

ANNUAL REPORT
of the
U.S. COURT OF MILITARY APPEALS



and the
JUDGE ADVOCATES GENERAL
of the
ARMED FORCES
and the
GENERAL COUNSEL
of the
DEPARTMENT OF TRANSPORTATION

**PURSUANT TO THE
UNIFORM CODE OF MILITARY JUSTICE**

**For the Period
January 1, 1968 to December 31, 1968**

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ANNUAL REPORT
SUBMITTED TO THE
COMMITTEES ON ARMED SERVICES
of the
SENATE AND OF THE
HOUSE OF REPRESENTATIVES
and to the
SECRETARY OF DEFENSE
AND SECRETARY OF TRANSPORTATION
and the
SECRETARIES OF THE DEPARTMENTS OF THE
ARMY, NAVY, AND AIR FORCE

PURSUANT TO THE
UNIFORM CODE OF MILITARY JUSTICE

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of the
U.S. COURT OF MILITARY APPEALS
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GENERAL COUNSEL OF THE
DEPARTMENT OF TRANSPORTATION

January 1, 1968, to December 31, 1968

The following is the 17th annual report of the committee created by article 67(g) of the Uniform Code of Military Justice, 10 U.S.C. 867(g). That article requires the judges of the U.S. Court of Military Appeals, the Judge Advocates General of the Armed Forces, and the General Counsel of the Department of Transportation to meet annually to survey the operations of the code and to prepare a report to the Committee on Armed Services of the Senate and of the House of Representatives, to the Secretary of Defense and the Secretary of Transportation, and to the Secretaries of the Departments of the Army, Navy, and Air Force with regard to the status of military justice and to the manner and means by which it can be improved by legislative enactment.

The chief judge and the judges of the U.S. Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, and the General Counsel of the Department of Transportation, hereinafter referred to as the Code Committee, have met and conferred at the call of the chief judge several times during the period of this report. These conferences included a full consideration of legislative amendments to the Uniform Code of Military Justice consistent with the policy and purpose of this committee.

On January 10, 1967, Representative Charles E. Bennett introduced H.R. 12705 which contained many provisions of one of his earlier bills, H.R. 226. Hearings were held on this bill before subcommittee

No. 1 of the House Armed Services Committee. The subcommittee voted to report the bill with certain amendments to the full committee. The full committee approved the bill, redesignated as H.R. 15971, on May 21, 1968, and the House passed the bill on June 3, 1968. On September 26, 1968, the bill was approved by the Senate Armed Services Committee with certain amendments proposed by Senator Sam Ervin of North Carolina. On October 3, 1968, the bill was passed as amended by the Senate, and the House passed this version on October 10. The bill became Public Law 90-632 on October 24 when it was signed by President Johnson.

Public Law 90-632 is an act designed to increase the participation of lawyer counsel and of military judges (formerly called law officers) in courts-martial, to make court-martial procedures more efficient and give added procedural safeguards to the accused. It embodies many provisions long advocated by the Code Committee. In addition to the savings in time and manpower afforded by the act, meaningful benefits and protections are provided the accused.

This legislation permits the procedure for trials by special and general courts-martial to conform more closely with the procedure used in the trial of criminal cases in the U.S. district courts and will enhance the prestige and effectiveness of the military judge, so that his judicial stature and authority in the courtroom will more closely approximate that of a civilian trial judge. This act allows the military judge to rule finally on certain procedural matters, such as motions for findings of not guilty, on which he now may be overruled by the court members who are untrained in the law. The act provides for pre-trial and post-trial sessions to be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions. The act provides for trial in special and general courts-martial by a military judge alone without court members if the accused requests and the request is approved by the military judge. These last two provisions are expected to save time of line officers who would otherwise be required to be in attendance at courts-martial.

The act contains the following provisions designed to increase the fairness of the military justice system. The accused must be afforded the opportunity to be defended by legally qualified counsel at special courts-martial unless the commander certifies one cannot be obtained. Mere inconvenience is not a basis for certifying the nonavailability of legal counsel. Before a bad-conduct discharge may be adjudged at special court-martial, the accused must be represented by qualified counsel and the proceedings must be presided over by a military judge

except when physical conditions or military exigencies prevent a judge from being obtained. The act extends the time within which the accused can petition for a new trial to 2 years, and extends this right to all court-martial cases. Additionally, the Judge Advocate General is given power to review all cases not reviewed by a Court of Military Review. The act changes the name of Boards of Review to Courts of Military Review. The act requires that the judges of these courts and the military judges of general courts-martial be part of an independent judiciary, responsible only to the Judge Advocate General. In addition, the act authorizes the convening authority to defer service of a sentence to confinement pending appeal. This provision is analogous to release on personal recognizance in the civilian courts pending appeal.

Finally, the act permits an accused faced with trial by summary court-martial to object to such trial, at which time the convening authority may refer charges to special or general court-martial or dismiss them.

The passage of the Military Justice Act of 1968 completes the passage of legislation affecting military justice and the U.S. Court of Military Appeals which has been advocated by the Code Committee. Two bills concerning administrative discharges were before Congress when it adjourned and are expected to be reintroduced during the next session: Title I of S. 2009, 90th Congress, 1st session, introduced by Senator Sam J. Ervin, Jr., of North Carolina, and H.R. 19697, 90th Congress, 2d session, introduced by Representative Charles Bennett of Florida. The Code Committee has not expressed its views on either bill, but has the bills under consideration because of their effect on the U.S. Court of Military Appeals.

Senator Ervin's bill would permit the U.S. Court of Military Appeals to review administrative discharges given under other than honorable conditions. This would place an extensive burden on the court as now constituted since 10,801 undesirable discharges were given in fiscal year 1968 by the three services. The bill would also require a substantial increase in military lawyers in the services. Representative Bennett's bill would establish new minimum standards for administrative discharges. Minimum standards are now provided by departmental regulation.

The sectional reports of the court and of the individual services outline the volume of court-martial cases subject to appellate review during the reporting period. Exhibit A is attached to recapitulate the number of court-martial cases of all types tried throughout the world,

the number of such cases which are reviewed by boards of review, and
the number ultimately reviewed by the U.S. Court of Military Appeals.

Respectfully submitted,

ROBERT E. QUINN,
Chief Judge.

HOMER FERGUSON,
Associate Judge.

WILLIAM H. DARDEN,
Associate Judge.

KENNETH J. HODSON,
The Judge Advocate General.
U.S. Army.

JOSEPH B. McDEVITT,
The Judge Advocate General.
U.S. Navy.

ROBERT W. MANSS,
The Judge Advocate General.
U.S. Air Force.

R. TENNEY JOHNSON,
General Counsel,
Department of Transportation.

EXHIBIT A
For the Period
July 1, 1967, to June 30, 1968

Court-Martial Cases

| | |
|-------------------|--------|
| Army ----- | 57,685 |
| Navy ----- | 28,962 |
| Air Force ----- | 3,002 |
| Coast Guard ----- | 307 |
| | |
| Total ----- | 89,956 |

Cases Reviewed by Boards of Review

| | |
|-------------------|-------|
| Army ----- | 2,017 |
| Navy ----- | 3,576 |
| Air Force ----- | 360 |
| Coast Guard ----- | 4 |
| | |
| Total ----- | 5,957 |

Cases Docketed with U.S. Court of Military Appeals

| | |
|-------------------|-----|
| Army ----- | 474 |
| Navy ----- | 361 |
| Air Force ----- | 115 |
| Coast Guard ----- | 1 |
| | |
| Total ----- | 951 |

REPORT OF THE U.S. COURT OF MILITARY APPEALS

January 1, 1968, to December 31, 1968

In compliance with the provisions of the Uniform Code of Military Justice, Article 67(*g*), 10 U.S.C. 867(*g*), the chief judge and associate judges of the U.S. Court of Military Appeals herewith submit their report on military justice matters to the Committees on Armed Services of the U.S. Senate and House of Representatives, the Secretary of Defense, the Secretary of Transportation, and the Secretaries of the Departments of the Army, Navy, and Air Force.

