Calendar No. 79

98TH CONGRESS, 1st Session | SENATE | REPORT No. 98-53

MILITARY JUSTICE ACT OF 1983

APRIL 5, 1983.—Ordered to be printed

Mr. JEPSEN, from the Committee on Armed Services, submitted the following

REPORT

[To accompany S. 974]

The Committee on Armed Services, having had under consideration legislation concerning the military justice system, reports the following bill (S. 974), to amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the military justice system, and for other purposes, and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill is to amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to further enhance the quality and effectiveness of the military justice system, including revisions to the laws concerning review of courts-martial, and for other purposes.

COMMITTEE CONSIDERATION

The Subcommittee on Manpower and Personnel of the Committee on Armed Services held two hearings (September 9, 1982, and September 16, 1982) on S. 2521, the bill referred to the Committee in the 97th Congress, and a legislative proposal from the Department of Defense. The following individuals and organizations provided oral or written testimony on the bill and the Department's proposals:

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

18-362 O

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

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

Rear Adm. John S. Jenkins, USN, Judge Advocate General of the Navy.

Rear Adm. Edwin H. Daniels, USCG, Chief Counsel of the Coast Guard.

Brig. Gen. William H. J. Tiernan, USMC, Director, Judge Advocate Division, Headquarters, U.S. Marine Corps.

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

Hon. William H. Cook, Associate Judge, U.S. Court of Military Appeals.

Hon. Albert B. Fletcher, Jr., Associate Judge, U.S. Court of Military Appeals.

Ernest H. Fremont, Jr., Esq., Chairman, American Bar Association (ABA) Standing Committee on Military Law.

F. Dore Hunter, Esq., Chairman, ABA Special Committee on Legal Assistance for Military Personnel.

Eugene R. Fidell, Esq., on behalf of the American Civil Liberties Union.

John J. Douglas, Esq., on behalf of the Judge Advocates Association.

Steven S. Honigman, Esq., Chairman, Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York.

Frank E. G. Weil, National Secretary, American Veterans Committee, Washington, D.C.

Background and Discussion

The Committee continues to believe that a sound and fair system of military justice is essential to a strong national defense. Military justice plays a central role in the maintenance of order and discipline in our armed forces. Without such order and discipline, the military effectiveness of our forces could be weakened and undermined. Therefore, we need a system of military justice which supports the commanders' efforts to instill respect, obedience and, indeed, superior performance in their subordinates. At the same time any vehicle of military discipline cannot ignore the tenets of fundamental fairness which are the standards of a democratic society. To do so, and create the potential for the capricious exercise of the broad authority commanders have over their subordinates, would risk disrespect and disobedience in the ranks and possibly even a dilution of public support for our military system.

Through the enactment and periodic adjustment of the Uniform Code of Military Justice (UCMJ) the Congress has attempted to balance both these important interests. The Committee believes that this attempt has generally been viewed as a successful one. Witnesses appearing before the Committee attested to the fact that our present military justice system is "working well as a general

matter"[1] and "is today a professional, respected, fair and effective system."[2]

While reassuring to the Committee, these views do not preclude periodic adjustments to the UCMJ which are justified, desirable and necessary. The UCMJ has been an evolutionary statute. Since its enactment on May 5, 1950 there have been a number of modifications, the most significant being the Military Justice Act of 1968. More recently, in 1979 and again in 1981, the Congress made adjustments to deal with specific problems or inefficiencies in the UCMJ. The Committee is pleased to hear that generally these changes have "already produced substantial gains in efficiency without jeopardizing fairness."[3] The Committee believes that this must be its goal in recommending any modifications to the UCMJ.

But, as the American Bar Association (ABA) pointed out, it can be a "continuing and difficult task to balance the often competing interests of the maintenance of military discipline [in an efficient manner] and the protection of an individual's rights."[4] Therefore, the Committee, the Congress and the Defense Department have always proceeded carefully and cautiously before recommending any changes to the rights and procedures embodied in the UCMJ.

That process was followed in reviewing S. 2521 and the proposals offered by the Department of Defense here. The Department's proposals, many of which were substantively similar to the provisions included in S. 2521, were the result of a careful, deliberate, formal process for considering changes to the UCMJ. That process—as the Department outlined in its testimony—entails discussion, review and coordination of the various proposals by military justice experts from the Office of the Secretary of Defense, the military services and the Coast Guard and the Judges of the U.S. Court of Military Appeals.

Using S. 2521 as its starting point, the Committee has also proceeded with due deliberation. In the course of its hearings the Committee heard testimony from military justice experts in the Defense Department, the Judges of the Court of Military Appeals, representatives of the private bar and concerned public interest groups. The Committee has considered closely that testimony and responses to extensive questions for the record posed by various members of the Subcommittee on Manpower and Personnel. The recommendations which result reflect the Committee's informed assessment of what changes to the UCMJ are needed and justified now and what proposals must be the subject of further study or consideration.

Each item in the bill is intended to respond to a specific problem or to address identified areas where efficiencies might be obtained

---

[1] Statement of Honorable William H. Taft IV, General Counsel, Department of Defense, before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, September 9, 1982, p. 9.

[2] Statement of Major General Hugh Clausen, Judge Advocate General of the Army, before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, September 9, 1982, p. 7.

[3] Statement of Honorable Robinson O. Everett, Chief Judge, U.S. Court of Military Appeals, before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, September 16, 1982, p. 1.

[4] Statement of Ernest H. Fremont, Chairman, ABA Standing Committee on Military Law, before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services September 16, 1982, p. 2.

in a fashion that would not adversely impact the fairness of the system. In the final analysis, the Committee believes its recommendations will maintain the essential balance between the need for an effective and efficient system of military discipline on the one hand and the important goal of preserving the fundamental rights of a defendant in any system of criminal justice on the other.

SUMMARY OF MAJOR PROVISIONS

The primary responsibility for the administration of military justice rests with the military commander. This reflects the fact that the commander is responsible for discipline within his command. The commander determines which cases should go to trial, what level of trial is appropriate, who should serve as members of the court-martial, and what action should be taken on the results of trial. The bill does not change the basic responsibilities of the commander, but makes a number of changes to facilitate the administration of military justice without undercutting the fundamental fairness of the system.

PRETRIAL RECOMMENDATION IN GENERAL COURTS-MARTIAL

There are three types of courts-martial to which the convening authority may refer a case. A general court-martial, which consists of a military judge and at least five members, or a military judge sitting alone (in noncapital cases), may adjudge any penalty authorized by the UCMJ and the Manual for Courts-Martial. A special court-martial, which normally consists of a military judge and at least three members or a military judge sitting alone, may adjudge a variety of lesser penalties, including a bad-conduct discharge and confinement at hard labor not to exceed six months. A summary court-martial, which consists of a single summary court officer, also may adjudge a variety of lesser penalties, including confinement at hard labor not to exceed thirty days.

Prior to referring a case to a general court-martial, current law requires the convening authority to make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. These questions can involve complex legal determinations, and in practice commanders normally rely on staff judge advocates to provide them with the basis for such legal conclusions. The amendments will provide formal recognition of current practice by requiring that the written legal determinations be made by the staff judge advocate. At the same time it will remain the commander's decision as to whether a case should be referred to a general court-martial.

EXCUSAL AND DESIGNATION OF COURT-MARTIAL PERSONNEL

When the convening authority refers a case to trial, he selects the members of the court-martial. Under current case law, there is some doubt as to whether the convening authority may delegate the authority to excuse members before the court actually assembles. Clear authority for such delegation is necessary to eliminate an administrative task that can be a burden on busy commanders. The current system can produce delays in courts-martial, with the

attendant waste of time by military personnel, including witnesses, judges, counsel, members, and other court personnel. Delays are caused by difficulties involved in securing the personal approval of the convening authority for excusal of a member who, because of last minute difficulties, is unable to attend the court-martial. These problems are significant in peacetime. In a combat environment they would be even worse, as the convening authority frequently would be distant from the location of the court-martial, the means of communication would be extremely limited, and more pressing duties would demand his time. At the same time, in a combat environment, the need to excuse members, particularly for last minute exigencies, is likely to be more frequent. The amendments permit the convening authority to delegate the power to excuse members, and authorize the military judge to excuse members for good cause after the court-martial has been assembled.

A related problem involves the current requirement that the convening authority personally detail the military judge and counsel, as well as any substitutions. This can create a burden on busy convening authorities, and, like the requirement to personally excuse members of the court, leads to unnecessary delay when the convening authority is unavailable to approve a necessary substitution of a military judge or counsel. Selection of the military judge and counsel need not require the personal attention of the convening authority. Military judges are not in any event assigned to the convening authority, but to the Judge Advocate General or his designee. Trial counsel and defense counsel are not necessarily assigned to the convening authority's command; rather, the assignment of counsel is subject to regulations of the military department in accordance with the differing needs and missions of each service. The bill will authorize the issuance of regulations governing the assignment of military judges and counsel to facilitate the detail and substitution of such personnel without undue burden on the convening authority or delay of the trial.

ORAL REQUEST FOR TRIAL BY JUDGE ALONE

The court members are responsible for the findings on the issue of guilt or innocence, and for determination of an appropriate sentence in the event of a finding of guilty. The accused has the right to request trial before the judge alone in noncapital cases, in which case the judge renders both the findings and sentence. Under current law, the request for trial by judge alone must be in writing. This can lead to appellate litigation concerning technical defects in the written request even if the accused on the record makes a knowing, voluntary, oral choice for trial before a specific judge. The amendments made by the bill will eliminate this problem by also authorizing an oral request for trial by judge alone on the record at the start of a trial.

USE OF VIDEOTAPE AND AUDIOTAPE RECORD OF TRIAL

The trial of a general or a special court-martial is conducted under rules of evidence and procedure similar to those applicable in a civilian criminal trial. The bill does not make any changes in this regard. However, it makes adjustments to reflect modern

trends by authorizing use of videotape and audiotape as a means of recording the proceeding in order to take advantage of the developing technology on use of such materials to serve as a record of trial or depositions. The Department of Defense testified that it presently intends to use this authority only for presenting videotaped depositions in a court-martial and for preserving the record of such depositions without redundant transcription. No changes are made in the substantive rules concerning admission of depositions, which preserve the basic rights of confrontation.

GOVERNMENT APPEAL

At the present time, there is no procedure for the government to appeal a ruling by the military judge when such ruling terminates the proceedings with respect to a charge or otherwise excludes important evidence. The bill allows appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution.

JUDGE-ALONE SENTENCING

If the accused is found guilty, the sentence is adjudged by the members of the court-martial, except when the case is tried before a judge sitting alone at the request of the accused. This contrasts with the civilian practice in the federal sector and in most states, in which the sentencing in noncapital cases is performed by the judge, even when the question of guilt or innocence has been determined by the jury. The Committee received some testimony which suggested that sentencing by military judges was more likely to produce punishments marked by consistency, uniformity and due concern for appropriateness, as compared to sentencing by members. However, the weight of the testimony before the Committee did not favor eliminating the role of the military jury in courts-martial sentencing at this time, at least not without a thorough review of any such proposal to ensure that it is consistent with the needs of military justice. The legislation calls for a detailed study and report on this matter.

CONFINEMENT POWERS OF SPECIAL COURTS-MARTIAL

S. 2521 included a provision expanding the confinement powers of the special court-martial from the present limit of 6 months to a period of up to one year. Department of Defense witnesses testified that such a change could help reduce the number of cases referred to general courts-martial, where the accused is exposed to a potential of substantially greater punishment and the administrative burden on the government is heavier. However, other witnesses opposed this fundamental change as unjustified and noted that it would allow a jury of only three persons to send an accused to jail for a year. After duly considering all the testimony, the Committee decided that this proposal should be subjected to further study to determine what kind of efficiencies might be achieved from such a change without undermining the fairness of the system or the fundamental rights of the accused.

POST-TRIAL REVIEW BY CONVENING AUTHORITY

After the sentence is announced, the case is reported to the convening authority. Under current law, the convening authority in effect functions as an appellate tribunal and makes a determination as to the legality of the findings and sentence. If the case was tried before a general court-martial, or before a special court-martial that adjudged a bad-conduct discharge, the convening authority who exercises general court-martial jurisdiction refers the case to his staff judge advocate or legal officer for a post-trial review. With certain exceptions, such cases are then subject to appellate review in the Court of Military Review, with the possibility of further review by the Court of Military Appeals.

When laymen presided over all courts-martial and lay officers served as counsel, there was a clear basis for requiring legal review in the field and requiring action on issues of law by the convening authority. This is less the case today when virtually all special and all general courts-martial are tried before military judges and qualified attorneys and all cases are subject to review by qualified attorneys. Moreover, as a result of court decisions, the staff judge advocate's review required in certain cases has become a cumbersome document which produces a substantial strain on legal resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is otherwise free of error.

