference (House Report No. 1946, 81st Congress, 2d Session (1950)) contained the following comments pertaining to the Court of Military Appeals:

Starting at page 4:

"2. In section 1, article 67, the House had provided for the establishment of a Court of Military Appeals, consisting of three judges appointed from civilian life by the President, by and with the consent and advice of the Senate, for life tenure. The House version further provided that such judges were to receive the same compensation, allowances, perquisites, and retirement benefits as judges of the United States court of appeals. The Senate amended this provision by reducing the tenure of the judges from life to a term of 8 years, providing that the first appointees should have staggered appointments with one expiring on March 1, 1953, a second on March 1, 1955, and the third on March 1, 1957, after which all successive appointments would be for a term of 8 years. While the Senate amendment left the salaries of these judges at $17,500 a year, it discarded the retirement benefits accorded judges of the United States court of appeals and substituted the same retirement benefits as those provided for judges of Territorial courts.

"The conference agreement provides that the judges of the Court of Military Appeals shall be appointed for a term of 15 years, the first appointees to receive staggered terms of 5, 10, and 15 years, respectively, the first of which will expire on May 1, 1956, the second on May 1, 1961, and the third one on May 1, 1966, with the terms of office of all successors to be for a full 15-year term.

"The conference agreement also terminated the retirement provisions provided by the Senate amendment and substituted therefor contributory civil-service retirement. It will be noted that, as a result of the conference agreement, the bill makes no reference to retirement privileges. However, it is a well settled principle of law that employees of the executive, legislative, and judicial branches of the Government for whom no other retirement system is provided will, as a matter of law, come within the provisions of contributory civil-service retirement. It is the intent of the conferees that this be the type of retirement for the judges of the Court of Military Appeals.

"The House recedes and agrees to the Senate amendment with an amendment."

Although there have been technical amendments to the Uniform Code of Military Justice (69 Stat. 10; 70 Stat. 911), the composition of the court or the qualifications of its members has not been changed since the court was established. By the act of March 2, 1955 (sec. 1(i), 69 Stat. 10) the salary of each judge was increased from $17,500 to $25,500 a year. The act also provided for the payment of travel

expenses and reasonable maintenance expenses, not to exceed $15 a day, when outside the District of Columbia on official business.

[s] Paul J. Kovar
PAUL J. KOVAR
Lieutenant Colonel, JAGC

5 Incl
Tabs "A" thru "E"

Article 52 as proposed in S. 64, a Bill "To establish military justice," Sixty Sixth Congress, First Session (1919)

"Art. 52. Revision by Court of Military Appeals.—There is hereby created a court of military appeals which, for convenience of administration only, shall be located in the Office of the Judge Advocate General, and which shall consist of three judges appointed by the President by and with the advice and consent of the Senate, each of whom shall be learned in the law, shall hold office during good behavior, and shall have the pay and emoluments, including the privilege of resignation and retirement upon pay, of a circuit judge of the United States. . . . said court shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial; . . .

Said judges may select the presiding judge of the court and may prescribe its rules and procedure. In case any judge shall become temporarily incapacitated for the performance of his duties, the President at the request of the court may assign to duty upon the court a judge advocate deemed qualified for such duty who upon assignment and taking the oath of office shall have the power and shall perform the duties of a judge of said court; and the Judge Advocate General shall assign to duty with the court such officers, enlisted men and civilian employees in the Judge Advocate General's department as the court may find necessary for the thorough and expeditious performance of its duties.

Each judge before entering upon the duties of his office shall take the oath prescribed for the judge advocate of a general court."

* * * * * * *

TAB A

Article 50½ of the 1920 Articles of War
(Act of 4 June 1920, c. II, 41 Stat. 787)

"Art. 50½. REVIEW; REHEARING.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

* * * * * * *

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President."