I

It is with sadness that we at the outset of this report note the sudden and unexpected passing of Judge Paul J. Kilday at the age of 68 on the morning of October 12, 1968. Judge Kilday had been active until 2 days before his death. President Kennedy nominated him as a judge of the Court on June 28, 1961, for the term expiring May 1, 1976. He was unanimously confirmed by the U.S. Senate on July 17, 1961, and took the oath of office on September 25, 1961, having the previous day resigned from the House of Representatives in which he had served continuously with distinction since January 3, 1939. During his congressional service as a member of the Committee on Military Affairs and later the Committee on Armed Services, he received many citations of honor for his timeless efforts for increased effectiveness of our Armed Forces and for the personal welfare of its members. Among the many fine tributes paid to him on the floor of the House of Representatives on the news of his death was that of the House Speaker John W. McCormack, who said "as a member of Congress and in his judicial capacity, he served his country well." President Johnson attended the graveside services at Arlington National Cemetery and later called Judge Kilday "one of the ablest and most courageous men I've ever known."

In the brief span of his judicial career, he was recognized as a learned jurist. He will be missed by his colleagues and members of the staff; he will long be remembered for his substantial contributions to our Armed Services, both as a Member of Congress, and as a judge on the highest tribunal in the military justice system.

II

President Johnson, on November 5, 1968, announced the recess appointment of William H. Darden, of Georgia, to succeed Judge Kil-day for the unexpired portion of his term which runs until May 1, 1976. Mr. Darden, 45, was serving as chief of staff of the Senate Committee on Armed Services. He had been on the staff since 1951. He was born May 16, 1923, in Union Point, Ga., and attended the University of Georgia, where he was elected to the honorary scholastic fraternity Phi Eta Sigma and received the B.B.A. and LL.B. degrees. He served in the Pacific during World War II as a lieutenant in the U.S. Navy.

Under the laws governing recess appointments, a nomination for Mr. Darden will be submitted to the Senate within the first 40 days of the 91st Congress. In the meantime, Mr. Darden took his oath of office on November 13, 1968, and assumed his new judicial duties.

III

During fiscal year 1968, there were docketed 951 cases, an increase of 157 cases over fiscal year 1967. Certified cases forwarded to the Court by the Judge Advocates General of the Armed Services totaled 18 as compared with 30 in the previous fiscal year. For the seventh consecutive year, no mandatory appeal involving a death sentence or of a general or flag officer was filed. The court granted 121 petitions of the 933 docketed, or 12.9 percent, and released 162 written opinions; and, in 71.6 percent of these cases, the court reversed the decisions of the boards of review in whole or in part.

As noted in the last annual report, a new category designated "miscellaneous dockets" was inaugurated for cases wherein the petitions sought extraordinary relief outside of the regular appellate procedures provided for under article 67 (b) (1), (b) (2), and (b) (3) of the Uniform Code of Military Justice. Activity in this category continues to increase sharply with 22 additional cases filed in this newly numbered series.

IV

The completion of the court's 17th year of operation was marked by the release of volume 17 containing the official decisions and written opinions of the court released through June 28, 1968. As noted in our last report, the full text of these opinions continues to be placed on magnetic tape for computer processing and retrieval for integration in the LITE (*Legal Information Through Electronics*) system of the Department of Defense.

V

Membership in the bar of our court now totals 13,977 practitioners as of December 31, 1968, an increase of 667 new members. Honorary

membership certificates were issued during the calendar year to 26 foreign attorneys from the following countries: Argentina (1); Chile (1); Ethiopia (1); Jordan (1); Korea (2); Nigeria (1); Thailand (3); Turkey (13); and Vietnam (3), bringing our overall number of honorary members to 92.

VI

Chief Judge Robert E. Quinn, joined by Associate Judges Homer Ferguson and Paul J. Kilday, attended the annual dinner in their honor sponsored by the Military Law Committee of the District of Columbia Bar Association, held at the National Aviation Club, Washington Hotel, Washington, D.C., on January 24, 1968. The committee discussed and, based on a study, voiced its support of S. 2634, 90th Congress, a bill to amend section 867(a) of title 10, *infra*, passed by the U.S. Senate on November 28, 1967, and then pending in the House of Representatives. The legislative program of the American Bar Association in the 90th Congress recommended the enactment of S. 2634.

The judges were honored at a reception held by the Pentagon chapter of the Federal Bar Association at the Bolling Air Force Commissioned Officers' Club on the evening of May 21, 1968.

Associate Judge Homer Ferguson represented the court at the annual meeting of the Judge Advocates Association on August 5, 1968, held in conjunction with the annual meeting of the American Bar Association in Philadelphia, Pa. Judge Ferguson also participated in the roundtable discussions of the Military Law and Justice Committee of the American Bar Association.

Chief Judge Quinn, on April 23, 1968, summarized the jurisdiction and business of the Nation's highest military tribunal as guest speaker of the Young Lawyers' Section of the District of Columbia Bar Association luncheon series.

Chief Judge Quinn prepared a review of the book "Civilians Under Military Justice" by Frederick Bernays Wiener for the William and Mary Law Review, Marshall-Wythe School of Law, summer 1968 issue, volume 9, No. 4, pp. 1203-1207. The chief judge also authored for a legal periodical an article entitled "Some Comparisons Between Courts-Martial and Civilian Practice," which appeared in the University of California (UCLA) Law Review, volume 15, No. 4, June 1968. The "Army Digest," the official magazine of the Department of the Army, carried a lead article by the chief judge on the court written, as requested, in layman terms.

Chief Judge Quinn attended as a guest the judicial conference of the U.S. Court of Appeals for the First Circuit held in Newport, R.I., on May 15-16, 1968.

VII

Mr. Daniel F. Carney was appointed chief commissioner, to succeed the former incumbent of the position, Richard L. Tedrow, whose disability retirement was approved on June 20, 1968. Mr. Tedrow, the initial appointee to that position, had served continuously from the date of establishment of the court in 1951.

Chief Commissioner Carney addressed the U.S. Naval Reserve Law Company 3-3, the second largest reserve law company in the country serving the Greater New York metropolitan area at the Third Naval District Headquarters, 90 Church Street, New York, N.Y., on the evening of January 17, 1968. In addition, Chief Commissioner Carney addressed the 48th basic class at the Judge Advocate General's School, Charlottesville, Va., on June 4, 1968, and the 49th Basic Class on December 4, 1968. He also spoke on the court and the code at a luncheon meeting of the Tidewater Area Legal Officers' Association at Langley Air Force Base, Va., on July 12, 1968, and participated in a roundtable discussion at the second annual Navy and Marine Corps Staff Judge Advocates conference on October 17, 1968, in Washington, D.C.

Commissioner Benjamin Feld participated in the planning conference on the subject "Human Rights of the Man in Uniform" held at George Washington University in June 1968 under the aegis of the American Veterans' Committee. He also addressed the law officer mobilization designee seminar at the Judge Advocate General's School, Charlottesville, Va., on August 7, 1968.