The legislation addresses these problems by recognizing that the convening authority's primary post-trial role should involve the exercise of command prerogative with respect to the case. Thus, the proposal would not require the staff judge advocate or legal officer to conduct a legal review of each case. The legislation retains the existing powers of the convening authority with respect to modifications of findings and sentence and authorizes the accused to submit matters for the convening authority to consider prior to acting on the case. In addition, the proposal requires the convening authority to consider the written recommendation submitted by the staff judge advocate or legal officer before acting on all general courts-martial and all special courts-martial in which the sentence includes a bad-conduct discharge. The record of trial must be referred to the staff judge advocate or legal officer to be used in preparing this recommendation. The bill retains the present requirement that the accused have an opportunity to respond to the staff judge advocate's or legal officer's views.

WAIVER OR WITHDRAWAL OF APPEAL—JUDGE ADVOCATE REVIEW

At the present time, there is no procedure for the accused to waive or withdraw from the appellate review process. Cases involving death, dismissal, punitive discharges or substantial confinement are automatically reviewed by the Courts of Military Review. General courts-martial convictions not meeting these sentence criteria are automatically reviewed in the office of the Judge Advocate General. Testimony before the Committee indicated that there are cases where the accused does not desire to appeal and in which counsel determine that there are no substantial issues. The bill will permit these accused to waive or withdraw an appellate review to

be processed under Article 66 or Article 69(a). The waiver or withdrawal must be knowing, voluntary and in writing. Appeal could not be waived in death penalty cases.

Further, the bill requires a thorough legal review even if appellate review is waived or withdrawn. Article 64, as proposed, requires a judge advocate to review all cases that are not appealed to a Court of Military Review under Article 66 or reviewed by the Judge Advocate General under Article 69(a). Further review by the general court-martial convening authority and under Article 69(b) may take place in certain cases as prescribed under Article 64.

ARTICLE 69 REVIEW

Article 69—Review in the office of the Judge Advocate General—is amended to conform to the revisions to Articles 61 (Waiver or Withdrawal of Appeal) and 64 (Review by a Judge Advocate). An accused will be able to waive or withdraw an automatic review under Article 69(a). In addition, under Article 69(a) the Judge Advocate General is given the authority to modify or set aside the findings or sentence, or both, without referring the case to the Court of Military Review as is currently required. Finally, under Article 69(b) the Judge Advocate General is authorized to modify or set aside the findings or sentence, or both, as a matter involving the appropriateness of the sentence or on several other grounds.

SUPREME COURT REVIEW

After the Court of Military Review completes its action, the Court of Military Appeals may review the case. That Court reviews all death penalty cases, cases certified to it by the Judge Advocate General, and other cases upon petition of the accused and a showing of good cause. However, there is no present authority for either party to seek direct Supreme Court review of decisions by the Court of Military Appeals. The accused may attempt to mount a collateral attack at his own expense, a difficult and costly endeavor, but the government has absolutely no judicial recourse from adverse decisions. There is no other major federal judicial body whose decisions are similarly insulated from direct Supreme Court review. The bill authorizes the parties to petition the Supreme Court to review decisions of the Court of Military Appeals through discretionary writs of certiorari.

Prior to the enactment of the UCMJ in 1950, civilian court review of courts-martial was virtually nonexistent, with very limited review over questions of jurisdiction. Congress changed that in 1950, by creating an independent civilian tribunal, the Court of Military Appeals. The Court of Military Appeals is the primary judicial authority on military law, and it plays a vital role in promoting public understanding of the military justice system. The Committee intends, and the legislation provides, that the Court will continue to be the highest authority within the military justice system.

But the Court of Military Appeals regularly interprets federal statutes, executive orders, departmental regulations, and it also determines the applicability of constitutional provisions to members of the armed forces. The decisions of the Court are of considerable

importance to our nation because they impact directly on the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system.

The Court of Military Appeals is an independent judicial tribunal. It has demonstrated a willingness to strike down provisions of the Manual for Courts-Martial and departmental regulations, and to interpret provisions of the UCMJ to require procedural requirements or to impose limitations. Such a development is a natural outgrowth of the creation of a civilian tribunal. When the Court overturns a rule or interprets a statute on nonconstitutional grounds, the President can amend the rule or seek an amendment of the statute. However, the absence of Supreme Court review means that the government cannot obtain judicial review of a decision by the Court of Military Appeals. This means that the Court of Military Appeals can render a decision as a matter of constitutional law interpreting a rule or statute in a manner that the President, on an issue vital to military discipline, might consider inconsistent with the intent of Congress or the views of the Supreme Court, but he could not obtain Supreme Court review. There is no other agency of government whose regulations can be ruled to be unconstitutional by a judicial body that is not subject to review by the Supreme Court.

As noted in *Middendorf* v. *Henry,* 425 U.S. 25 (1976), the Supreme Court will not necessarily defer to the Court of Military Appeals on issues of constitutional law raised through collateral attack. Under the current state of affairs, this means that the accused, but not the government, may initiate actions involving military justice issues which eventually might gain the Supreme Court's review. It is the committee's view that is an unsatisfactory way to manage a system of judicial review.

The concept of Supreme Court review of courts-martial decisions has been endorsed by the House of Delegates of the American Bar Association, the Committee on Military Justice and Military Law of the Association of the Bar of the City of New York, and the American Civil Liberties Union. It was approved without dissent by the House of Representatives in the 96th Congress, but the session ended prior to formal Senate consideration.

The Committee is well-aware of the concerns about the Supreme Court's docket that have been expressed recently by several Justices. The legislation has been drafted in a manner that will limit the number of cases subject to direct Court review. Cases in which the Court of Military Appeals declined to grant a petition for review are excluded, and the Supreme Court will have complete discretion to refuse to grant petitions for writs of certiorari.

The precise number of military justice cases in which a petition for a writ of certiorari will be filed will depend on the number of cases reviewed by the Court of Military Appeals in a given year, the types of issues that arise, the action of the Supreme Court on other military or criminal law cases, and other factors that do not lend themselves to easy quantification.

From a broad perspective, there are several ways to assess the potential impact of this proposal on the Supreme Court. The degree of impact depends on the baseline from which the assessment is

made; at least two are possible. The first assessment would use the number of cases potentially subject to Supreme Court review as a baseline for measuring the impact. In the last year for which data are available (1981), the United States Courts of Appeals terminated 27,984 cases all of which were subject to Supreme Court review. This, of course, does not include cases coming from the states, the Supreme Court of Puerto Rico, and the District of Columbia Court of Appeals. By contrast, in fiscal year 1981, 162 cases from the Court of Military Appeals would have been subject to review by the Supreme Court under the bill proposal. This means that the bill would produce an increase of only 0.58 percent over the cases potentially coming from the U.S. Courts of Appeals to the Supreme Court.

A second, and more practical assessment uses only those cases which reach the Supreme Court's docket. As a baseline, the Supreme Court docketed 4,417 cases during the 1981 Court year. In the last five fiscal years, the number of cases reviewed by the Court of Military Appeals that would have been eligible for Supreme Court review under the bill would have ranged from a high of 440 in 1978 to a low of 143 in 1979, with an average of 280 cases. If review were sought in every case, this would affect the number of certiorari petitions filed with the Supreme Court in the range of 3 to 10 percent per year, based on the 1981 figure. The average increase would have been 6.3 percent.

The actual number is likely to be considerably less based on the following factors:

The Court of Military Appeals normally issues only slightly more than 100 written opinions a year, and it is much less likely that a petition for a writ of certiorari would be filed in a case involving summary affirmance or reversal.

The Solicitor General is likely to exercise firm control over government petitions.

The mere availability of review does not mean that every accused will seek review in the Supreme Court. For example, even though any accused can petition the Court of Military Appeals at government expense to review an adverse decision by a Court of Military Review, such petitions are filed in only about half the cases decided by the Courts of Military Review. Although it would be speculative at best to translate these figures into a firm prediction of the impact on the Supreme Court, these figures suggest that the number of petitions is likely to be kept to a reasonable figure.

With respect to the number of petitions that are likely to be granted by the Supreme Court, the Committee wishes to emphasize that it does not intend to displace the Court of Military Appeals as the primary interpreter of military law. The Solicitor General will ensure that the government only seeks review in occasional cases of great importance. The Supreme Court does not grant review in many cases. In 1981, for example, the Court granted review in only 210 out of the 4,114 cases in which a petition for a writ of certiorari was filed. The Supreme Court repeatedly has emphasized the unique nature of military law. In such circumstances, it is unlikely that the Supreme Court will grant review in a substantial number of military justice cases. The Court of Military Appeals will con-

tinue to be the principal source of authoritative interpretations of the UCMJ.

The Committee's concern for the Supreme Court's docket may be observed by contrasting the limits in the Committee's bill to the absence of limits on the reviewability of final decisions from the United States Courts of Appeals. There were over 27,000 cases terminated in 1981 just from the United States Courts of Appeals. A petition for a writ of certiorari may be filed in such cases no matter how insubstantial the issue.

The Committee's bill, however, ensures that court-martial cases will not be subject to direct Supreme Court review if the Court of Military Appeals has not granted review. In fiscal year 1981 for example, the Court of Military Appeals terminated 2,028 petitions for review and petitions for extraordinary relief by declining to grant review, while it heard only 162 cases that would have been subject to review in the Supreme Court under the Committee's bill. In other words, the Committee's bill would have authorized Supreme Court review in only about 8 percent of the cases before the Court of Military Appeals, whereas a petition for a writ of certiorari can be filed in every case terminated by the United States Courts of Appeals without regard to the relative importance of the case.

PUNITIVE ARTICLE FOR DRUG ABUSE OFFENSES

The legislation establishes a specific punitive article proscribing drug abuse offenses. Abuse of controlled substances is one of the most significant disciplinary problems facing the armed forces. In contrast to other offenses, however, criminal use of drugs is not the subject of a specific punitive article. The Committee believes that it is the responsibility of Congress to provide express guidance on drug offenses, and the amendment fulfills that obligation. The provision is modeled on a suggestion by the Court of Military Appeals and on the recent Executive Order of the President on drug offenses in the military. *See* Exec. Order No. 12383, 47 Fed. Reg. 42317 (1982).

DISCHARGE REVIEW AND CORRECTION BOARDS

The bill adjusts the authority of the administrative boards established pursuant to 10 U.S.C. § 1552 (Boards for the Correction of Military/Naval Records) and § 1553 (Discharge Review Boards). In view of the military justice appellate system these administrative bodies should not render legal judgments on the results of courts-martial by overturning, as a matter of law, findings or sentences of courts-martial. This task is the job of the appellate review system established by the UCMJ. Therefore, the bill limits the authority of these Boards, in reviewing courts-martial in the future, to acting on courts-martial sentences as a matter of clemency after exhaustion of remedies under the UCMJ.

SECTION-BY-SECTION ANALYSIS

Section 1 contains the short title of the bill and an explanation of references concerning the Uniform Code of Military Justice (UCMJ).

Section 2 amends Article 1(13) of the UCMJ to include a "law specialist" of the Coast Guard. In addition, this section contains conforming amendments to Articles 6(a), 15(e), 27, 42, and 136 of the UCMJ.

Section 3 contains amendments concerning the designation of court members, military judges, and counsel. It also contains changes concerning the requirements for excusal of court members and the procedure for requesting trial by judge alone. The changes made by this section are intended to facilitate the administration of courts-martial without affecting the fundamental rights of the accused or the duties of commanders, counsel, court members, and the military judiciary. These changes also will reduce the potential for jurisdictional error in courts-martial.

Under these amendments, errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required composition of a court-martial will be tested solely for prejudice under Article 59.

Section 3(a) amends Article 16(1)(B) to permit an oral request for trial by judge alone. At present, trial by judge alone is authorized only upon written request. The requirement for a written request was placed in the law when trial by judge alone was first authorized in 1968. This requirement, however, creates the possibility of administrative error even if the accused on the record makes a knowing, voluntary, oral choice for trial before a specific judge. Currently, each such error may cause appellate litigation despite the fact that the military judge made a satisfactory inquiry on the record into accused's decision.

Nothing in this amendment modifies the defense counsel's responsibility to discuss with the accused the options concerning the composition of the court-martial; nor does it modify the military judge's responsibility to determine that the accused understands the options and that the accused has had an adequate opportunity to consult with counsel about the choice. Likewise, the amendment does not affect the military judge's responsibility to ensure that the accused has made a knowing, voluntary request if the accused elects to be tried by judge alone. *See United States* v. *Parkes,* 5 M.J. 489 (C.M.A. 1982).