TAB B

Article 50 of the Articles of War, as amended, by the Act of 24 June 1948

(62 Stat. 627, 635)

"Art. 50. Appellate Review.—

"a. Board of Review; Judicial Council.—The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided,* That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer."

TAB C

H.R, 2498, 81st Cong., 1st session a Bill ". . . to establish a Uniform Code of Military Justice."

Article 67.

"Art. 67. Review by the Judicial Council.

(a) There is hereby established in the National Military Establishment a Judicial Council. The Judicial Council shall be composed of not less than three members. Each member of the Judicial Council shall be appointed by the President from civilian life and shall be a member of the bar admitted to practice before the Supreme Court of the United States, and each member shall receive compensation and allowances equal to those paid to a judge of a United States Court of Appeals.

* * * * * * *

(g) The Judicial Council and The Judge Advocate General of the armed forces shall meet annually to make a comprehensive survey of the operation of this code and report to the Secretary of Defense and the Secretaries of the Departments any recommendations relating to uniformity of sentence policies, amendments to this code, and any other matters deemed appropriate."

TAB D

"Art. 67. Review by the Court of Military Appeals.

(a)(1) There is a Court of Military Appeals, located for administrative purposes in the Department of Defense. The Court of Military Appeals consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of that court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or of the highest court of a State. Each judge is entitled to a salary of $25,500 a year and is eligible for reappointment. The President shall designate from time to time one of the judges to act as Chief Judge. The Court of Military Appeals may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court. Upon his certificate, each judge is entitled to be paid by the Secretary of Defense (1) all necessary traveling expenses, and (2) his reasonable maintenance expenses, but not more than $15 a day, incurred while attending court or transacting official business outside the District of Columbia.

(2) The terms of office of the three judges first taking office after February 28, 1951, expire, as designated by the President at the time of nomination, one on May 1, 1956, one on May 1, 1961, and one on May 1, 1966. The terms of office of all successors expire 15 years after the expiration of the terms for which their predecessors were appointed, but any judge appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed may be appointed only for the unexpired term of his predecessor.

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

(4) If a Judge of the Court of Military Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of a United States Court of Appeals to fill the office for the period of disability.

* * * * * * *

(g) The Court of Military Appeals and the Judge Advocate General shall meet annually to make a comprehensive survey of the operation of this chapter and report to the Committees on Armed

Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of the Treasury, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate."