Commissioner Feld and Miss Dorothy Allport, the court librarian, represented the court at the 48th annual convention of the Federal Bar Association, held at the Shoreham Hotel, Washington, D.C., September 11-14, 1968, and attended the panel discussion "The Manual for Courts-Martial, 1968", sponsored by the Military Law and Justice Committee. Miss Allport also attended the annual meeting of the American Association of Law Libraries held in Philadelphia, Pa., June 30 to July 4, 1968.

VIII

The court was honored on February 12, 1968, by the visit of Maj. Gen. Faruk Aldemir, the chief judge of the Turkish Military Court, and other Turkish dignitaries. Included in the group of 13 were the Honorable Hasan Dincer, Minister of Justice; the Honorable Mazhar Arikan, Member of Parliament of Turkey; Professor Ali Bozer, president of the Turkish-American Law Association; the Honorable Lutfi Erdemir, member of the High Board of Judges; the Honorable Senai Olgac, Judge of the Supreme Court of Appeals; the Honorable A. Fahri Yucel, president of the High Criminal Court of Ankara; Mr.

Fazil Alp, chief public prosecutor of Ankara; Mr. Oktay Cubukgil, president of Ankara Bar Association; Mr. Ekrem Isbir, law-speaker—State Council; and three attorneys, Mrs. Guler Berkin, Mr. Ali Karaca, and Mr. Mustapha Ovacik, the latter two serving as interpreters.

Other foreign visitors who made courtesy calls on the judges of the court were Lt. Ireneo Jorge Portela, associated with the Argentine Navy Bureau of Justice, on February 21, 1968; Mr. Steady Stephen Arthur-Worrey, legal adviser to the Ministry of Defense, Republic of Nigeria; Capt. de Frigata Sergio Rillon, Ministry of National Defense, Navy Sub-Secretariat, Republic of Chile; and the Honorable Huynh Duc Buu, former Minister of Justice of South Vietnam, presently serving as Judge of the Court of Appeals of South Vietnam, on September 6, 1968.

IX

S. 2634, a bill to amend 867 (a) of title 10, United States Code, in order to establish the Court of Military Appeals as the U.S. Court of Military Appeals under article I of the Constitution of the United States, and/or other purposes, passed the U.S. Senate on November 28, 1967. It was pending before the House Armed Services Committee for concurrence when the first session of the 90th Congress adjourned.

On May 8, 1968, Chief Judge Quinn, Judge Ferguson, and Judge Kilday appeared and testified at the hearings held by House Armed Services Subcommittee No. 1, to which S. 2634 had been referred for consideration. The statements of the chief judge and associate judges are as follows:

STATEMENT OF CHIEF JUDGE ROBERT E. QUINN

Mr. Chairman and members of the committee: Thank you for inviting us here to explain our position on Senate bill 2634. The really important provision contained in this bill is that it establishes the U.S. Court of Military Appeals as a judicial tribunal in every sense of the word. In the past there have been intimations at least that it really was only an administrative agency. This bill removes any doubt about its full stature as a U.S. court. It increases its standing and prestige in the judicial hierarchy and, by implication, gives it the full powers of a U.S. court.

The U.S. Court of Military Appeals was created 17 years ago and at that time faced a substantial backlog. When President Truman requested me to become the first chief judge of the new court, he said you are facing a large backlog of cases and almost a superhuman job. We had no courthouse; we had no staff; we had no rules; and we had no organization. This we had to build. We organized the court; we disposed of the backlog and I think perhaps we are the only Federal court in the land that can honestly say that we have no backlog. We have disposed of approximately 21,000 cases and we are current. This has been no easy job.

During one year we wrote 319 opinions and this work is an extremely large order for a three-judge court. It's important that we remain up to date in our petitions and decisions. We do not have cases involving millions or billions of dollars or the rights and interests of great corporations but we do deal in the

lives and liberties of the fighting men of America which, in our opinion, is much more important. This is the only court which comes within the purview of the Armed Services Committees of the House and Senate. This bill makes it a constitutional court under article I of the Constitution which gives the Congress the right and the power to regulate the Armed Forces of the United States.

In the regular Federal judicial system, any judge reaching the age of 70 who has served 15 years, has the right to retire upon full salary. The House of Representatives has twice passed a bill to provide life tenure for the judges of our court, which would give us the same rights of retirement. The Senate refused to concur because, apparently, some Members of the Senate feel that no judge should have life tenure. But the Armed Services Committee of the Senate agreed to the provisions of this bill and the bill was passed unanimously by the Senate of the United States. In the regular Federal system, after retirement, a judge becomes a senior judge and has the right, at the request of the chief judge of any circuit, to serve temporarily in the event of need. This bill provides that a retired judge shall become a senior judge and, at the request of the chief judge of the court, in the event of sickness or temporary disability of any sitting judge, may be called upon to serve in his place. This only with the consent of the retired judge.

There is a further provision for clerical assistance for the retired judge. This assistant would be a kind of combination law clerk, typist, filing clerk, index clerk, and general factotum. There is an increasing large volume of criminal law pouring out from the Supreme Court, the courts of appeals, and the supreme courts of the respective States. If a retired judge is to serve efficiently when called upon, he must be familiar with these decisions and I presume every judge keeps a kind of digest of opinions that are important to him and his court. This assistant would be of great value in doing these things. In the regular federal system, the retired judges are provided with a law clerk, a secretary, and a messenger, if they make themselves available for service. Such an assignment would, of course, always be subject to the approval of the chief judge.

My associates on the court are hardworking, distinguished, conscientious judges. It has always been a pleasure to work with them and every judge of our court and every member of our organization has discharged his obligations with honor and diligence, and I am quite proud of the record of the U.S. Court of Military Appeals.

I hope the committee sees fit to concur with the Senate in the passage of this bill.

STATEMENT OF JUDGE HOMER FERGUSON

Mr. Chairman and members of the committee, I share the views of my colleagues on this bill and I think it is essential to have access to senior judges. Take the question of the court being up to date: I think it is important that this court keep up to date on the cases and their work because the men in the services are not permitted to have bail. It is unusual for a court of appellate jurisdiction to be current, and I think we have been very fortunate to have been so. This bill could use retired judges to help in the work as it increases. Also, I think it is very important that Congress go on record making this a legislative court in words. I believe that they have always intended it to be so.

Therefore, for these reasons, and what my colleagues have said, I recommend the enactment of this legislation.

STATEMENT OF JUDGE PAUL J. KILDAY

Mr. Chairman, this bill as originally offered in the Senate contained mandatory language to the effect that any judge of the U.S. Court of Military Appeals

who is receiving retired pay: "shall become a senior judge, shall occupy offices in a Federal building, shall be provided with a staff assistant."

The Senate committee struck out this mandatory language and inserted authorizing or permissive language as follows: "may become a senior judge, may occupy offices in a Federal building, may be provided with a staff assistant whose compensation shall not exceed the rate prescribed for GS-9 under the general schedule under section 4332 of title 5. * * *"

This authorizing language must be administered. I submit this could be done by rule adopted by this court or it could be done by the chief judge under his responsibility for the administration of the court. I agree with Mr. Bennett that much of this could be clarified by a statement in the report of the committee. I do not believe that either the court in adopting a rule or the chief judge in administering the court would act irresponsibly in this regard.

This bill contains two provisions which are of overriding importance. The first appears on page 1 beginning at line 5 and reads: "There is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense."