Because the military judge's inquiry and the response of the accused will be on the record, there is no need for the UCMJ also to require a written request as a statutory prerequisite to trial by judge alone. With respect to a summarized record (*e.g.,* in a special court-martial when the sentence is not sufficiently serious to authorize review before a Court of Military Review), the Committee directs that a standard format be developed to ensure that a summary of the oral request and the inquiry concerning that request is preserved.

Section 3(b) amends Article 25 to permit the convening authority to delegate his authority to excuse court members before assembly to this staff judge advocate, legal officer, or another principal assistant. Under current case law, there is substantial doubt as to whether the convening authority may delegate the authority to excuse members before assembly. *See United States* v. *Colon.* 6 M.J. 73 (C.M.A. 1978); *United States* v. *Ryan,* 5 M.J. 97 (C.M.A. 1978); *United States* v. *Newcomb,* 5 M.J. 4 (C.M.A. 1978); *United States* v.

Flowers, 7 M.J. 659 (A.C.M.R. 1979); *see also United States* v. *Allen,* 5 C.M.A. 626, 18 C.M.R. 250 (1955). Clear authority for such delegation is necessary to eliminate an administrative task that now can be a burden on busy commanders. The current system can produce delays in courts-martial, with the attendant waste of time by military personnel, including witnesses, judges, counsel, members, and other court personnel. Delays are caused by difficulties involved in securing the personal approval of the convening authority for excusal of a member who, because of last minute difficulties, is unable to attend the court-martial. These problems are significant in peacetime. In a combat environment they would be even worse, as the convening authority frequently would be distant from the location of the court-martial, means of communication would be extremely limited, and more pressing duties would demand his time. At the same time, in a combat environment, the need to excuse members before assembly of a court-martial, particularly for the last minute exigencies, is likely to be more frequent.

The Committee directs that the Manual for Courts-Martial place reasonable limits on delegation of excusal authority to ensure that the convening authority does not avoid his primary responsibility for the selection of members. Nothing in this amendment in any way relaxes or supplements the permissible reasons for excusing members before assembly of a court-martial.

Section 3(c) amends Articles 26(a) and 27(a) to eliminate the requirement that the convening authority personally detail the military judge and counsel. *See United States* v. *Ryan,* 5 M.J. 97 (C.M.A. 1978); *United States* v. *Newcomb,* 5 M.J. 4 (C.M.A. 1978).

Selection of the military judge and counsel need not require the personal attention of the convening authority. Military judges are not assigned to the convening authority, but to the Judge Advocate General or his designee. The trial counsel and defense counsel are not necessarily assigned to the convening authority's command; rather, the assignment of counsel is subject to regulations of the military department in accordance with the differing needs and missions of each service. Even where trial counsel and defense counsel are assigned to the convening authority's command, the convening authority rarely exercises personal discretion in the selection of counsel without obtaining and following the recommendation of his staff judge advocate.

The present requirement that the convening authority personally detail each military judge and counsel, as well as any substitutions, can create a burden on busy convening authorities. Moreover, courts-martial are occasionally delayed because the convening authority is unavailable to approve a necessary substitution of the military judge or counsel. These problems would be particularly harmful in a combat environment for the same reasons discussed in the analysis of section 3(b) above. Further, in addition to removing these potential burdens, eliminating the requirement for the convening authority to personally detail the military judge and counsel will remove any hint or possibility of improper command influence or control in the selection of such court-martial personnel.

Because the legal offices of the various services are organized differently, the development of procedures for detail of military

judges and counsel is left to Secretarial regulations and the Judge Advocate General concerned. There is no requirement under this section for the Judge Advocate General personally to detail each military judge. Each service has an independent judicial structure in accordance with Article 26(c) and service regulations. Under the proposed legislation, authority to detail military judges could be delegated and subdelegated through the judicial structure according to the organization and needs of each service's judiciary. The Committee directs that the President, in the Manual for Courts-Martial, provide general guidance for administration of this section, including procedures for placing in the record of trial appropriate documentation concerning the assignment of the military judge and counsel to the specific case.

Section 3(d) amends Article 29(a) to allow the military judge to excuse members "for good cause" after assembly. Currently, only the convening authority may excuse members for good cause following assembly of a court-martial. The convening authority needs such power in order to discharge his responsibilities as a commander, because there are circumstances in which he may decide that a member is needed to perform important duties elsewhere. However, in some cases, a member may be unable to attend, due to unusual circumstances, and the convening authority cannot be reached. This is likely to be a serious problem in the event of war or hostilities. If such an excusal cannot be made, the court-martial must halt in the middle of the trial. This not only disrupts the proceedings, but adds costs in terms of time and money to the trial of the case. The military judge presiding at the trial is well-situated to determine whether good cause exists for excusing a member after assembly. "Good cause" under Article 29 has been construed to mean military exigency, and does not include temporary inconveniences or absences which are incident to normal conditions of military life. Manual for Courts-Martial, paragraph 37*b* (rev. ed. 1969). Nothing in this amendment modifies these standards and the Committee directs that these standards be incorporated in appropriate revisions to the Manual for Court-Martial, along with a requirement that good cause for an excusal be shown on the record. *See United States* v. *Greenwell,* 12 C.M.A. 560, 31 C.M.R. 146 (1961); *United States* v. *Boysen,* 11 C.M.A. 331, 29 C.M.R. 147 (1960).

Section 3(e)(1) amends Article 38(b)(6), regarding assignment of counsel, as a conforming amendment in conjunction with the amendment to Article 27(a) made by section 3(c), above. Under the Military Justice Amendments of 1981, Pub. L. No. 97–81, 95 Stat. 1085 (amending Article 38(b)), the accused has the right to request representation by military counsel of his own selection in lieu of counsel detailed under Article 27 if the requested counsel is reasonably available in accordance with regulations of the Secretary concerned. At the time of the 1981 amendments, the determination as to the availability of counsel was made by the convening authority because that officer detailed counsel under Article 27. Under the amendments in this bill, the responsibility to detail counsel under Article 27 will be established under regulations of the Secretary concerned. The responsibility to determine the availability of individually requested military counsel under Article 38 remains with the commander of the person requested by the accused to serve as

counsel. As presently written, however, Article 38(b)(6) provides that the convening authority decides whether the detailed counsel will remain on the case as assistant or associate defense counsel. The bill amends this provision to make it clear that the determination as to whether detailed counsel remains on the case as assistant or associate defense counsel will be made by the same authority who details counsel under the Secretarial regulations prescribed under Article 27. This section does not modify the changes made by the Military Justice Amendments of 1981 and implementing regulations thereunder with respect to the standards relating to assignment of detailed counsel or individually requested military counsel.

Section 3(e)(2) amends article 38(b)(7) regarding the right to individual military counsel. In 1981 the Committee reacted to testimony concerning abuse of the right of an accused to request individual military counsel under Article 38 of the Code. According to testimony, the lack of any comprehensive definition of when a requested counsel was "reasonably available" for purposes of that Article contributed to this problem. At the time, there was no statutory authority for the military services to prescribe such a definition by regulation.

In the Military Justice Amendments of 1981 (P.L. 97-81, 95 Stat. 1085) the Congress directed each Secretary concerned to define, by regulation, "reasonably available" and establish procedures for determining whether the military counsel selected by the accused is reasonably available. The Congress also decided that generally the accused should only be entitled to one lawyer at government expense.

In approving these changes this Committee instructed that the term "reasonably available" should not be "so narrowly or rigidly defined (either in geographic, organizational, or other terms) so as to deprive a member of any meaningful opportunity to select individual military counsel . . . ." S. Rep. No. 146, 97th Cong., 1st Sess. 21 (1981).

In January, 1982 the President issued Executive Order 12340, which, among other things, defined persons not "reasonably available" to serve as individual military counsel. The Executive Order established 11 categories of judge advocates whose rank or duty assignment preclude their service as individual military counsel. For example, one of these categories includes judge advocates assigned to appellate review authorities. These categories were "in addition to any persons the Secretary concerned may determine to be unavailable to act as individual military counsel because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity." Moreover, a geographic restriction of 100 miles from the place of trial was placed on counsel who were requested "from an armed force different from that of the accused."

In accordance with the Congressional mandate each military service and the Coast Guard in turn issued its own regulations. Each Service Secretary defined categories of lawyers by rank or responsibility who are unavailable to serve as individual military counsel. They also provided lists of general factors, to be applied on an *ad hoc* basis in cases where individuals not in the excluded categories were requested as individual military counsel.

The Committee continues to believe that reasonable regulation of the right to request individual military counsel—which is a right unique to the military justice system—is necessary and appropriate. However, it may be that the regulations promulgated—with their rank, duty assignment and geographical exclusions—are too restrictive at some locales and that Congress ought to consider prescribing that there be some minimum number of reasonably available lawyers.

Accordingly, the Committee directs the Secretary of Defense to submit a report to the Committee, not later than June 30, 1983, explaining the reasons for excluding the various classes of attorneys excluded under the Executive Order. The Secretary shall also provide data on the effect of the rank, duty assignment and geographical exclusions in the Executive Order and service regulations, on the number of attorneys available to be selected as individual military counsel by an accused being tried at each major military installation in the United States and overseas. If possible the report should include similar data on the Coast Guard.

While the Committee wants to make a fully informed judgement as to the need for prescribing that there be some minimum number of reasonably available attorneys, the Committee sees no reason for imposing on the military services geographical limitations regarding requests for individual military counsel by accused from other services which differ from the geographical limitations imposed on requests by the service's own accused. For example, the Air Force permits requests for counsel, from its own service members, who are up to 300 miles from the place of trial. But the President's Executive Order limits requests from another service for Air Force counsel to counsel within a 100 mile radius. Indeed, removal of this form of restriction may help alleviate any potential problem concerning the total number of reasonably available counsel addressed above. Of course, the availability of any particular counsel, irrespective of whether he or she meets geographical or categorical criteria, ultimately will depend on workload and other factors outlined in the Manual and service regulations.

Section 3(e)(3) amends Article 38(c) to clarify the role of the defense counsel in the preparation of the submission to the convening authority to be permitted under Article 60(c). *See* Section 5, *infra.*

Section 4 amends Article 34 of the UCMJ to require that the convening authority receive written advice of the staff judge advocate before referral of charges to a general court-martial. The authority to refer cases to trial is a fundamental responsibility of commanders, and nothing in the amendments made by the Committee changes the convening authority's role in this regard. Current law, however, requires that a commander, prior to referring a case to a general court-martial, must make specific legal determinations as to the legality of the charge, legal sufficiency of the evidence, and court-martial jurisdiction. These questions can involve complex legal determinations, and commanders normally rely on staff judge advocates for advice on such legal conclusions. The amendments to Article 34 will provide formal recognition of current practice, without any derogation of the commander's prerogative to make a command decision about whether a case should be tried.

Under the amendments, the pretrial advice must state the staff judge advocate's conclusions as to whether each specification alleges an offense under the UCMJ, whether the allegation of each offense is warranted by the evidence in the Article 32 pretrial investigation (if any), and whether a court-martial would have jurisdiction over the accused and the offense. The amendments do not establish a requirement for the advice to set forth the underlying analysis or rationale for those conclusions, but, the advice also should include, where appropriate, a brief discussion of the circumstances and available evidence, significant mitigating and extenuating factors and any prior recommendations for disposition of the case. The requirement that the advice be in writing and accompany the charges if they are referred for trial reflects current practice as prescribed by paragraph 35*c* of the Manual for Courts-Martial (rev. ed. 1969).

Article 34(a)(2), as amended, reflects the fact that the Article 32 investigation may be waived by the accused, *United States* v. *Schaffer,* 12 M.J. 425 (C.M.A. 1982), but the government may require such an investigation to be held regardless of such waiver. Any waiver of the Article 32 investigation must be knowing and voluntary. It should be signed by the accused and counsel and made a part of the record.

The requirements of this Article are binding on all persons administering the UCMJ, but failure to follow them does not constitute jurisdictional error. *United States* v. *Ragan,* 14 C.M.A. 119, 33 C.M.R. 331 (1963). Errors, if any, under this Article will be tested solely for prejudice under Article 59.

Section 5 contains amendments related to action of the convening authority on the case and the right to appeal. In the past, as successive layers of review have been added to the military justice system, there has been a tendency to retain rather than replace existing review procedures, leading to unnecessary duplication. Presently, for example, a general court-martial involving a punitive discharge is reviewed successively for legal errors by a staff judge advocate, the convening authority, the Court of Military Review, and, if review is granted, by the Court of Military Appeals. The purpose of this section is to improve the administration of the military justice system by eliminating redundant legal reviews without diluting the accused's ability to obtain a meaningful appellate examination of his case.