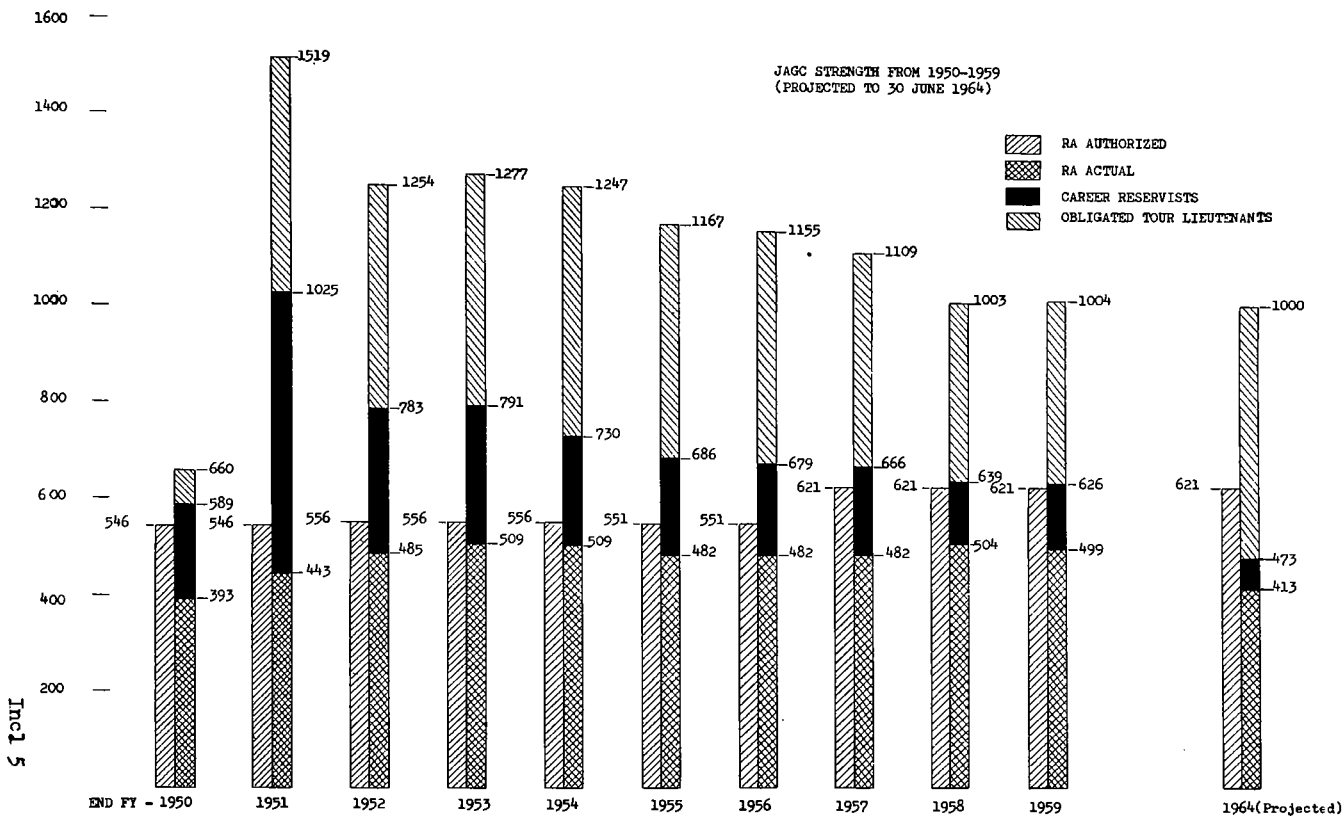

JAGC STRENGTH FROM 1950-1959
(PROJECTED TO 30 JUNE 1964)
RA AUTHORIZED
RA ACTUAL
CAREER RESERVISTS
OBLIGATED TOUR LIEUTENANTS
1600
1400
1200
1000
800
600
400
200
Incl 5
END FY - 1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1964(Projected)
546
660
589
546
393
1519
1025
556
443
1254
783
556
485
1277
791
556
509
1247
730
556
509
1167
686
551
482
1155
679
551
482
1109
666
621
482
1003
639
621
504
1004
626
621
499
1000
621
473
413

Figure 2.

Summary of Views Expressed by Colonel Albert J. Glass, Office of The Surgeon General, to Ad Hoc Committee for Study of the Uniform Code of Military Justice on 24 November 1959.

[After a presentation of the views of The Surgeon General concerning the test for insanity now prescribed in Manual for Courts-Martial, 1951, and the definition of sodomy in Article 125, Uniform Code of Military Justice, Colonel Glass was asked by General Powell to discuss the general problem of non-effective soldiers and rehabilitation. The views of The Surgeon concerning insanity and sodomy are summarized in memorandum for Deputy Chief of Staff for Logistics, dated 16 November 1959.]

It is obvious that individuals vary in their ability to cope with the problems and stresses of military service just as they do in their ability to meet the stresses of civilian existence. Acquisition standards have been designed to reject those most unsuited to military life. Nevertheless, some of this group do enter the service. The problem with them is quick identification so that they may be separated.

Then there are some individuals who are more or less marginal risks and some who should have no trouble at all. Even the best may become non-effective, however, if presented with a problem they cannot solve. The existence of such a problem may be manifested in a number of ways. Since it is characteristic of young American males to react to frustration by doing something, offenses against discipline may be first signals of loss of effectiveness.