In some quarters the status of this court has been called into question. There are some who contend that the court is an administrative agency in the Department of Defense and not a court in the true sense. This provision establishes the status of the court as a court in the true sense and under the Constitution. This is of the greatest importance. Those who contend that we are an administrative agency challenge our power to question the constitutionality of any provision of the Manual for Courts-Martial. The manual is an Executive Order of the President. Under article 36 of the Uniform Code of Military Justice, the President is given power to provide the procedure, including modes of proof, in cases tried by courts-martial. The modes of proof (rules of evidence) have been established by the President in the manual. We have questioned some manual provisions, notably a provision permitting answers to written interrogatories to be admitted into evidence against an accused. We have held this to be unconstitutional as violative of the constitutional right to be confronted by the witnesses and the right to cross-examination.

Clearly, as a court we have the right to pass on that constitutional question. It is contended, however, that as an administrative agency we have no power to challenge the action of the President. We have always proceeded as a court and this provision sustains that position.

Another very important provision appears on page 3 beginning at line 7, and provides that in the event a judge of this court is temporarily unable to perform his duties, "the President may designate a Judge of the United States Court of Appeals for the District of Columbia to fill the office for the period of disability."

The present provisions of the Uniform Code of Military Justice provides that in the case of such disability, "the President may designate a judge of the United States Court of Appeals to fill the office." During the hearings on the life tenure bill this provision was seriously questioned. The objection being that a judge of a court created under article III of the Constitution could not, or would not be required to, perform duties on a court created under article I of the Constitution. The life tenure bill contained language similar to this language in the present bill. The point is that it has been held that courts of the District of Columbia exist under both articles I and III of the Constitution. That is, the power of the Congress under article I to exercise exclusive legislation over the seat of Government and under article III establishing the judiciary.

Everything in this bill would have been accomplished by the life tenure bill,

either by direct provision thereof or by the necessary result of some provision thereof. This bill will be very helpful to the court and I hope it will be adopted.

The full House Armed Services Committee met on May 21, 1968 in executive session and unanimously reported favorably to the House S. 2634 without amendment. The accompanying House Report No. 1480 submitted by Congressman Philip J. Philbin, chairman of the subcommittee No. 1, sets forth the purpose, background and cost of the bill:

PURPOSE

The purpose of this proposal is to establish the Court of Military Appeals as the U.S. Court of Military Appeals under article I of the Constitution and to permit a retired judge to sit with the court if his services are needed.

BACKGROUND

In 1950 the Congress exercised its powers under the provision of the Constitution enabling it to "make rules for the Government and regulation of the land and naval forces" by enacting the Uniform Code of Military Justice. As part of that law, the Court of Military Appeals was established as a three-man court hearing only appeals from courts-martial. To date it has handled 21,000 cases, and it is current with its workload. Its workload has been materially increasing, and it is expected that the workload will increase even more, due in part to the situation in Southeast Asia. There is one statutory requirement on the court which also adds to its burden, namely the requirement that it act upon any petition for review within 30 days of the time the petition is received. With this statutory requirement, the court must stay up to date in its actions on the petitions. It cannot take its time in making this kind of ruling.

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

The second major purpose of this bill is to make retired judges of the court available to sit with the court if the chief judge should find that their services are needed. This would parallel the availability of retired judges of courts of appeals to sit with their courts. While retired judges of regular courts of appeals are provided with a law clerk, a secretary and a messenger, this bill would allow a retired judge to have only the services of a staff assistant who would not be paid more than a GS-9 (presently \$9,000). The retired judge would sit as may be agreed upon with the chief judge. The chief judge would also control the tenure and workload of the staff assistant, so as to be certain that his services are best utilized, while still being of assistance to the retired judge. At any time that the staff assistant was no longer performing a useful function to the court as a whole, then the chief judge would terminate his services.

While the House, upon the request of the Armed Services Committee has on three separate occasions, voted to have the judges of the Court of Military Appeals have life tenure, as do judges of regular courts of appeals, the Senate has so far

refused to agree. On the other hand, the Senate has already agreed to the present bill, thus assuring some kind of reserve for the court if it should need it.

There is a third purpose of the bill. Under the present law, judges of the regular courts of appeals may be appointed to help relieve the workload in case of sickness or disability of any judge of the court. There has been some question raised as to whether it is constitutional for judges of article III courts to sit on an article I court. In order to be sure that this question is not raisable, the bill would limit the judges available to assist in this way to the Court of Appeals for the District of Columbia, a court formed under both article I and article III of the Constitution. As a practical matter, however, the present judges of the Court of Appeals of the District of Columbia are so overburdened as not to be available to help anywhere else.

COST

The cost of implementing this bill will be the salary of the staff assistant which, presently, would not be more than \$9,000 a year as the present salary level of a GS-9.

The House of Representatives passed S. 2634, as reported, on June 3, 1968 and the President affixed his approval on June 15, 1968 as Public Law 90-340.

AN ACT

To amend section 867(a) of title 10, United States Code, in order to establish the Court of Military Appeals as the United States Court of Military Appeals under article I of the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 867(a) (article 67(a)) of title 10, United States Code, is amended to read as follows:

“(a) (1) There is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. The terms of office of all successors of the judges serving on the effective date of this Act shall expire fifteen years after the expiration of the terms for which their predecessors were appointed, but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of a State. Each judge is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Court of Appeals, and is eligible for reappointment. The President shall designate from time to time one of the judges to act as chief judge. The chief judge of the court shall have precedence and preside at any session which he attends. The other judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The court may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court.

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

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

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

Sec. 2. The United States Court of Military Appeals established under this Act is a continuation of the Court of Military Appeals as it existed prior to the effective date of this Act, and no loss of rights or powers, interruption of jurisdiction, or prejudice to matters pending in the Court of Military Appeals before the effective date of this Act shall result. A judge of the Court of Military Appeals so serving on the day before the effective date of this Act shall, for all purposes, be a judge of the United States Court of Military Appeals under this Act.

X

To provide additional space for the expanded District of Columbia court system as recommended by the President's Commission on Crime in the District of Columbia, the Administrator of General Services Administration proposed moving the U.S. Court of Military Appeals from its present building at Fifth and E Streets NW., to interim space on Lafayette Square pending the assignment of permanent quarters in a proposed new court building to house the U.S. Tax Court. This proposal was supported by the Attorney General.

Chief Judge Quinn met with the Attorney General on March 5, 1968, to discuss the problems which the proposed interim move would present to the U.S. Court of Military Appeals. As a result of this meeting, the proposed interim move of the court was canceled. Negotiations were then commenced shortly thereafter to consider permanent relocation of the court in the new Federal courthouse which will be erected at Second and E Streets NW., with a view of allocation and developing a design of the space to be assigned to the court as joint tenant with the U.S. Tax Court. It does not appear possible that this relocation could take place before 1974, at the earliest, at which time the new court building is expected to be ready for occupancy.

XI

Two cases now pending before the United States Supreme Court will have important effects on the finality of this court's judgments. The Supreme Court has granted certiorari in *Augenblick v. United*

States, 180 Ct. Claims 131, 377 F. 2d 586 (1967), and in *United States ex rel O'Callahan v. Parker*, 390 F. 2d 360 (C.A. 3d Cir.) (1968). Each involves major aspects of the administration of military justice.

In *Augenblick v. United States*, *supra*, the Court of Claims held that denial of review by this court and consequent affirmance of the accused's conviction did not prevent its grant of further review and relief in a suit for pay and allowances, notwithstanding the provision of article 76, Uniform Code of Military Justice (10 U.S.C. 876), that proceedings here "are final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States." Refusing to accord such credit to this court's denial of accused's petition for review, it invalidated his conviction. The Supreme Court's grant of certiorari will test the validity of this superimposition of an additional appellate process in military justice matters.