When laymen presided over all courts-martial and lay officers served as counsel, there was a clear basis for requiring legal review in the field and action on issues of law by the convening authority. Today, however, a majority of all cases are tried before military judges and qualified attorneys, and all cases are subject to review by qualified attorneys. Moreover, all cases involving a punitive discharge or substantial confinement are subject to consideration in a Court of Military Review, where the parties are represented before the judges by appellate counsel. In view of these developments, there is less need for a detailed legal review in the field. Instead, detailed appellate review procedures are provided in section 7 of this legislation for all courts-martial. The changes made by this section will not alter the existing power of the convening authority with respect to the findings or sentence. However, these changes

emphasize that the primary role of the convening authority after the trial should involve the exercise of command prerogative with respect to the case. This section continues the current prohibition against action by the convening authority that would increase the severity of the sentence adjudged by the court-martial.

The Committee directs that the Manual for Courts-Martial incorporate detailed requirements for the administration of this section. For example, if a finding of guilty is announced under Article 53, the court-martial shall advise the accused on the record of the right to appeal and of the right to submit matters to the convening authority under the proposed amendments to Article 60 in section 5(a) *infra*. *See* Federal Rule of Criminal Procedure 32(a)(2).

Section 5(a) amends Article 60 to provide a statutory procedure for the convening authority's action on the case. As revised, Article 60 contains the following provisions:

Article 60(a) requires the convening authority to be notified promptly of the findings and sentence of a court-martial.

Article 60(b) provides a 30-day statutory time limit for the accused to submit matters for consideration by the convening authority. The convening authority or other person taking action may extend this period, for good cause, for up to 30 days if the accused shows that additional time is required to enable the accused to submit such matters.

If a recommendation by a staff judge advocate or legal officer is required, the accused has an additional opportunity to submit matters to the convening authority under the time limits in Article 60(d). If the accused makes a submission after the applicable time limits have expired, such matters will be attached to the record for consideration by subsequent reviewing authorities. *See* Article 38(c).

In cases where a recommendation by the staff judge advocate or legal officer is required, the convening authority or other person taking action under Article 60(c) must refer the record of trial to the staff judge advocate or legal officer to be used in preparation of that recommendation. In these and all other cases, the Committee directs that the Manual for Courts-Martial contain rules concerning the accused's access to the record during preparation of a post-trial submission in accordance with the following guidelines. It is anticipated that a submission to the convening authority by the accused under Article 60(b), in most cases, will be based upon retained copies of matters introduced at trial during sentencing proceedings. If the accused determines that the access to other matter from the proceedings is required in order to prepare a submission to the convening authority, a request may be made for copies of an unauthenticated record (or portions thereof) or the reporter's back-up tapes (if any). The accused also may request a copy of the authenticated record (or portions thereof) in order to prepare a submission. Nothing in this section requires the government to create or duplicate an unauthenticated record or back-up tapes (or portions thereof). If the government determines that duplication of such material would be too time-consuming or burdensome, it may meet its obligation to respond to the request by providing the accused with a copy of an authenticated record when the record is completed. In such cases, preparation of the authenticated record

should be completed in expeditious fashion so that it can be used in preparation of the post-trial submission, especially where the record must be referred to the staff judge advocate or legal officer. Any request for a copy of the unauthenticated record, back-up tape, or the authenticated record (or portions of such materials) for the purpose of preparing a submission under Article 60(b) shall be made within the initial 30-day period in order to constitute good cause for an extension of the time limits for a submission to the convening authority. If the material is not made available by the government within the initial 30-day period, the extension will begin to run from the day on which the material is provided to the accused or his counsel.

Article 60(c) requires action on the sentence after either consideration of any matters submitted by the accused or the expiration of the time for submitting such matters. The convening authority, in his discretion, also may act on the findings when he takes action on the sentence.

Article 60(c) provides the convening authority with complete discretion in acting on the sentence, so long as the sentence is not made more severe. It also authorizes the convening authority to set aside a finding of guilty and dismiss the charge and specification as a matter of discretion. In addition, he may modify a finding of guilty to specify a lesser included offense. The requirement in the current Article 64 that the convening authority approve only so much of the findings of guilty and sentence "as he finds correct in law and fact" is deleted. Under Article 60, as proposed, the convening authority may take any action on findings and sentence he deems appropriate (as long as the result is not made more severe). Such action is a matter of commander's prerogative that is taken in the interests of justice, discipline, mission requirements, clemency, or other appropriate reasons, and is not a review for legal sufficiency.

It is the intent of the Committee that the Manual for Courts-Martial should specify what additional information may be used by the convening authority (e.g., personnel records) in acting on the case. The information normally will be compiled by the convening authority's staff judge advocate or legal officer in accordance with procedures that will be set forth in the Manual for Courts-Martial. Those procedures should provide for notice to the accused of the additional information to be used. In cases where the staff judge advocate or legal officer must make a recommendation, the record of trial will be available because it must be referred to the staff judge advocate or legal officer to be used in preparation of that recommendation. Otherwise, the bill does not retain the statutory requirement that an authenticated record of trial be prepared prior to the convening authority's action in every case. In these other cases, the Manual for Courts-Martial should set forth the circumstances in which the record, or portions of it, will be prepared prior to the convening authority's action. For example, if the accused requests an authenticated record under Article 60(b) or the convening authority (or his staff judge advocate or legal officer) determines that all or part of the record is necessary for the exercise of command prerogative, those aspects of the record shall be prepared.

Article 60(d) requires the convening authority to consider the written recommendation of his staff judge advocate or legal officer before taking action on a general court-martial. Such a recommendation also is required in a special court-martial in which the sentence includes a bad-conduct discharge. The convening authority must refer the record of the trial to the staff judge advocate or legal officer to be used in preparation of this recommendation. A comparable requirement was included in S. 2521, but not in the Defense Department proposal. Upon consideration of all the testimony, the Committee felt that in these major cases, the record of trial was an important piece of information for the convening authority to have in considering how to exercise his command prerogative.

Still, this amendment is a substantial change from present law, which is based upon the current responsibilities of the convening authority to conduct a legal review of the case. Under current law, the staff judge advocate's review has become a cumbersome document which produces a substantial strain on legal resources. *See, e.g., United States* v. *Morrison,* 3 M.J. 408, 409 (C.M.A. 1977) (Fletcher, C.J., concurring). It can be a source of appellate litigation even when the trial is otherwise free of error. It has become unnecessary and redundant in view of the substantial effort now devoted to appellate review by the Courts of Military Review and the Court of Military Appeals. Under the proposal, the responsibility to review the case for legal errors is assigned to appellate authorities, making it unnecessary for the convening authority to receive a legal review of the case prior to taking action. Under the proposal, the staff judge advocate or legal officer will provide the convening authority with a concise written communication, reflecting the views and recommendation of the convening authority's principal advisor on military justice matters; it will not be a legal review of the proceedings. The President shall prescribe the specific form and content of the recommendation in the Manual for Courts-Martial. However, the Committee directs that the recommendation include concise information that will assist the convening authority in acting on the case, especially in evaluating sentence appropriateness and clemency (*e.g.,* the findings and sentence, a summary of the member's service record, information concerning pretrial restraint, the pretrial agreement, if any, and any other matters which the staff judge advocate, in his discretion, determines to be relevant to the action of the convening authority). In addition, the accused's submission to the convening authority (if any) will be attached. The staff judge advocate or legal officer, in his recommendation, may discuss matters in the accused's submission. The Manual will further provide that when the recommendation is prepared by a staff judge advocate, he should respond to allegations of legal error raised by the accused and address any *prima facie* legal errors he discovers. However, the legislation does not require the staff judge advocate to set forth supporting analysis or rationale in his response to allegations of legal error. Such a response may consist of a statement of agreement or disagreement with the matter raised by the accused. Finally, the staff judge advocate or legal officer will include a specific recommendation as to the sentence, along with any appropriate recommendations as to the findings.

The accused is entitled to submit matters in response to the recommendation regardless of whether matters were earlier submitted for the convening authority's consideration under Article 60(b). The 5-day time limit on submitting a response reflects current practice under *United States* v. *Goode,* 1 M.J. 3 (C.M.A. 1975). The convening authority or other person taking action may extend this period upon a showing of good cause, for up to an additional 20 days. Since the record of trial must be referred to the staff judge advocate or legal officer to be used in preparation of the recommendation, it will be made available to the accused for use in preparing a response, if it has not already been so provided. A request for a copy of the record (or portions of such materials) for the purpose of preparing a response must be made within the initial 5-day period. If the material is not made available by the government within the initial 5-day period, any extension will begin to run from the day on which the material is provided to the accused or his counsel. If the accused has any objections to the staff judge advocate's recommendations, those objections must be raised in the response; failure to do so constitutes a waiver of the objection to the staff judge advocate's recommendation and the effect of the recommendation on the convening authority's action. If there is an objection to an error that is deemed to be prejudicial under Article 59 during appellate review, it is the Committee's intent that appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority. Because the convening authority is not acting as an appellate tribunal, the accused is not required to raise legal objections to the court-martial in his submission to the convening authority in order to preserve such objections for appellate consideration.

Article 60(e) contains discretionary authority to order proceedings in revision and rehearings. It does not require the convening authority or staff judge advocate to review the proceedings to determine whether proceedings in revision should be ordered or a rehearing is necessary because of legal errors; nor does it require the convening authority to provide supporting analysis or rationale when responding to a request by any party for proceedings in revision or rehearing. It is designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under Article 60(c). The denial of a motion for a proceeding in revision or a rehearing is without prejudice to the right of a party to raise the same allegations of error during subsequent review of the case. The substantive rules on a rehearing are taken from the present version of Article 63(a), as implemented by paragraph 92a of the Manual for Courts-Martial (rev. ed. 1969). This continues current authority for the convening authority to order three types of rehearings: 1) a rehearing in full on all charges and specifications; 2) a rehearing on the sentence only based upon approved findings; and 3) a combined rehearing, which requires findings by the court-martial only on specifications referred to the rehearing, with sentencing based upon those of which the accused is convicted at the rehearing combined with those that were approved from the previous trial. The convening authority, of course, may reduce the sentence as a matter of command prerogative without a rehearing. The rules on proceedings in revision are taken from the

present version of Article 62(b). The rules governing the procedures for these actions, including the appropriate time for such actions in the post-trial process, will be set forth in the Manual for Courts-Martial. It is the intent of the Committee that if the case is subject to review by a Court of Military Review, a rehearing or proceedings in revision may be ordered at any time prior to transmittal of the record by the convening authority under Article 65(a), as amended by section 6(d) *infra.*

Section 5(b) is a complete revision of Article 61. The revised provision permits an accused to file a statement expressly waiving the right to appellate review within 10 days after notice of the convening authority's action in cases that are subject to review by a Court of Military Review under Article 66 or by the Judge Advocate General under Article 69(a). The accused may also withdraw an appeal already commenced. These provisions are not applicable in death penalty cases, which will be subject to review. The convening authority may extend the period of time, for good cause, for up to an additional 30 days.

At the present time, there is no procedure for waiver or withdrawal of appellate review. Appellate proceedings before the Courts of Military Review are held in every case in which the sentence extends to death, dismissal, a punitive discharge, confinement for one year or more, or otherwise affects a general or flag officer. Every general court-martial in which there has been a finding of guilty and a sentence, the appellate review of which is not provided for under Article 66, is reviewed in the office of the Judge Advocate General under Article 69(a). These review proceedings are held regardless of whether the accused wishes to appeal, even when trial defense counsel, or appellate defense counsel, and the accused all determine that there are no issues of law to submit on review. A plea of guilty, for example, bars appellate review of most issues, except for matters such as voluntariness of plea, competence of defense counsel, and the government's compliance with the terms of a pretrial agreement. *See, e.g., Blackledge,* v. *Allison,* 431 U.S. 63 (1977), *Tollett* v. *Henderson,* 411 U.S. 258 (1973); *Fontaine* v. *United States,* 411 U.S. 213 (1973); *Santobello* v. *United States,* 404 U.S. 257 (1971); *Boykin* v. *Alabama,* 395 U.S. 238 (1969). *United States* v. *Joseph,* 11 M.J. 33 (C.M.A. 1981). Although the number of cases in which the accused does not desire to appeal or to seek review by the Judge Advocate General cannot be quantified precisely without intruding on the attorney-client relationship, testimony before the Committee indicates that there are cases in which the accused does not desire to appeal and in which counsel determine that there are no substantial issues. To require automatic review of all such cases represents an inefficient use of judge advocate resources and unnecessarily delays consideration of cases in which the appellate review is of importance to the accused or the system in general.

Under the proposal, the decision as to whether the case should be appealed will not be made by the accused until after the convening authority takes his action. Nothing in this legislation changes current military law precluding pretrial agreements that involve a forfeiture of the right to appellate review, the right to representation by military appellate counsel, and the right to consideration

by a Court of Military Review of sentence appropriateness. *See United States* v. *Mills,* 12 M.J. 1 (C.M.A. 1981).