Mental Health Units working closely with confinement officers and others in evaluating and assisting first court-martial offenders find that they fall into three groups: (1) those who are in trouble for the first time and probably won't be in trouble again; (2) a large group who might be salvaged by counselling and assistance; (3) a small group who should never have been enlisted or inducted.

In time of peace every effort should be made to drop those who can't contribute. The attitude should be "The Army is a man's job and you're not ready for it. We're not mad at you. You go home and maybe if you grow up you might be able to make the grade later." Statistics and reason do not indicate that effective soldiers are encouraged to get out because of this attitude. By and large, there is no great problem anyway with inductees who are older on the average and have a goal of successfully completing a prescribed period of service.

The stockade screening program was undertaken upon discovery that there were more soldiers confined for disciplinary offenses than there were sick and injured in all Army hospitals. Great progress has been made in identifying recidivist offenders who should be eliminated.

Incl. 6

It has been found, however, that, for salvage purposes, attention after incarceration is often too late since offenders are not given confinement sentences the first time they get in trouble.

Applying the lessons learned in the treatment of psychiatric casualties in combat; namely, treatment early and as far forward as possible, a soldier should be seen by the Mental Health Unit when he first gets into trouble. We are now experimenting with referrals at the time of the *first court-martial.* This system holds promise of helping the soldier when he may still be able to tell you what his problem is and before he gets infected by the adverse attitude of the misfits he may meet in the stockade.

In wartime you have a different situation. Many people want to avoid danger. You need to deter others from copying attempts to escape danger. One of the best deterrents during the Korean war was the program of shipping directly to the combat area those who tried to avoid overseas duty by going AWOL. There is no evidence that such persons performed less satisfactorily than others who went voluntarily, although it may be assumed the program was distasteful to combat commanders.

In general, you do not deter anyone from doing something he would not do. For example, it is so ingrained in our society that murder is unacceptable that the individual has his own controls which deter him from committing murder. On the other hand, "borrowing" or treating personal property as having community ownership in a barracks can be so well accepted by the particular community that it simply isn't regarded as stealing or as culpable. You can't deter conduct of that sort until you change the values of the community. The Prohibition Law against alcohol is another example.

ARMY PRISONERS CONFINED, 30 June, 1949–1959

	30 June 1949	30 June 1950	30 June 1951	30 June 1952	30 June 1953	30 June 1954	30 June 1955	30 June 1956	30 June 1957	30 June 1958	30 June 1959
In Stockades	7,093	5,024	8,873	13,428	10,883	9,102	7,059	6,083	5,310	3,384	2,838
In Disciplinary Barracks (Army)	3,144	2,551	2,111	3,874	4,724	5,344	6,095	4,359	2,960	1,723	895
In Federal Institutions (Army)	[a] 2,189	[a] 1,877	[a] 1,740	[a] 1,351	[a] 1,398	1,361	1,008	1,410	906	722	565
In Rehabilitation Training Center	0	0	0	103	301	46	26	0	0	0	0
In Naval Retraining Command	0	0	0	0	0	0	99	58	0	0	0
En Route fr. Overseas	[b] 50	[b] 50	0	139	85	88	31	5	95	0	0
TOTAL	12,476	9,502	12,724	18,895	17,391	15,941	14,318	11,915	9,271	5,829	4,298
ARMY STRENGTH, TOTAL	660,473	593,167	1,531,596	1,596,419	1,533,815	1,404,598	1,109,296	1,025,778	997,994	898,925	861,964
TOTAL RATE PER 1,000	18.9	16.0	8.3	11.8	11.3	11.3	12.9	11.6	9.3	6.5	5.0

[a] Estimated, Army.
[b] Estimated.