O'Callahan v. Parker, *supra*, involves the more serious question whether military courts have jurisdiction to try servicemen for civil-type offenses committed off post in time of peace. Such authority was granted to the services at large for the first time under the Uniform Code. Prior to the code's enactment, such offenses were usually tried in time of peace by civilian courts. *Cf. Lee v. Madigan*, 358 U.S. 223, 3 L. ed. 2d 260, 79 S. Ct. 276 (1959). O'Callahan was convicted by general court-martial of assault with intent to commit rape, attempted rape, and housebreaking. The offenses occurred in Honolulu, Hawaii, at a civilian hotel. The conviction was duly affirmed, and this court denied accused's petition for review on March 1, 1957. On October 17, 1966, the court likewise denied accused's petition for a writ of habeas corpus. On December 6, 1966, it ordered a petition for rehearing treated as a petition for writ of error coram nobis and set down for oral argument. After hearing argument and considering the briefs filed in the case, the court issued its opinion denying the writ. *United States v. O'Callahan*, 16 U.S.C.M.A. 568, 37 C.M.R. 188. Thereafter, accused sought relief in the Federal court system by writ of habeas corpus, the denial of which ultimately led to the present grant by the Supreme Court.

Should O'Callahan's contention prevail, it will effect a substantial reduction in military criminal jurisdiction for courts-martial would be restricted to trying military offenses, cases arising overseas, and those civil-type crimes committed on military installations within the United States. The court, in common with Judge Advocates General, is closely following developments in this area and stands ready to make appropriate recommendations, depending on the resultant decision.

XII

There is attached hereto a detailed analysis of the status of the cases which have been processed by the court since the commencement of its operations in 1951 (exhibit A).

Respectfully submitted,

ROBERT E. QUINN
Chief Judge.

HOMER FERGUSON,
Associate Judge.

WILLIAM H. DARDEN,
Associate Judge.

EXHIBIT A

Status of Cases
U.S. Court of Military Appeals

CASES DOCKETED

| Total by services | Total as of June 30, 1966 | July 1, 1966 to June 30, 1967 | July 1, 1967 to June 30, 1968 | Total as of June 30, 1968 |
|--------------------------------------|------------------------------|-------------------------------------|-------------------------------------|------------------------------|
| <i>Petitions (art. 67(b)(3)):</i> | | | | |
| Army..... | 10,498 | 354 | 468 | 11,320 |
| Navy..... | 4,442 | 288 | 354 | 5,084 |
| Air Force..... | 4,375 | 119 | 111 | 4,605 |
| Coast Guard..... | 49 | 3 | 0 | 52 |
| Total..... | 19,364 | 764 | 933 | 21,061 |
| <i>Certificates (art. 67(b)(2)):</i> | | | | |
| Army..... | 147 | 16 | 6 | 169 |
| Navy..... | 208 | 7 | 7 | 222 |
| Air Force..... | 77 | 6 | 4 | 87 |
| Coast Guard..... | 6 | 1 | 1 | 8 |
| Total..... | 438 | 30 | 18 | 486 |
| <i>Mandatory (art. 67(b)(1)):</i> | | | | |
| Army..... | 31 | 0 | 0 | 31 |
| Navy..... | 3 | 0 | 0 | 3 |
| Air Force..... | 3 | 0 | 0 | 3 |
| Coast Guard..... | 0 | 0 | 0 | 0 |
| Total..... | 37 | 0 | 0 | 37 |
| Total cases docketed..... | 19,839 | 794 | 951 | ² 21,584 |

¹ 2 Flag officer cases; 1 Army and 1 Navy.

² 21,211 cases actually assigned docket numbers. Overage due to multiple actions on the same cases.

COURT ACTION

| | Total as of June 30, 1966 | July 1, 1966 to June 30, 1967 | July 1, 1967 to June 30, 1968 | Total as of June 30, 1968 |
|---|------------------------------|-------------------------------------|-------------------------------------|------------------------------|
| Petitions (art. 67(b)(3)): | | | | |
| Granted..... | 2, 042 | 102 | 121 | 2, 265 |
| Denied..... | 16, 871 | 612 | 823 | 18, 306 |
| Denied by memorandum opinion..... | 2 | 0 | 3 | 5 |
| Dismissed..... | 15 | 3 | 1 | 19 |
| Withdrawn..... | 344 | 11 | 19 | 374 |
| Disposed of on motion to dismiss: | | | | |
| With opinion..... | 8 | 0 | 0 | 8 |
| Without opinion..... | 40 | 1 | 0 | 41 |
| Disposed of by order setting aside findings and sentence.. | 5 | 0 | 1 | 6 |
| Remanded to Board of Review..... | 168 | 0 | 9 | 177 |
| Court action due (30 days) ¹ .. | 42 | 80 | 30 | 30 |
| Awaiting replies ¹ | 18 | 16 | 24 | 24 |
| Certificates (art. 67(b)(2)): | | | | |
| Opinions rendered..... | 427 | 15 | 29 | 471 |
| Opinions pending ¹ | 2 | 15 | 0 | 0 |
| Withdrawn..... | 7 | 0 | 0 | 7 |
| Remanded..... | 2 | 0 | 2 | 4 |
| Disposed of by order..... | 1 | 0 | 0 | 1 |
| Set for hearing ¹ | 0 | 0 | 0 | 0 |
| Ready for hearing ¹ | 0 | 0 | 2 | 2 |
| Awaiting briefs ¹ | 0 | 2 | 2 | 2 |
| Mandatory (art. 67(b)(1)): | | | | |
| Opinions rendered..... | 37 | 0 | 0 | 37 |
| Opinions pending..... | 0 | 0 | 0 | 0 |
| Remanded..... | 1 | 0 | 0 | 1 |
| Awaiting briefs ¹ | 0 | 0 | 0 | 0 |
| Opinions rendered: | | | | |
| Petitions..... | 1, 768 | 97 | 119 | 1, 984 |
| Motions to dismiss..... | 11 | 0 | 0 | 11 |
| Motions to stay proceedings.. | 1 | 0 | 0 | 1 |
| Per curiam grants..... | 40 | 8 | 8 | 56 |
| Certificates..... | 375 | 14 | 26 | 415 |
| Certificates and petitions.... | 49 | 1 | 3 | 53 |
| Mandatory..... | 37 | 0 | 0 | 37 |
| Remanded..... | 2 | 0 | 0 | 2 |
| Petitions for a new trial..... | 2 | 0 | 0 | 2 |
| Petitions for reconsidera- tion of: | | | | |
| Denial order..... | 5 | 1 | 2 | 8 |
| Opinion..... | 1 | 0 | 0 | 1 |
| Petition for new trial..... | 1 | 0 | 0 | 1 |
| Motion to reopen..... | 1 | 0 | 0 | 1 |

See footnotes at end of table.