The Committee considered a requirement for the accused to file a notice of appeal in every case currently reviewed automatically under Article 66 or 69(a), but concluded that such a requirement would only create additional paperwork and the opportunity for allegations of technical error. Further, the problem about which the witnesses expressed concern was those individuals who do not want to appeal, and the need for a statutory mechanism for them to exercise that desire in a voluntary, knowing fashion.

The waiver statement is filed with the convening authority as a matter of administrative convenience, not for his review. The form of the waiver statement may be prescribed by regulation, but it should be simple and concise. The Committee expects the Department of Defense to develop an appropriate format which protects the right of the accused to make voluntary and informed choice, and also protects the counsel against unfounded challenges of inadequate representation. Moreover, the proposal ensures a thorough legal review even if the appeal is waived or withdrawn. Article 64, as proposed, requires a judge advocate to review all cases that are not appealed to a Court of Military Review under Atricle 66 or reviewed by the Judge Advocate General under Article 69. *See* section 7(a) *infra.* Further review in such cases may take place under Article 69(b) as prescribed under Article 64. Review under Article 69(b) also may be granted by the Judge Advocate General on his own motion or upon application as provided in Article 69(b). *See* section 7(d) *infra.*

Section 5(c) amends Article 62 to allow appeal by the government of certain rulings in a court-martial over which a military judge presides and in which a punitive discharge may be adjudged. To the extent practicable, the proposal parallels 18 U.S.C. § 3731, which permits appeals by the United States in federal prosecutions. Article 62(c), which excludes the appeal from computations of time in deciding speedy trial motions, is taken from 18 U.S.C. § 3161 (h)(1)(E), which excludes interlocutory appeals from speedy trial computations in Federal civilan criminal trials. In federal civilian criminal trials, the law provides for sanctions in the event of frivolous or dilatory motions. *See* 18 U.S.C § 3162. The Committee directs that the same standards used in judging the appropriateness of such sanctions be applied to determine whether the government is entitled to the benefit of the exclusion in Article 62(c).

The determination as to whether the appeal meets the criteria of Article 62, as proposed, will be subject to review by appellate authorities. The decision to appeal will be made by the trial counsel or a superior as representative of the government. The Manual for Courts-Martial and service regulations will provide procedural requirements for approval by appellate counsel, who represent the government before the Courts of Military Review under Article 70, before an appeal is filed. Either party may appeal an adverse ruling from the Court of Military Review to the Court of Military Appeals. An appeal by the government to the Court of Military Appeals will be subject to additional procedural requirements for approval under the Manual for Courts-Martial and service regulations.

The present provision of Article 62(a), which permits the convening authority to return all legal rulings to a military judge for reconsideration, is repealed as unnecessary in view of the authority for appeal by the government, the authority to order rehearings, and the ability of a party to request the military judge to reconsider a ruling not amounting to an acquittal. The provisions of present Article 62(b) concerning proceedings in revision are set forth in the proposed Article 63(a).

Section 5(d) amends Article 63 to conform it to the amendments in Article 60(e) concerning rehearings and proceedings in revision ordered by the convening authority. The provisions concerning such actions, as set forth in the amendment to Article 60(e), are substantially similar to current law. The difference is that the convening authority is not required to base his action on a review of the case for legal sufficiency.

Additional language has been added at the end of Article 63 with respect to rehearings. This is designed to correct an anomaly in the present law. If an accused pleads guilty and receives a sentence from the convening authority pursuant to a pretrial agreement that is less than that adjudged at trial, the maximum sentence that may be imposed on a rehearing under the current law is the sentence contained in the pretrial agreement. This limitation is imposed by current law even if the accused does not plead guilty at a rehearing. The effect of this anomaly is to enable the accused to have the benefit of a pretrial agreement without fulfilling his agreement to plead guilty. Under the amendment, an accused would have the benefit of the original pretrial agreement at a rehearing only if he continued to fulfill its terms. If not, the maximum sentence as to the charges that were covered by the pretrial agreement would be the punishment adjudged at the original trial.

Section 5(e) amends Article 71 concerning the execution of sentences. This conforms to the amendments concerning the powers and duties of the convening authority after trial and in the appellate process. The amendments will eliminate the current ambiguity between Article 71, which limits execution of a sentence, and Articles 57 and 58a, which establish the effective date of confinement (the date the sentence is adjudged), forfeitures (the date the sentence is approved by the convening authority), and automatic reduction of an enlisted person to E–1 (when a punitive discharge or confinement at hard labor is approved by the convening authority). This legislation continues the present requirement that death sentences receive Presidential approval and that dismissal of an officer be approved by the Secretary of the Military Department concerned before such sentences are executed under Article 71. Such reviews are conducted after all legal reviews are completed, and do not involve a review of the legality of the proceedings; rather, they are conducted as a matter of clemency. In such cases, the remaining portion of the sentence may be executed when approved by the convening authority, but the President (in death cases) and the Secretary (in dismissal cases), as a matter of clemency, may remit any previously executed portion of the sentence.

The legislation also continues current law requiring completion of the legal review of the case prior to execution of a punitive discharge. This not only will protect the accused, it will also ensure

that the government does not terminate military jurisdiction until a legal review of the case is completed. When a considerable period of time has elapsed between approval of the sentence by the convening authority and completion of appellate review, there should be a determination by the authority empowered to execute the discharge as to whether retention on active duty would be in the best interest of the service. The Manual for Courts-Martial shall set forth guidances as to the standards for such determinations and the nature of the recommendations that should be provided in such cases.

Article 71(a) is amended to eliminate the requirement of approval by the President prior to execution of any sentence involving a general or flag officer. This is consistent with the amendments to Articles 66 and 67, eliminating special review of cases involving general or flag officers. The amendment also permits the portion of the sentence that does not extend to death in a capital case to take effect without Presidential approval. The term "remit" is used in this section in the sense of the power to pardon.

Articles 71(b) and 71(c) are amended to modify the limitation on execution of a sentence as follows:

First, the limitation on execution applies only to the part of a sentence which imposes a dismissal or dishonorable or bad-conduct discharge. Second, the prohibition of execution of a dishonorable or bad-conduct discharge is absolute at least until completion of review under Article 64. If appellate review in such cases has not been waived or withdrawn, the period is continued until the sentence is affirmed by a Court of Military Review, and, in cases reviewed by it, the Court of Military Appeals. If a timely petition for a writ of certiorari to the Supreme Court has been filed, the mandate of the Court of Military Appeals is stayed until action has been completed by the Supreme Court.

Article 71(d) is amended to make express the authority of a convening authority to order executed any part of a sentence if the execution of that part is not limited by other subsections of Article 71 whether or not the execution of another part of the sentence is so limited. The present authority of the convening authority to suspend the execution of any sentence or any part thereof is preserved.

Section 5(f) is a conforming amendment to make it clear that forfeitures may become effective when approved by the convening authority.

Section 5(g) amends Article 76a relating to appellate leave to conform it to the revised version of Article 60, which replaces Articles 64 and 65 as the authority for action on the sentence. *See* section 5(a) *supra.*

Section 6 contains amendments pertaining to records of trial. Under present law, the record of trial must be in writing. This does not permit the armed forces to take advantage of the developing technology on use of audiotape, videotape, and similar materials to serve as a record of trial. The Committee directs that audiotape, videotape, or similar material should be used only to the extent that the equipment is capable of preserving the record for reviewing authorities. The decision to use audiotape, videotape or similar material must also be governed by the availability of adequate

facilities and equipment so that trial and defense counsel can make use of the record in this form with the same degree of privacy as a written transcript. The Manual for Courts-Martial will set forth procedures permitting trial and defense counsel to obtain transcripts of such materials where they are entitled to the record in connection with the convening authority's action on the case.

Section 6(a) amends Article 1 by adding a definition of "record," which permits audiotape, videotape, or similar materials to be used as a record of trial or depositions. The "record" also will include all briefs, motions and other pleadings, exhibits and documents filed in the case. The Manual for Courts-Martial will set forth procedures governing use of audiotape, videotape or similar materials at trial, as well as procedures permitting reviewing authorities to obtain transcripts of such materials under appellate court rules.

Section 6(b) amends Article 49 with respect to depositions. It permits audiotape, videotape, or similar materials to be admitted by use of electronic equipment rather than "read." It does not make any change in the law governing admissibility of depositions in lieu of live testimony. The procedure for use of audiotape or videotape at trial will be set forth by the President in the Manual for Courts-Martial.

Section 6(c) amends Article 54 with respect to the cases in which a complete record of the proceedings and testimony must be prepared. As revised, Article 54 would require a complete record in all general courts-martial cases in which the sentence included death, a discharge or dismissal or, in cases where the court has adjudged a sentence not including a discharge, punishment in excess of that which can otherwise be adjudged by a special-martial. This provision is drawn directly from paragraph 82.b. of the Manual for Courts-Martial (rev. ed. 1969). Nothing in this provision is intended to require a complete record in any general court-martial where it is not presently required by this paragraph in the Manual and the pertinent appendices thereto. A complete record also would be required in any special court-martial in which the sentence includes a punitive discharge. When a complete record is not required under the amendment, the record will contain such matter as may be prescribed by the President. These changes will permit the use of summarized records in cases that now require a complete record (*e.g.* cases affecting a flag or general officer that do not fall within the sentence requirements of Artice 54). *See* section 8(a) *infra.* See section 5(a) *supra* with respect to preparation of the record in whole or in part prior to the convening authority's action under Article 60(c).

Section 6(d) amends Article 65 to eliminate the requirement to send the record of trial of a special court-martial to the officer exercising general court-martial jurisdiction over the command for review if the sentence as approved by the convening authority includes a bad-conduct discharge. This will eliminate an unnecessary step in the review process for cases that are subject to appellate review by a Court of Military Review. It also makes certain other amendments, as follows:

Article 65(a) is revised to conform it to the terminology of the procedure under proposed Articles 60, 61, 66, and 69. The present version of Article 65(a) has been modified to reflect that appellate

review of certain cases under Article 66 and Article 69(a) can now be waived under new Article 61. Therefore, only in cases subject to appellate review under those sections wherein review is not waived or withdrawn shall the record of trial be forwarded to the Judge Advocate General. The reference to "the opinion or opinions of the staff judge advocate or legal officer" presently contained in Article 65(a) also has been eliminated because the subject of the judge advocate advice in the proposed amendments is governed by Articles 60 and 64. *See* section 5(a) and 5(e) *supra.*

Article 65(b) is substantially the same as the present Article 65(c) but the references to legal review have been eliminated in view of the provisions for legal review in the amendments to Article 64. *See* section 7(a) *infra.*

Section 7 governs review of courts-martial for legal sufficiency and related matters.

Section 7(a) amends Article 64 to require review by a judge advocate in cases that are not subject to review by a Court of Military Review under Article 66 or the Judge Advocate General under Article 69(a) or in which appellate review has been waived or withdrawn under Article 61. This replaces the current provisions of Article 65 relating to approval of findings and the sentence by the convening or supervisory authority, and ensures that each case will receive a complete review by a lawyer for legal errors. Article 64, as proposed, has the following provisions:

Article 64(a) provides for written review by a judge advocate under regulations prescribed by the Secretary concerned, of all cases that are not reviewed by a Court of Military Review under Article 66 or by the Judge Advocate General under Article 69(a). This includes cases not within the jurisdiction of such courts under Article 66 or the Judge Advocate General under Article 69(a) and cases within those jurisdictions in which the review is waived or withdrawn. No person is eligible to review a case under this Article if he has acted in the same case as an accuser, investigating officer, member, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense. The judge advocate is required to respond in writing to any written allegation of error of law raised under Article 38(c) and to determine whether the court had jurisdiction of the accused and the offense, whether the charge and specification state an offense, and whether the sentence was within the limits prescribed by the law. The judge advocate is authorized to recommend appropriate corrective action. This subsection is similar to, but more extensive than, the present version of Article 65(c).

Article 64(b) requires that the record, which will include the judge advocate's review, must be forwarded to the officer exercising general court-martial jurisdiction over the accused in the following cases: when the judge advocate recommends corrective action, when the sentence extends to a punitive discharge or confinement for more than six months or when such review is otherwise required by service regulations.

Article 64(c) authorizes the general court-martial convening authority who receives the record with the judge advocate's review, to take action on the findings and sentence and to order rehearings. It requires the record of trial and action thereon to be sent to the

Judge Advocate General for review under Article 69 if the officer exercising general court-martial jurisdiction does not take the action recommended by the judge advocate, except where the charges are dismissed or the action taken is more favorable to an accused than that recommended by the judge advocate.