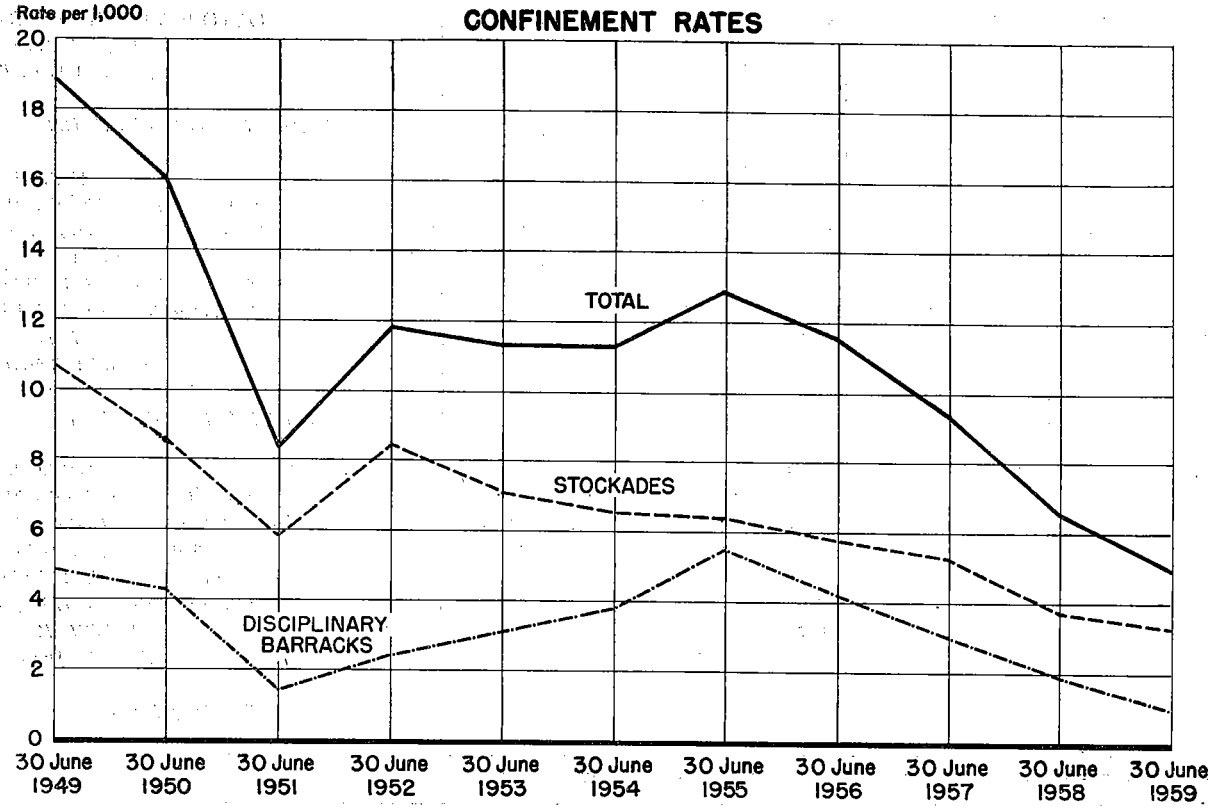

CONFINEMENT RATES
Rate per 1,000
20
18
16
14
12
10
8
6
4
2
0
TOTAL
STOCKADES
DISCIPLINARY BARRACKS
30 June 1949
30 June 1950
30 June 1951
30 June 1952
30 June 1953
30 June 1954
30 June 1955
30 June 1956
30 June 1957
30 June 1958
30 June 1959

Figure 3.