COURT ACTION—Continued

| | Total as of June 30, 1966 | July 1, 1966 to June 30, 1967 | July 1, 1967 to June 30, 1968 | Total as of June 30, 1968 |
|--|------------------------------|-------------------------------------|-------------------------------------|------------------------------|
| Opinions rendered—Continued | | | | |
| Petitions in the nature of | | | | |
| writ of error coram nobis_ _ _ | 1 | 1 | 0 | 2 |
| Miscellaneous dockets_ _ _ _ _ | 0 | 1 | 4 | 5 |
| Total_ _ _ _ _ | 2, 294 | 123 | 162 | ^a 2, 579 |
| Completed cases: | | | | |
| Petitions denied_ _ _ _ _ | 16, 871 | 612 | 823 | 18, 306 |
| Petitions dismissed_ _ _ _ _ | 15 | 3 | 1 | 19 |
| Petitions withdrawn_ _ _ _ _ | 344 | 11 | 19 | 374 |
| Certificates withdrawn_ _ _ _ _ | 7 | 0 | 0 | 7 |
| Certificates disposed of by order_ _ _ _ _ | 1 | 0 | 0 | 1 |
| Opinions rendered_ _ _ _ _ | 2, 286 | 123 | 162 | 2, 571 |
| Disposed of on motion to dismiss: | | | | |
| With opinion_ _ _ _ _ | 8 | 0 | 0 | 8 |
| Without opinion_ _ _ _ _ | 40 | 1 | 0 | 41 |
| Disposed of by order setting aside findings and sentence_ _ | 5 | 0 | 1 | 6 |
| Writ of error coram nobis by order_ _ _ _ _ | 2 | 0 | 1 | 3 |
| Motion for bail denied_ _ _ _ _ | 1 | 0 | 0 | 1 |
| Remanded to board of review_ | 169 | 0 | 11 | 180 |
| Total_ _ _ _ _ | 19, 749 | 750 | 1, 018 | 21, 517 |
| Miscellaneous dockets (January 1967 to present): | | | | |
| Pending ^a _ _ _ _ _ | | 5 | 3 | 3 |
| Granted_ _ _ _ _ | | 0 | 0 | 0 |
| Denied_ _ _ _ _ | | 2 | 14 | 16 |
| Withdrawn_ _ _ _ _ | | 0 | 0 | 0 |
| Dismissed_ _ _ _ _ | | 2 | 6 | 8 |
| Opinion rendered_ _ _ _ _ | | 1 | 4 | 5 |
| Total_ _ _ _ _ | | | | 32 |

See footnotes at end of table.

COURT ACTION—Continued

| | Pending completion as of— | | |
|--|---------------------------|---------------|---------------|
| | June 30, 1966 | June 30, 1967 | June 30, 1968 |
| Opinions pending----- | 17 | 32 | 1 |
| Set for hearing----- | 0 | 0 | 0 |
| Ready for hearing----- | 0 | 0 | 6 |
| Petitions granted—awaiting briefs----- | 7 | 4 | 5 |
| Petitions—court action due 30 days---- | 42 | 80 | 30 |
| Petitions—awaiting replies----- | 18 | 16 | 24 |
| Certificates—awaiting briefs----- | 0 | 2 | 2 |
| Mandatory—awaiting briefs----- | 0 | 0 | 0 |
| Total----- | 84 | 134 | 68 |

¹ As of June 30, 1966, 1967, and 1968.

² 2,579 cases were disposed of by 2,545 published opinions. 131 opinions were rendered in cases involving 72 Army officers, 32 Air Force officers, 18 Navy officers, 6 Marine Corps officers, 2 Coast Guard officers, and 1 West Point cadet. In addition 19 opinions were rendered in cases involving 20 civilians. The remainder concerned enlisted personnel.

³ As of June 30, 1967 and 1968.

**REPORT OF
THE JUDGE ADVOCATE GENERAL OF THE ARMY
January 1, 1968, to December 31, 1968**

COURT-MARTIAL ADMINISTRATION

The number of persons tried by courts-martial for fiscal year 1968 (average strength total Army, 1,510,064) follows:

| | Convicted | Acquitted | Total |
|-------------------|----------------|---------------|----------------|
| General..... | 2, 221 | 154 | 2, 375 |
| Special..... | 41, 834 | 1, 935 | 43, 769 |
| Summary..... | 10, 594 | 947 | 11, 541 |
| Total..... | 54, 649 | 3, 036 | 57, 685 |

Records of trial by general court-martial received by the Judge Advocate General during fiscal year 1968:

| | |
|---------------------------------------|---------------|
| For review under article 66..... | 1, 871 |
| For examination under article 69..... | 434 |
| Total | 2, 305 |

Workloads of the Army boards of review during the same period:

| | |
|---|---------------------|
| On hand at the beginning of period..... | 368 |
| Referred for review..... | ¹ 2, 095 |
| Total | 2, 463 |
| Reviewed | 2, 017 |
| Pending at close of period..... | 446 |
| Total | 2, 463 |

¹This figure includes 22 cases which were referred to boards of review pursuant to article 69, Uniform Code of Military Justice, and 50 cases on rehearing or reconsideration.

Actions taken during period July 1, 1967, through June 30, 1968, by boards of review:

| | |
|------------------------|-----|
| Affirmed | 998 |
| Sentence modified..... | 787 |
| Charges dismissed..... | 22 |

| | |
|--|--------------|
| Findings and sentence disapproved in part..... | 62 |
| Findings disapproved in part..... | 5 |
| Findings approved, sentence disapproved..... | 6 |
| Findings and sentence disapproved in part, rehearing ordered..... | 40 |
| Findings disapproved in part, rehearing ordered..... | 6 |
| Rehearing ordered as to sentence only..... | 8 |
| Sentence commuted..... | 3 |
| Transmitted to TJAG for remand and further proceedings in compliance with U.S.C.M.A. opinion (<i>U.S. v. DuBay et al.</i>)..... | 80 |
| Total | 2,017 |

Of the 2,017 accused whose cases were reviewed by boards of review pursuant to article 66 during the fiscal year, 1,480 (73.4 percent) requested representation by appellate defense counsel. The records in the case of 474 accused were forwarded to the U.S. Court of Military Appeals pursuant to the three subdivisions of article 67(b). These comprised 23.4 percent of the number of these cases reviewed by boards of review during the period. Of the mentioned 474 cases, 468 were forwarded on petition of accused and six were certified by the Judge Advocate General.

The actions taken by the Court of Military Appeals on Army cases for fiscal year 1968 were as follows:

| Opinions on petitions | | Certification | | Mandatory review | | Petitions denied | Petitions granted |
|-----------------------|----------|---------------|----------|------------------|----------|------------------|-------------------|
| Affirmed | Reversed | Affirmed | Reversed | Affirmed | Reversed | | |
| 14 | 44 | 5 | 13 | 0 | 0 | 423 | 54 |

In compliance with the mandate of article 6(a), Uniform Code of Military Justice, the Judge Advocate General and senior members of his staff inspected numerous judge advocate offices in the United States and overseas in the supervision of the administration of military justice.

UNITED STATES ARMY JUDICIARY ACTIVITIES

During the period July 29 through August 9, 1968, the U.S. Army Judiciary conducted a law officer seminar at the Judge Advocate General's School. Participating in the seminar were active duty officers from the Army, Navy, and Marine Corps, and reservists (mobilization designees from the Army). The latter group included two State supreme court justices, a judge of a lower court, a law professor and several practicing attorneys.

The Law Office Handbook, DA Pamphlet 27-9, was revised during 1968. The draft changes were published in the Judge Advocate Legal Service and were distributed to the law officers as completed. The complete handbook should be published and distributed soon after the "Manual for Courts-Martial, United States, 1969", becomes effective.

LEGISLATION AND MILITARY JUSTICE PROJECTS

My office participated in establishing favorable Department of the Army and Department of Defense positions on the Military Justice Act of 1968. The bill incorporates reforms and changes which I have long advocated to modernize and improve the administration of military justice.