Section 7(b) amends Article 66(a) to permit a Court of Military Review, while sitting as a whole, to reconsider the decision of a panel of that court. Article 66 has been interpreted through judicial decision as neither expressly nor impliedly authorizing reconsideration of a panel decision by the whole court. *United States* v. *Wheeler*,. 20 C.M.A. 595, 44 C.M.R. 25 (1971); *United States* v. *Chilcote,* 20 C.M.A. 283, 43 C.M.R. 123 (1971). By overriding the *Chilcote* and *Wheeler* decisions, the legislation would assist in resolving conflicts among panels and promote finality of Court of Military Review decisions within the respective services, without the necessity to certify individual panel decisions to the Court of Military Appeals. The bill would in no way affect the right of a military accused to petition the Court of Military Appeals for review of his or her conviction.

Section 7(c) amends Article 66(b) to remove from the mandatory appellate jurisdiction of the Courts of Military Review cases affecting a general or flag officer that are not otherwise within the jurisdiction of the court. As amended, Court of Military Review jurisdiction over a case affecting such officers will be the same as jurisdiction over all military personnel. Only a handful of cases have involved general or flag officers since the UCMJ was enacted over 30 years ago; the requirement of mandatory appellate review of all cases affecting such officers, however, may lead to a perception that the Code provides rights to flag and general officers that are not available to other service personnel. Although there are situations where military life requires distinctions based upon rank, this is not such a case. The amendment retains automatic review of all death penalty cases, but removes from automatic review other cases in which the accused waives or withdraws appellate review under the amendment to Article 61. *See* section 5(b) *supra.*

Section 7(d) amends Article 67(b)(1) to remove the requirement for automatic review by the Court of Military Appeals of all cases affecting a flag or general officer, regardless of the severity of the sentence. This is consistent with the amendment to the jurisdiction of the Courts of Military Review in Article 66. *See* section 7(c) *supra.*

Section 7(e) amends Article 69(a) to make it clear that the accused may waive or withdraw the automatic review in the office of the Judge Advocate General of general courts-martial that are not reviewed by a Court of Military Review. This conforms Article 69(a) to the amendments to Article 61. At the present time, the office of the Judge Advocate General reviews all general courts-martial in which the sentence does not include a punitive discharge or confinement for one year or more, regardless of whether the accused desires such review. Under the amendment, the accused will be able to waive or withdraw from such a review. Under Article 69(b), as amended, the Judge Advocate General could consider cases not reviewed under Article 66 or Article 69(a) on certain grounds (e.g. newly discovered evidence, fraud on the court, lack of jurisdiction

over the accused or the offense, error prejudicial to the rights of the accused or as a matter involving the appropriateness of sentence) if the accused subsequently seeks review under Article 69(b) within two years after the sentence is approved or establishes good cause for failure to apply within that time. The amendment also authorizes the Judge Advocate General to modify or set aside the findings or sentence in cases reviewed under this section without referring the case to the Court of Military Review. In addition, the amendment gives the Judge Advocate General powers similar to those exercised under Article 66 by the Court of Military Review with respect to rehearings, dismissal of charges, and review of cases for sentence appropriateness.

Section 8 creates a new section, Article 112a, to proscribe wrongful use, possession, manufacture, distribution, importation, exportation, or introduction of controlled substances. Although drug abuse is one of the most serious disciplinary problems facing the armed forces, there is no specific section of the UCMJ concerning illegal drugs. Prosecution of drug offenses under Article 133 (conduct unbecoming an officer and a gentleman), Article 134 (e.g., crimes that are prejudicial to good order and discipline, service discrediting) or Article 92 (violations of lawful orders) are cumbersome, and have led to litigation about compliance with the technical requirements of those Articles and implementing provisions. *See, eg. United States* v. *Ettleson,* 13 M.J. 348 (C.M.A. 1982); *United States* v. *Thurman,* 7 M.J. 26 (C.M.A. 1979); *United States* v. *Guibault,* 6 M.J. 20 (C.M.A. 1978).

Although prosecutions under Articles 92, 133 and 134 are appropriate, Congress traditionally has set forth the details of significant offenses in the text of the UCMJ. There is a detailed statutory scheme for addressing drug offenses in the civilian sector under title 21, United States Code. In view of the substantial dangers to morale and readiness created by drug abuse in the armed forces, and the continuing litigation in this area, it is essential that Congress provides a specific article on controlled substances in the UCMJ.

The new Article follows the tradition of the UCMJ by setting forth the specific offenses. The maximum punishments will be established by the President in the Manual for Courts-Martial under Article 56. The article sets forth some of the more frequently abused substances, such as marijuana, cocaine, heroin, and LSD and incorporates the controlled substances listed by the Attorney General under title 21, as well as any controlled substances listed by the President in the Manual for Courts-Martial.

The President recently issued a change to the Manual for Courts-Martial, Exec. Order No. 12383, 47 Fed. Reg. 42317 (1982), that substantially clarifies existing law. Nothing in this amendment should be construed as invalidating or otherwise affecting any prosecution under those changes to the Manual for Courts-Martial. The definitions and terms set forth in Executive Order 12383 are consistent with the Committee's intent with respect to Article 112a.

This amendment is intended to apply solely to offenses within its express terms. It does not preempt prosecution of drug paraphernalia offenses or other drug-related offenses under Article 92, 133, or 134 of the UCMJ.

Section 9 amends Article 67 to make the Director, Judge Advocate Division, Headquarters, U.S. Marine Corps a statutory member of the "Code Committee." At present, this officer sits as an unofficial member, and the amendment would provide a formal basis for his participation. For the same reason, the amendment substitutes the Chief Counsel, United States Coast Guard, for the General Counsel of the Department of Transportation, as member of the Code Committee.

The Code Committee performs an extremely valuable service in evaluating the operation of the UCMJ and in considering proposed modifications. This Committee believes that public participation on the Code Committee would increase public understanding of the military justice system and could provide the Code Committee with useful contributions from the public, the private bar, and the academic community.

For this reason, the Committee has added two public seats to the Code Committee created under Article 67 of the UCMJ. These would be reserved for members of the civilian community who are expert in military justice or criminal law, and whose primary professional career has been in the civilian sector. They would be appointed by the Secretary of Defense for renewable terms of three years. These appointments will be made without regard to political affiliation, and with a view to providing a balanced membership on the Code Committee. The Committee intends that the term "members of the public" exclude officers or employees of the United States, members of the armed forces on active duty for more than 30 days, and retired members of a regular component.

Because the addition of public members represents a substantial departure from past practice, the Committee wishes to proceed carefully with respect to other possible measures to increase public participation in Code Committee activities. The bill provides that, for the time being, the Federal Advisory Committee Act will continue to be inapplicable to the Code Committee. At the same time, however, the Committee strongly encourages the expanded Code Committee to meet in public at least twice a year, following notice in the *Federal Register* and by such other means as are likely to encourage public and bar attendance. While the Code Committee may conduct its other meetings in private, it is the Committee's hope that the Code Committee will be generous in exercising its discretion to open those meetings to the public as well.

This section also requires the Secretary of Defense to establish a commission to advise the Code Committee and the Congress on certain military justice issues. The first issue is whether the military judge should exercise the sentencing authority in all noncapital courts-martial. Under both current law and the amendments made by this legislation, military judges are detailed to all general courts-martial and virtually all special courts-martial. *See* Articles 16, 19, and 26. The military judge may grant a request by the accused for trial before the judge alone in noncapital cases, in which event the judge renders both the findings and sentence. However, if the accused is tried before a court with members (the military equivalent of a jury), the members are responsible both for the findings on the issue of guilt or innocence, and for the determination of an appropriate sentence in the event of a finding of guilty.

In the federal civilian system, however, the judge is responsible for sentencing in all cases, even those in which the guilt or innocence of the accused is determined by the jury. All but seven states also rely on judicial sentencing. In those states use of jury sentencing is limited in scope.

S. 2521 would have shifted sentencing in all cases where a military judge presided to that judge. The Committee received some testimony which suggested that sentencing by military judges was more likely to produce punishments marked by consistency, uniformity, and due concern for appropriateness, as compared to sentencing by members. Other witnesses however, suggested that the unique relationship between the military community and the military justice system would be affected adversely by an end of the members' participation in the sentencing process. The weight of the testimony before the Committee did not favor eliminating the role of the military jury in courts-martial sentencing at this time, at least not without further careful study and the gathering of additional data and information on the need for, and impact of, such a major change. This was the course of action favored by the Department of Defense. Suspension power for military judges and the Courts of Military Review also will be studied.

The second issue deals with the expansion of the confinement jurisdiction of the special court-martial from its current 6-month level to one year, the traditional dividing line in the federal criminal system between misdemeanors and felonies. S. 2521 included a provision making this change.

Witnesses from the Department of Defense testified that many convening authorities feel compelled to refer cases for trial by general courts-martial because present ceilings on punishment that may be adjudged by a special court-martial are too stringent. A trial by general court-martial presents the accused with a risk of substantial confinement, limited only by the maximum punishment for the offense, which may be a period of many years. A general court-martial also increases the burden for the government in terms of the requirement for an Article 32 pretrial investigation and a greater number of persons sitting on the court (a minimum of 5 members for a general court-martial as compared to a minimum of 3 members for a special court-martial).

On the other hand, other witnesses challenged whether there would be any impact on the number of general courts-martial; noted that a bad conduct discharge generally was perceived to be the equivalent of 6 months confinement; and pointed out that under the proposal an accused could be sent to a year in jail by a 3-person jury. Faced with this difference of view about a major revision to the UCMJ, the Committee decided that the necessity and impact of this proposal required further study.

In conjunction with considering whether the jurisdiction of the special court-martial should be expanded the commission will also review the jurisdiction of the Courts of Military Review and, thus, ensuing access to the Court of Military Appeals. At present, substantial numbers of courts-martial are not subject to appellate review by any court, even in cases where there is no discharge or dismissal, but confinement up to one year. These cases presently are reviewed in the offices of the Judge Advocates General or by

other judge advocates. The present limitations on appellate review by the Courts of Military Review and the Courts of Military Appeals have led the accused to rely on the extraordinary writ powers of these courts, a vehicle which may be ill suited to the particular circumstances of the case.

The Committee believes that it may be appropriate to modify the appellate review process so that a greater number of cases receive review by the military appellate courts, in lieu of legal reviews presently conducted in the office of the Judge Advocate General and elsewhere, especially if it were determined that the special court-martial confinement jurisdiction should be expanded. The Committee therefore has asked the commission in conjunction with consideration of expanding special court-martial jurisdiction, to review current appellate practice to consider whether there is any need to modify or clarify the present process.

The question of tenure for military judges was raised by at least one witness who testified before the Subcommittee on Manpower and Personnel. In view of the vital importance of an independent judiciary in the military justice system, the Committee has directed that this issue also be studied.

The Manpower and Personnel Subcommittee recommended deletion of a provision of the bill regarding the establishment of a retirement program for the judges of the United States Court of Military Appeals. The Committee believes that this matter deserves further study and, therefore, has directed the commission to make recommendations to the Committee on the elements of a fair and equitable retirement system for these judges.

To study these issues the legislation requires the Secretary of Defense to establish a 7-member commission. At least three members of the commission shall be members of the public. The Committee intends that these public members be selected under the same criteria applicable to the public members of the Code Committee under Article 67(g), as proposed by this section. The Committee directs that the membership of the commission include representatives of the full spectrum of roles in the military justice system—prosecution, defense and judiciary. The commission will have 9 months in which to do its analysis and report to the Code Committee. A copy of the report will be forwarded to the Armed Services Committees of both Houses of Congress. The Code Committee will have three months to review and comment on the report of the commission.

In conjunction with this matter, the Committee was concerned about the need for an improved data base for analyzing military justice issues. The Committee expects the Secretary of Defense, working with the Code Committee, to establish a uniform process and format to collect data on key operational military justice indicators that will permit useful analysis of military justice trends and issues.

Section 10 governs Supreme Court review. The bill makes a link which is missing in the present military justice appellate process under which that process is not subject to direct review in the United States Supreme Court. At present, court-martial convictions are reviewed in the federal courts only through collateral proceedings such as a petition for a writ of *habeas corpus* filed in a federal

district court by the accused. There is no statutory authority for decisions of the Court of Military Appeals adverse to the government to be reviewed in the federal courts.

The authority for the parties to seek review in the Supreme Court is a logical step in the evolution of the military justice system. Thirty-five years ago, review of courts-martial by civilian tribunals was limited to questions of jurisdiction. The creation of the Court of Military Appeals in 1950, however, institutionalized civilian review of the entire record for errors of law. The Court of Military Appeals regularly interprets federal statutes, executive orders, departmental regulations, and determines the applicability of constitutional provisions to members of the armed forces. The decisions of the Court are of considerable importance to our nation because they impact directly on the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system.