AVERAGE TIME REQUIRED FOR STEPS IN APPELLATE REVIEW

	1954	1955	Jan-Jun 56	Jul-Dec 56	Jan-Jun 57	Jul-Dec 57	Jan-Jun 58	Jul-Dec 58	Jan-Jun 59
COUNSEL—GP									
Arrest/Restr to Trial	25	26	38. 2	40. 5	42. 1	42. 4	50. 1	50. 3	50. 0
Trial to CA Action	13	12	14. 8	15. 1	13. 2	13. 8	17. 9	16. 7	17. 7
CA Action to receipt in OJAG	12	12	14. 3	16. 4	15. 3	14. 2	13. 4	11. 8	13. 3
Receipt in OJAG to BR decision	13	15	15. 8	20. 3	21. 8	29. 9	30. 3	31. 1	30. 4
BR decision to Petition to CMA	59	49	50. 0	49. 8	46. 9	53. 3	56. 5	46. 1	42. 4
Petition to CMA to CMA Ruling	33	33	30. 7	31. 1	29. 1	30. 4	37. 5	42. 8	35. 7
CMA Ruling to CMA Opinion				119. 0	210. 3	200. 0	152. 9	136. 6	100. 4
TOTAL	155	147	163. 8	292. 2	378. 7	384. 0	358. 6	335. 5	289. 9
COUNSEL—NG PLEA									
Arrest/Restr to Trial	28	28	46. 8	47. 6	51. 6	51. 4	56. 7	62. 1	68. 7
Trial to CA Action	22	22	27. 3	28. 6	28. 4	29. 8	33. 6	33. 0	42. 1
CA Action to receipt in OJAG	13	14	14. 1	14. 9	14. 4	14. 2	14. 3	13. 3	12. 3
Receipt in OJAG to BR decision	24	27	29. 7	36. 1	43. 1	55. 4	56. 6	59. 1	56. 8
BR decision to Petition to CMA	63	56	47. 0	45. 0	53. 8	57. 9	62. 3	58. 8	60. 6
Petition to CMA to CMA Ruling	38	37	34. 7	34. 2	37. 9	43. 3	42. 0	55. 8	54. 6
CMA Ruling to CMA Opinion	230	183	179. 3	166. 3	175. 3	163. 6	176. 7	157. 9	132. 5
TOTAL	418	367	379. 3	372. 7	404. 5	415. 6	442. 2	440. 0	427. 6
NO COUNSEL—G PLEA									
Arrest/Restr to Trial	25	25	39. 0	39. 8	41. 0	40. 7	46. 0	47. 6	47. 5
Trial to CA Action	12	12	13. 3	12. 5	13. 8	13. 4	17. 0	15. 4	18. 1
CA Action to Receipt in OJAG	12	13	13. 5	13. 8	13. 6	12. 5	12. 8	12. 5	11. 7

Receipt in OJAG to BR decision	5	5	4.5	5.0	3.8	5.0	5.1	6.2	5.3
BR Decision to Petition to CMA	57	52	58.1	49.0	59.9	60.2	63.0	64.1	68.7
Petition to CMA to CMA Ruling	32	32	32.5	30.8	27.5	29.8	40.7	50.2	46.3
CMA Ruling to CMA Opinion					14.0	114.2	193.9	157.8	129.3
TOTAL	143	139	160.9	150.9	173.6	275.8	378.5	353.8	326.9
NO COUNSEL—NG PLEA									
Arrest/Restr to Trial	28	28	47.4	50.7	52.6	53.0	63.7	60.4	63.8
Trial to CA Action	20	21	22.6	26.8	23.6	26.4	32.4	30.1	35.6
CA Action to Receipt in OJAG	14	13	14.4	14.3	14.9	14.0	15.8	15.1	14.6
Receipt in OJAG to BR decision	6	5	3.9	6.0	4.8	10.7	9.1	6.8	7.6
BR decision to Petition to CMA	66	52	50.7	35.4	47.6	47.1	58.9	82.2	54.3
Petition to CMA to CMA Ruling	34	32	29.1	21.6	30.1	32.1	44.0	85.7	37.8
CMA Ruling to CMA Opinion	192				127.0	106.3	112.4	169.0	
TOTAL	360	139	168.1	154.8	300.6	290.2	336.3	449.3	213.7

GP—Guilty Plea
CA—Convening Authority
BR—Board of Review
CMA—Court of Military Appeals
NG—Not Guilty

U.S. GOVERNMENT PRINTING OFFICE: 1960