During the past year my office participated in two revisions of the manual for courts-martial. The "Manual for Courts-Martial, United States, 1969", goes into effect on 1 January 1969. It was promulgated by Executive Order 11430, dated September 11, 1968. This manual for courts-martial which has been in preparation for a number of years reflects the law at the time the draft was completed (May 1967). The purpose of this revision was to conform the Manual for Courts-martial to the law as modified and interpreted by decisions of the U.S. Court of Military Appeals and the U.S. Supreme Court. An effort also was made wherever possible to improve or streamline procedures and to improve the guidance portions of the Manual. Army regulations implementing this Manual were also prepared.

Enactment of the Military Justice Act of 1968 requires another revision of the Manual for Courts-martial. Changes in the Uniform Code of Military Justice brought about by the Military Justice Act of 1968 make this revision of the Manual for Courts-martial substantial. Department of Defense has designated the Secretary of the Army as executive agent for revision of the Manual for Courts-Martial, 1969. The Judge Advocate General of the Army, acting for the Secretary of the Army, heads a triservice committee that is now drafting the new Manual provisions. The new Manual will be promulgated by Executive Order and will become effective on August 1, 1969, the date the act goes into effect. Army regulations implementing this Manual are also being prepared.

PERSONNEL

The strength of the Judge Advocate General's Corps continued to grow in fiscal year 1968. At the year end 1,490 judge advocates were on active duty, an increase of 90 over the previous year. Over 300 separate legal offices were staffed to meet the increasing world-wide demand for legal services. Regular Army strength reached 633, reflecting an overall gain of 44 officers, most in the grade of captain. Following their admission to the bar, 33 new judge advocates were appointed under the excess leave program which continues to operate at its full-planned capacity of 105.

Retention of experienced officers remains the principal problem facing the Corps. Unacceptable losses continue to occur when junior officers complete their obligated service and when experienced judge

advocates become eligible for voluntary retirement. There is concern that a failure to reduce this trend may jeopardize the Corps' ability to provide required legal services in the future. At the end of fiscal year 1968, the Corps was short over 30 percent of its authorized field grade officers, with the most critical shortages in the grade of lieutenant colonel. During the year an imbalance in the experience level of personnel continued to develop and the ratio of career officers to obligated reservists remained at an unfavorable level.

The Department of Defense working group studying problems in the procurement, utilization, and retention of military lawyers remained active through the year. Representatives from the Office of the Judge Advocate General participated in this effort, together with judge advocates and personnel specialists from all services. As a part of its work, the group reviewed and analyzed responses to a comprehensive questionnaire addressed to all judge advocates on active duty and those who left the service in the past 5 years. For the Army, the 1,500 responses received from present and former judge advocates provided vital information on attitudes, intentions and various factors influencing career decisions.

In October 1968, the group submitted its formal report of the results of its in-depth study. The specific findings and recommendations have not been released to date.

The Military Justice Act of 1968 will require a substantial number of new judge advocates to implement its provisions. Plans are under way to procure, train and utilize these additional officers. At the same time, the Judge Advocate General will continue his efforts to improve the retention rate of trained personnel and attain a more favorable experience level throughout the Corps.

EDUCATION AND TRAINING

During calendar year 1968, the Judge Advocate General's School, U.S. Army, provided resident instruction for 906 students. This instruction was presented in 19 courses.

Two cycles of the 10-week basic class were conducted at the School during 1968. The 48th Basic Class of 92 students, including one Jordanian, one Ethiopian, Korean, three Thai, and one Vietnamese officer, was graduated in June 1968. The 49th Basic Class of 99 students, including one Korean officer and one Vietnamese officer, was graduated in December. A judge advocate officer orientation course of 24 students was graduated in September 1968.

The 16th Judge Advocate Officer Advanced Course was graduated from the School in May of 1968. It was composed of 31 students, including one officer of the U.S. Navy, two officers of the U.S. Marine Corps, one officer from Iran, and one officer from the Republic of China. The

17th Advanced Course began in September of 1968. Among its 38 officer students are one officer from the U.S. Navy and three officers of the U.S. Marine Corps.

In addition to these three general courses, a number of short functional courses were conducted during calendar year 1968. These courses were: Procurement Law (3 cycles); Judge Advocate Refresher; Civil Affairs; Military Justice; Law in Vietnam (2 cycles); International Law; Civil Law; Military Affairs; Foreign Law; and the Law Officer Seminar.

Three Army Subject Schedules were prepared by the school during 1968. These include ROTC Subject Schedules S-402 and S-502 instruction in military justice for use by Army ROTC instructor groups, and S-301, the Role of the Judge Advocate General's Corps. A supplement to the basic evidence text, Department of the Army Pamphlet 27-172, a revised Legal Clerk's Handbook for printing as a Department of the Army pamphlet, revised DA Pamphlet 27-150, Procurement Law Statutes, revised Outline of Procurement Law Instruction, and six issues of the Procurement Legal Service were also prepared by the School in 1968.

The annual Judge Advocate General's Conference was held at the School during the period October 7-10, 1968. Over 190 conferees attended. The "Manual for Courts-Martial, United States, 1969," and the Military Justice Act of 1968 were among the topics discussed along with many other legal subjects.

The School continued to oversee qualification of enlisted personnel as legal clerks and court reporters, through preparation and administration of standard qualifying tests requiring knowledge of the Uniform Code of Military Justice.

Four issues of the "Military Law Review" were published during 1968. Once again, articles of interest to all military attorneys were predominant. Volume 40 contained a 10-year cumulative index.

During 1968, 32 issues of the "Judge Advocate Legal Service" were published to insure rapid dissemination of recent military justice developments to judge advocates in the field. This newsletter includes digests of all U.S. Court of Military Appeals decisions, all published Army board of review opinions, selected military affairs opinions, and selected civilian court decisions.

During calendar year 1968, 60 hours of filmed instruction were prepared at the School for use by reserve judge advocates. The subjects included in the films were claims, military affairs, procurement law, military justice, and international and comparative law. Student and instructor packets were prepared to accompany the films. The use of training films, with coordinated student and instructor materials, is a new concept in U.S. Army Reserve instruction.

During 1968, a Military Legal Center was established at the Uni-

versity of Virginia, School of Law Library. The center is a depository for books, working papers and JAG memorabilia, and is intended as a center for in-depth military legal research.

The School planned the judge advocate phases of LOGEX, the annual logistical exercise conducted at Fort Lee, Va. In May 1968, members of the staff, faculty, and Advanced Class participated in the exercise.

KENNETH J. HODSON,
Major General, USA,
The Judge Advocate General,
U.S. Army.

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY

January 1, 1968 to December 31, 1968

Following the practice in recent years of having the Code Committee report reach the Armed Services Committees of Congress shortly after the convening of each new session, this report, although embracing calendar year 1968, contains, unless otherwise indicated, statistical information covering fiscal year 1968.