The legislation permits direct access to the Supreme Court, by both the accused and the government in certain military justice cases, via a petition for a discretionary writ of certiorari. The Committee's recommendation does not reflect dissatisfaction with the Court of Military Appeals or with the tenor of its decisions. The Committee intends that the Court of Military Appeals will be the principal source of authoritative interpretations of the law. However, the very success of the Court in institutionalizing civilian review has called into question the basis for excluding review by the Supreme Court. After careful consideration, the Committee does not find this to be a situation where aspects of military society dictate a difference between the military justice system and our federal judicial system. Of course, the Committee intends to monitor closely the impact of this significant change to the appellate process on the military justice system overall.

The Committee is well-aware of the significant national concern over the Supreme Court's workload. The decision as to whether review will be granted under this bill is solely in the discretion of the Supreme Court. None of the cases under this bill will fall within the Supreme Court's mandatory appellate jurisdiction. Moreover, the Committee has taken steps to ensure that the bill will not result in an undue increase in the volume of cases presented to the Supreme Court. Although Supreme Court jurisdiction over other courts generally permits review of all cases within the lower courts' jurisdiction, the Department of Justice recommended that direct Supreme Court review of military justice cases be limited to those actually considered by the Court of Military Appeals, thereby precluding direct Supreme Court review in cases where the Court of Military Appeals declined to exercise its discretionary jurisdiction as well as in cases not subject to the jurisdiction of the Court of Military Appeals. The Department of Justice offered the following rationale for this limitation: "The propos(al) . . . would permit appeal in a circumstance in which a decision of the Court of Military Appeals affected military jurisprudence. To limit direct appealability in such a way would permit the Supreme Court to consider issues of public importance but would preserve the role of the Court of Military Appeals as the primary civilian interpreter of the Uniform Code of Military Justice." Testimony before the Com-

mittee also indicated that the legislation probably would not produce a significant increase in the number of certiorari petitions filed with the Supreme Court, particularly in view of these limitations.

In developing the certiorari proposal the Committee has tried to strike a balance between the need to provide a reasonable opportunity for Supreme Court review, the interest in preserving the place of the Court of Military Appeals as the primary interpreter of the UCMJ, and a justifiable concern over recent statements by a majority of the Supreme Court about the size of that Court's docket. This proposal places new significance on the Court of Military Appeals, decision whether to hear a case on the merits. As pointed out by the Chief Judge of that court "for an accused . . . our Court would hold the key allowing access to the Supreme Court." At least one witness before the Committee expressed concern about this. Thus, the number of cases which reach the Supreme Court becomes dependent on the frequency with which the Court of Military Appeals grants an accused's petition for review. In the period FY 1977–FY 1981, such grants occurred in an average of 280 cases per year.

In the federal civilian system, of course, any criminal conviction is ultimately subject to Supreme Court review via a petition for a writ of certiorari. Where appropriate the Committee wishes to achieve parity with the civilian system to the maximum extent practicable, but recognizes that the unique nature of the military justice system dictates that the Court of Military Appeals should remain the principle interpreter of the UCMJ and at least at the outset, restricting direct access to the Supreme Court to cases the Court of Military Appeals has agreed to hear is necessary as a practical matter.

The Committee is confident that the judges of the Court of Military Appeals will, in ruling on petitions for review, take into account the fact that denial of such a petition would preclude not only full review in that Court but also, under this bill, direct review in the Supreme Court. The Committee believes that the question of what cases are heard by the Court of Military Appeals is a matter of internal management, properly left to that Court's decision in accordance with guidelines expressed in that Court's rules. However, the Committee would hope that the Court of Military Appeals would examine its current rules and procedures, such as the number of votes required to grant a petition for review, and other procedures, such as summary dispositions, in light of the "key" to access to the Supreme Court that it would hold if this bill were enacted.

Section 10(a) amends chapter 81 of title 28, United States Code, by adding a new provision, § 1259, to authorize discretionary review by the Supreme Court through writs of certiorari in the following cases: cases reviewed by the Court of Military Appeals under its mandatory review jurisdiction in which the sentence, as affirmed by a Court of Military Review, extends to death (Article 67(b)(1)); cases certified to the Court of Military Appeals by the Judge Advocates General (Art. 67(b)(2)); cases in which the Court of Military Appeals granted review under Article 67(b)(3); other cases in which that Court granted relief. Under the proposed Article 67(h)(1), sec-

tion 10(c)(2) *infra,* direct review by the Supreme Court under section 1259 will not extend to any action of the Court of Military Appeals in refusing to grant a petition for review. As with other proceedings reviewed by the Supreme Court, the judgment of the Supreme Court in any case reviewed under this provision is final. The availability of subsequent action as a matter of clemency or command discretion and the existence of collateral proceedings does not affect the finality of the judgment or the authority of the Court to enforce its mandate. For example, the responsibilities of the President, the Secretary concerned, or subordinate officials under Article 71, 74, or 75 do not affect the finality of the Supreme Court's judgment as to the legality of the proceedings.

Section 10(b) concerns the time limits governing applications for Supreme Court review. Under 28 U.S.C. § 2101, the time limits are established by statute for certain classes of cases and by the Supreme Court in other classes of cases (*e.g.,* appeals from state courts in criminal cases). In the Committee's view, the court-martial system can be most closely compared to those types of cases where the Supreme Court is permitted to establish by rules the time for application. Accordingly, the language in § 2101(d) has been followed.

Section 10(c)(1) amends Article 66(e) of the UCMJ to make it clear that decisions of the Courts of Military Review are not final until subsequent action, if any, is completed by the Court of Military Appeals and the Supreme Court.

Section 10(c)(2) amends Article 67 of the UCMJ, as follows:

Article 67(h)(1) contains a reference to the authority for review of the decisions of the Court of Military Appeals by the Supreme Court. This Article also provides expressly that the Supreme Court may not review any action of the Court of Military Appeals in refusing to grant a petition for review. This section does not affect existing law governing collateral review in the Article III courts of cases in which the Court of Military Appeals has granted review. The Committee intends that the availability of collateral review of such cases be governed by whatever standards might be applicable to the availability of collateral review of civilian criminal convictions subject to direct Supreme Court review.

Article 67(h)(2) permits the accused to petition the Supreme Court for review without prepayment of fees and costs. This is consistent with the underlying policy of the UCMJ in providing servicemembers with counsel and the right of appeal without special fees.

Section 10(c)(3) amends Article 70 of the UCMJ which presently authorizes judge advocates to represent the government and the accused in appellate proceedings. The amendment authorizes military appellate counsel to represent the government and the accused in Supreme Court proceedings. The authority to represent the government is modified by the requirement that military counsel must be requested by the Attorney General. This is in accord with 28 U.S.C. § 519, which requires the Attorney General to supervise all litigation except where otherwise authorized by law, and 28 U.S.C. § 518, which provides that the Attorney General and the Solicitor General shall conduct, argue, or direct all suits and appeals in the Supreme Court.

Section 11 amends sections 1552 and 1553 of title 10 with respect to review of courts-martial by the Discharge Review Boards (DRBs) and the Boards for the Correction of Military/Naval Records (BCMRs). The proposed legislation makes it clear that the appellate procedures under the UCMJ provide the sole forum under title 10, United States Code, for a legal review of the legality of courts-martial.

When Congress established the UCMJ in 1950, it provided a comprehensive system for judicial review of court-martial proceedings. Cases in which the approved sentence involves a punitive discharge, death penalty, or substantial confinement are subject to review under Article 66 by a Court of Military Review, a tribunal in each Service comprised of senior judge advocates. Such cases are subject to further review under Article 67 by the United States Court of Military Appeals, an independent tribunal composed of three civilian judges. Other general courts-martial are subject to review in the office of the Judge Advocate General under Article 69(a). Cases involving lesser sentences or which are not appealed are reviewed automatically by a judge advocate, Article 65 and Article 64, as proposed, and are subject to further review in the Office of the Judge Advocate General under Article 69(b). In addition, the President and the Secretaries of the military departments may take action on a case under the President's constitutional authority and Articles 71, 74, and 75.

Several other provisions of title 10 of the United States Code have led to some duplication in the procedures for review of courts-martial. The BCMRs are empowered to modify "any military record . . . to correct an error or remove an injustice" (10 U.S.C. §1552). The DRBs may change any discharge or dismissal, other than a separation by order of a general court-martial (10 U.S.C. §1553). Under these provisions, the BCMRs have acted on a variety of court-martial cases, and the DRBs have acted on punitive discharges resulting from special courts-martial.

The BCMRs and DRBs were established at the close of World War II, prior to enactment of the UCMJ, to relieve Congress of the burden of correcting military records through the passage of private bills. According to testimony from the Department of Defense, the members of these boards generally are laymen who have no judicial training. The primary work of the boards involves review of administrative records. The Department of Defense testified that the boards have extremely large caseloads, with neither the time nor the expertise for the judicial review of courts-martial. Because the UCMJ provides a comprehensive system for appellate review and post-conviction relief, these boards need not be involved in the issues of law concerning the court-martial process.

The proposed legislation would make it clear that with respect to cases tried after May 4, 1950, the BCMRs and DRBs have no authority to modify, as a matter of law, findings or sentences of courts-martial. This will have the effect of channelling all appellate proceedings and claims for post-conviction relief into the judicial forums established for such actions by Congress in the UCMJ.

To the extent that other military records, such as personnel files, are based on the results of trial by court-martial, existing procedures would be available to insure that records are corrected to re-

flect any change in the court-martial record that results from review under the UCMJ. The BCMRs would still retain their authority to correct such collateral records to reflect final action under the UCMJ. In addition, the DRBs and BCMRs would retain the authority to act on court-martial sentences as a matter of clemency after exhaustion of remedies under the UCMJ.

Section 12 contains effective date provisions for the amendments made by this Act and a conforming amendment to the effective date provisions of the Military Justice Amendments of 1981. Section 2 (definition of "judge advocate") is effective on the first day of the eighth month after enactment. It is a technical amendment and applies to all cases whenever initiated. Section 3 (matters relating to the military judge, counsel, and members of the court-martial) is effective on the first day of the eighth month after enactment. It does not affect the designation or detail of a military judge or counsel in accordance with the law as it existed prior to that date. Section 4 (pretrial advice and referral of charges) applies only to actions taken after the first day of the eighth month after enactment. It does not affect the referral of charges in accordance with the law as it existed prior to that date. The amendments made by sections 5 through 7 (right to appeal, record of trial, and review of courts-martial) apply to all cases tried on or after the first day of the eighth month after enactment except for those cases in which the findings and sentence are adjudged prior to that date. Cases in which the findings and sentence are adjudged before that date will have the record prepared and case reviewed under the law as it existed before that date. Section 8 (controlled substances) applies only to offenses committed on or after the first day of the eighth month after enactment. Offenses committed before that date will be prosecuted under that law as it existed prior to that date (*e.g.,* under Article 134 in accordance with Executive Order 12383). The President will issue an Executive Order governing the effective date of changes to the Manual for Courts-Martial (Table of Maximum Punishments) in accordance with Article 56. Section 9 (composition of the Code Committee) is effective on the date of enactment.

Section 10 (Supreme Court review) permits the Supreme Court to review directly decisions of the Court of Military Appeals. The Court may initiate such direct review at any time on or after the first day of the eighth month after enactment. The legislation contemplates review of decisions from the Court of Military Appeals that are issued prior to that date; but the precise details will depend on rules issued by the Supreme Court governing submission of petitions for review. Section 11 (correction boards and discharge review boards) is effective on the date of enactment with respect to cases filed after that date. This section does not affect the right of an applicant to receive changes in a military record as a matter of clemency so long as such change does not alter the underlying judgment of the court-martial. The Committee intends that nothing in Section 11 shall be construed to render invalid any rule or decision made by such Boards under provisions of law that existed on the date of enactment.

COMMITTEE ACTION

On March 21, 1983, the Subcommittee on Manpower and Personnel reported the bill favorably to the full Armed Services Committee. On March 22, 1983, the full Armed Services Committee (a quorum being present), ordered this bill reported favorably by a vote of 16 to 0.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Section 403 of the Congressional Budget and Impoundment Control Act of 1974 requires that a budget estimate and comparison be included in each report accompanying a bill or resolution reported by a committee of the Senate. That estimate follows.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., March 23, 1983.

Hon. JOHN TOWER,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed the Military Justice Act of 1983, as ordered reported by the Senate Committee on Armed Services, on March 22, 1983.

The bill amends the Uniform Code of Military Justice to improve the quality and efficiency of the military justice system, to revise the laws concerning review of courts-maritial, and for other purposes.

Only two provisions in this bill would incur an additional cost to the government. One of these is the establishment of a commission to study and make recommendations to the Senate and House Armed Services Committees concerning, the sentencing authority in court-martial cases, tenure for military judges, and other such related items. The commission will have nine months to complete this study. In addition, the bill would expand the membership of the Code Committee that annually reviews the Military Justice Act, to include two members of the public, to be appointed by the Secretary of Defense.

Based on information provided by the Department of Defense, CBO estimates that these two provisions would cost approximately $100,000 in fiscal year 1984. The majority of these funds would be for the expenses of the commission. Beyond 1984, there would be no significant costs to the government.

Enactment of the bill would not affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

JAMES BLUM
(For Alice M. Rivlin, Director.)

Regulatory Impact

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that a report of the regulatory impact of a bill be included in the report on such bill. The Committee finds that in the case of this bill there is no regulatory impact.

Changes in Existing Law Made by the Bill, as Reported

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted, is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 10, UNITED STATES CODE—ARMED SERVICES

* * * * * * *

Subtitle A—General Military Law

* * * * * * *

PART II—PERSONNEL

* * * * * * *

CHAPTER 47—UNIFORM CODE OF MILITARY JUSTICE

Subchapter I—General Provisions

* * * * * * *

§ 801. Article 1. Definitions

In this chapter:

* * * * * * *

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

"Judge advocate" means—

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

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

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

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

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

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

* * * * * * *

§ 806. Art 6. Judge advocates and legal officers

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

* * * * * * *

Subchapter III—Non-Judicial Punishment

* * * * * * *

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

(a) * * *

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

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

(2) correctional custody for more than seven days;

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

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

(5) extra duties for more than 14 days;

(6) restriction for more than 14 days; or

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

the authority who is to act on the appeal shall refer the case to a judge advocate [of the Army, Navy, Air Force, or Marine Corps, or

a law specialist or lawyer of the Coast Guard or] *or a lawyer of the* Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

* * * * * * *

Subchapter IV—Court-Martial Jurisdiction

* * * * * * *

§ 816. Art 16. Courts-martial classified

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

(1) general courts-martial, consisting of—

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

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

(2) special courts-martial, consisting of—

(A) not less than three members; or

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

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

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

* * * * * * *

SUBCHAPTER V—COMPOSITION OF COURTS-MARTIAL

* * * * * * *

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

* * * * * * *

(e) Before the court assembles for the trial of a case, the convening authority may excuse individual court members from participating in the case. The convening authority may under regulations prescribed by the Secretary concerned, delegate his authority under this subsection to the staff judge advocate, legal officer, or other principal assistant to the convening authority.

* * * * * * *

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

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

preside over each open session of the court-martial to which he has been detailed.

* * * * * * *

(c) [The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail by the convening authority, and, unless] *The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force in which the military judge is a member for detail in accordance with the regulations prescribed under subsection (a). Unless* the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

* * * * * * *

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

(a) [For each general and special court-martial the authority convening the court shall detail trial counsel and defense counsel, and such assistants as he considers appropriate.] *Under regulations of the Secretary concerned, trial counsel and defense counsel shall be detailed for each general and special court-martial. Such regulations shall also provide that assistant trial counsel and assistant and associate defense counsel may also be detailed to such courts-martial.* No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant *or associate* defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

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

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

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

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

(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

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

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

* * * * * * *

§ 829. Art. 29. Absent and additional members

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

* * * * * * *

Subchapter VI—Pre-Trial Procedure

* * * * * * *

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

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

(1) the specification alleges an offense under this chapter,

(2) the specification is warranted by the evidence indicated in the report of investigaton, if any, and

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

(b) The advice of the staff judge advocate required under subsection (a) shall include a written and signed statement by the staff judge advocate expressing the conclusions of the staff judge advocate with respect to each matter set forth in subsection (a) and the action the staff judge advocate recommends that the convening authority take regarding the specification. If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

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

* * * * * * *

Subchapter VII—Trial Procedure

* * * * * * *

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

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

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. [However, a convening authority, in his sole discretion—

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

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.] *The individual empowered to detail counsel under section 827 of this title (article 27), in his sole discretion, may detail additional military counsel as assistant defense counsel and, if the accused is represented by*

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

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

(c) [In every court-martial proceeding, the defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he considers appropriate.] *In any court-martial proceeding resulting in a conviction, the defense counsel may forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate), may assist the accused in the submission of matters under section 860 of this title (article 60), and shall, subject to regulations of the President, perform other acts authorized by this chapter.*

* * * * * * *

§ 842. Art. 42. Oaths

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

(b) Each witness before a court-martial shall be examined on oath.

* * * * * * *

§ 849. Art. 49. Depositions

* * * * * * *

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

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

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

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

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

(f) Subject to subsection (d), a deposition may be read in evidence *or, in the case of audiotape, videotape, or similar material, may be played* in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

* * * * * * *

§ 854. Art. 54. Record of trial

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

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

(c)(1) A complete record of the proceedings and testimony shall be prepared in all general court-martial cases in which the sentence adjudged includes death, a dismissal, a discharge, or, if the sentence adjudged does not include a discharge, any other punishment

which exceeds that which can otherwise be adjudged by a special court-martial and in all special court-martial cases in which the sentence adjudged includes a bad-conduct discharge.

(2) In all other cases, the record shall contain such matter as the President may prescribe.

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

* * * * * * *

Subchapter VIII—Sentences

* * * * * * *

§ 857. Art. 57. Effective date of sentences

(a) [Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended or deferred, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.] *No forfeiture may extend to any pay or allowances accrued before the date on which the sentence is approved by the person acting under section 860(c) of this title (article 60(c)).*

* * * * * * *

[Subchapter IX—Review of Courts-Martial]

Subchapter IX.—Post-Trial Procedure and Review of Courts-Martial

* * * * * * *

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

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

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

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

(b) Within 30 days after the sentence of a court-martial is announced, the accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. If the accused shows that additional time is required to enable the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the period for not more than 30 additional days.

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

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

(3) Action on the findings of a court-martial is not required. However, the convening authority or other person taking action on the sentence may, in such person's sole discretion—

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

(B) change to an appropriate lesser included offense a finding of guilty to a charge or specification.

(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to this staff judge advocate or legal officer and the staff

judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe and shall be served on the accused, who shall have five days from the date of receipt in which to submit any matter in response. The convening authority or other person taking action under this section, for good cause, may extend that period for up to an additional 20 days. Failure to object in the response to the recommendation or to any matters attached thereto waives the right to object thereto.

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

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

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

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

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

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

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

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

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

(a) In each case subject to review under sections 866 (article 66) or 869 (a) (article 69 (a)) of this title, except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right to appellate review. An ex-

press waiver of the right to appellate review shall be signed by the accused and defense counsel. The statement shall be filed within ten days after the action under section 860(c) of this title (article 60(c)) is served on the accused or his counsel. The convening authority, for good cause, may extend that period for not more than 30 additional days.

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

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

[§ 862. Art. 62. Reconsideration and revision

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

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

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

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

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

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

(a) In any trial by court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal any order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding, except that no such appeal shall lie from an order or ruling that is or amounts to, a finding of not guilty. The trial counsel shall provide the military judge with written notice of appeal from an order or ruling authorized to be appealed under this section within seventy-two hours of such order or ruling. Such notice shall include a certification that the appeal is not taken for the purpose of delay and, when applicable, that the evidence is substantial proof of a fact material in the proceeding. If the United States takes an appeal under this section, appellate counsel shall diligently prosecute the appeal.

(b) An appeal under this section shall be forwarded by an appropriate means directly to the Court of Military Review and shall, whenever practicable, have priority over all other proceedings before

that court. In determining an appeal under this section, such Court of Military Review may take action only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

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

§ 863. Art. 63. Rehearings

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

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

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

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

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

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

(1) Conclusions as to whether—

(A) the court had jurisdiction over the accused and the offense,

(B) the charge and specification stated an offense, and

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

(2) A response to each written allegation of error made by the accused.

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

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

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

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

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

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

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

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

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

(D) dismiss the charges.

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

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

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

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

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

officer exercising general court-martial jurisdiction includes a bad-conduct discharge, whether or not suspended, the record shall be sent to the appropriate Judge Advocate General to be reviewed by a Court of Military Review.

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

§ 865. Art. 65. Disposition of records

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

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

§ 866. Art. 66. Review by Court of Military Review

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

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

(1) in which the sentence as approved, extends to death; or

(2) in which—

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

(B) the right to appellate review has not been waived or an appeal withdrawn under section 861 of this title (article 61).

* * * * * * *

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, [or the Court of Military Appeals] *the Court of Military Appeals, or the Supreme Court* instruct the convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

* * * * * * *

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

* * * * * * *

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

(1) all cases in which the sentence, as affirmed by a Court of Military Review, [affects a general or flag officer or] extends to death;

(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

* * * * * * *

(g) [The Court of Military Appeals and the Judge Advocates General] *A committee consisting of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel, United States Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense* shall meet *at least* annually 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. *Each public member of the committee shall be a recognized authority in military justice or criminal law and shall be appointed for a term of three years. The Federal Advisory Committee Act (5 U.S.C. App. I) shall not apply to the committee established under this subsection.*

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

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

* * * * * * *

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

[Every record of trial by general court-martial, in which there has been a finding of guilty and a sentence, the 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). Notwithstanding section 876 of this title (article 76), the findings or sentence, or both, in a court-martial case which has been finally reviewed, but has not been reviewed by a Court of Military Review may be vacated or modified, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, or error prejudicial to the substantial rights of the accused. When such a case is considered upon application of the accused, the application must be filed in the Office of the Judge Advocate General by the accused before—

[(1) October 1, 1983; or

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

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

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

(b) The findings or sentence or both in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the ac-

cused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-yeur period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

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

§ 870. Art. 70. Appellate counsel

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

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

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

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

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

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

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

(1) when requested by the accused;

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

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

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

* * * * * * *

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

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

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

(b) [No sentence extending to the 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 any case in which the sentence provides for the dismissal of a commissioned officer, cadet, or midshipman, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary, or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.* In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c) [No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a Court of Military Review and, in cases reviewed by it, the Court of Military Appeals.] *(1) If appellate review is not waived or withdrawn under section 861 of this title (article 61), that part of a sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment under this chapter as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review and—*

(A) the accused does not file a timely petition for review by the Court of Military Appeals and the case is not otherwise under review by that Court;

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

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

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

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

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

(2) If appellate review is waived or withdrawn under section 861 of this title (article 61), that part of a sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review and action thereon is completed under section 864 of this title (article 64). Any other part of a court-martial sentence may be ordered executed by the convening authority when approved by him.

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

* * * * * * *

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

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

* * * * * * *

Subchapter X—Punitive Articles

* * * * * * *

§ 912a. Art. 112a. Controlled substances

Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports, exports, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, marijuana, or any compound or derivative thereof or any other drug or substance that is listed in Schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), or in any schedule of controlled substances issued by the President, shall be punished as a court-martial may direct.

* * * * * * *

Subchapter XI—Miscellaneous Provisions

* * * * * * *

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

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

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

[(2) All law specialists.]

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

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

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

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

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

(b) The following persons on active duty may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

(2) The president and the counsel for the court of any court of inquiry.

(3) All officers designated to take a deposition.

(4) All persons detailed to conduct an investigation.

(5) All recruiting officers.

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

(c) No fee may be paid to or received by any person for the performance of any notarial act herein authorized.

(d) The signature without seal of any such person acting as notary, together with the title of his office, is prima facie evidence of his authority.

* * * * * * *

CHAPTER 79—CORRECTION OF MILITARY RECORDS

* * * * * * *

§ 1552. Correction of military records: claims incident thereto

(a) * * *

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried after May 4, 1950 of this title, the action under subsection (a) may extend only to—

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title; or

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

§ 1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal. *With respect to a discharge or dismissal adjudged by a court-martial case tried after May 4, 1950 the action under this subsection may extend only to a change in the discharge or dismissal for purposes of clemency.*

(b) A board established under this section may, subject to review, by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

* * * * * * *

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * * * *

PART IV—JURISDICTION AND VENUE

CHAPTER 81—SUPREME COURT

* * * * * * *

§ 1259. Court of Military Appeals; certiorari

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

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

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

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

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

PART V—PROCEDURE

* * * * * * *

CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

* * * * * * *

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

* * * * * * *

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

MILITARY JUSTICE AMENDMENTS OF 1981

Public Law 97-81 (95 Stat. 1085)

* * * * * * *

EFFECTIVE DATES

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

(b)(1) [The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after the effective date of such amendments under section 864 or 865 (article 64 or 65) of title 10, United States Code, by the officer exercising general court-martial jurisdiction.] *The amendments made by section 2 shall apply to each member whose sentence by court-martial is approved on or after January 20, 1982—*

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

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

* * * * * * *

O