Courts-martial of all types—general, special, and summary—convened within the Navy and Marine Corps decreased from 31,431 in fiscal year 1967 to 28,962 in fiscal year 1968. Although there was a 444-case increase in general courts-martial and special courts-martial involving bad-conduct discharges, there was a 2,913-case decrease in special courts-martial not involving bad-conduct discharges and summary courts-martial, which accounted for the overall decrease in cases. The fluctuation in each type of case is set forth below:

| Type case | Fiscal year 1968 | Fiscal year 1967 | Increase or decrease | Percent of increase or decrease |
|--|------------------------|------------------------|----------------------|---------------------------------------|
| General court-martial..... | 832 | 553 | 279 increase.... | 50-percent increase. |
| Special court-martial involv- ing bad-conduct discharge. | 3, 055 | 2, 890 | 165 increase.... | 6-percent increase. |
| Special court-martial not in- volving bad-conduct discharge. | 12, 885 | 14, 633 | 1,748 decrease... | 12-percent decrease. |
| Summary court-martial..... | 12, 190 | 13, 355 | 1,165 decrease... | 9-percent decrease. |
| Total..... | 28, 962 | 31, 431 | 2,469 decrease... | 8-percent decrease. |

During fiscal year 1968 Navy boards of review received for review 587 general courts-martial and 3,055 special courts-martial (total, 3,642) as compared with 383 general courts-martial and 2,890 special courts-martial (total, 3,273) during fiscal year 1967. Of the 3,642 cases received by boards of review during fiscal year 1968, 1,757 accused

requested counsel (48 percent). A more detailed statistical report is attached as exhibit A.

Complying with the requirements of article 6(a), Uniform Code of Military Justice, the Judge Advocate General visited overseas installations, and the Judge Advocate General, Deputy Judge Advocate General and senior members of the Office of the Judge Advocate General visited numerous commands within the United States in the supervision of the administration of military justice.

In 1965 the Secretary of the Navy's Task Force on Military Personnel Retention recommended and the Secretary of the Navy approved the establishment of "law centers" in areas where there are large concentrations of Navy personnel. The concept of these centers is that as many as possible of the Navy lawyers in a particular area will be assigned to a central activity so that the pooling of available talent will make possible greater flexibility of assignment of tasks, more efficient application of experience, improved coordination of services, and, overall, more efficient utilization of the available legal services.

Pursuant to the Secretary's approval of the concept of law centers, the first of such centers was established on a pilot basis in Norfolk in 1966. The test period for the Norfolk Law Center proved successful, and it has been established on a permanent basis. A second center has been established at San Diego and studies are currently in progress with respect to the establishment of law centers worldwide.

The provisions of the Military Justice Act of 1968 which make lawyer counsel for the accused in all special courts-martial a requirement, except in rare circumstances, will place an additional workload on Navy judge advocates. The establishment of law centers worldwide will be required in order to properly furnish fleet units the necessary lawyer counsel with a minimum increase in the number of judge advocates. Additional judge advocates will be detailed to the various law centers to cover the anticipated additional workload.

A new summary courts-martial trial guide, NAVPERS 10091, has been published and distributed to the field in order to provide guidelines for use in summary court-martial proceedings.

The problems of administering military justice under combat conditions have continued to be the object of study in 1968. These studies indicate that many of the problems will be solved upon implementation of the Military Justice Act of 1968.

The new Manual for Courts-martial, mentioned in my previous reports, became effective on January 1, 1969. Due to changes in the Uniform Code of Military Justice, effected by the Military Justice Act of 1968, it has become necessary to make numerous changes to the new Manual. An ad hoc joint services committee is presently preparing the required changes, and their work is moving toward successful completion.

The U.S. Naval Justice School, which is under the technical supervision of the Judge Advocate General, continues to offer intensive courses of instruction in the fundamental principles of military justice and procedures under the Uniform Code of Military Justice. The School affords instruction in military justice, legal clerk duties and court reporting to officers and enlisted personnel of all the Armed Forces, and provides a 7-week officer lawyer course which is designed for the direct-appointment lawyers of the Navy. During the calendar year, the School provided instruction in various courses to a total of 2,708 officers and enlisted personnel of all the Armed Forces.

Eight nonlawyer officer classes graduated at the Justice School in Newport and one class at Camp Pendleton, Calif. The graduating classes consisted of 719 officers of the Navy, Marine Corps, and Coast Guard. In addition thereto, 367 lawyer officers of the Navy, Marine Corps, and Coast Guard have completed nine 7-week officer lawyer courses offered by the School.

Three hundred thirty-six officers completed the senior officers' short courses offered in Newport, R.I., and Quantico, Va. Three hundred fourteen officers completed the Reserve seminars for lawyers offered in Newport, R.I., Seattle, Wash., and Jacksonville, Fla., and 385 officers of the Navy were given special instruction in military justice by officers of the Naval Justice School staff as part of the course at the Naval Destroyer School.

Five hundred eighty-seven enlisted members of the Army, Navy, Air Force, Marine Corps, and Coast Guard have graduated from seven 5-week legal clerk and court reporting courses.

In an effort to consolidate ideas as to effective methods of administering the Uniform Code of Military Justice today, a conference of staff judge advocates from all major Navy and Marine Corps commands was held in October 1968 in Washington, D.C. The conference was eminently successful, and will prove of help in solving existing problems and in providing ideas for future study and implementation. A similar conference is planned for the fall of 1969.

JOSEPH B. McDEVITT,
Rear Admiral, USN,
The Judge Advocate General,
U.S. Navy.

EXHIBIT A

Fiscal Year 1968

| | | |
|---|---------------|-----|
| General courts-martial: | | |
| Received for review under article 66..... | 587 | |
| Received for review under article 69 and acquittal..... | 245 | |
| Total | <u>832</u> | |
| Special courts-martial: | | |
| Received for review under article 66..... | 3,055 | |
| Received for review under article 65c..... | 5 | |
| Reviewed in the field..... | 12,880 | |
| Total | <u>15,940</u> | |
| Summary courts-martial: | | |
| Received for review under article 65c..... | 0 | |
| Reviewed in the field..... | 12,190 | |
| Total | <u>12,190</u> | |
| Total all courts-martial..... | <u>28,962</u> | |
| Board of review actions: | | |
| On hand for review July 1, 1967..... | 178 | |
| Received for review during fiscal year 1968..... | 3,642 | |
| Total on hand..... | <u>3,820</u> | |
| Reviewed during fiscal year 1968..... | 3,576 | |
| Pending review on June 30, 1968..... | 244 | |
| Total | <u>3,820</u> | |
| Findings modified or set aside by boards of review during fiscal year 1968 | | 134 |
| Requests for appellate counsel..... | <u>1,757</u> | |
| Court of Military Appeals actions: | | |
| Petitions forwarded to U.S.C.M.A..... | 354 | |
| Cases certified to U.S.C.M.A. by JAG..... | 7 | |
| Total cases docketed with U.S.C.M.A..... | <u>361</u> | |
| Petitions granted by U.S.C.M.A..... | 45 | |
| Petitions denied by U.S.C.M.A..... | 308 | |
| Total petitions acted upon by U.S.C.M.A..... | <u>353</u> | |

REPORT OF THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

January 1, 1968 to December 31, 1968

1. During the calendar year, Maj. Gen. Robert W. Manss, the Judge Advocate General, and Brig. Gen. William H. Lumpkin, the Assistant Judge Advocate General, made staff visits to legal offices in the United States and overseas as required by article 6(a), Uniform Code of Military Justice. Generals Manss and Lumpkin also attended various bar association meetings and spoke before numerous civic, professional and military organizations. The Judge Advocate General hosted a world-wide Major Command and General Court-Martial Convening Authority Staff Judge Advocates Conference at Headquarters U.S. Air Force in November 1968. The new Manual for Courts-Martial, 1969, was given detailed coverage at the conference. The Military Judge Act of 1968 was also covered and each conferee given a copy of the law and an outline of the changes in court-martial practice and procedures brought about by the act so that judge advocates in the field will be properly indoctrinated by the time the act becomes effective in August 1969.

2. *a.* The number of records of trial received in the Office of the Judge Advocate General, for review pursuant to article 66 and for examination pursuant to article 69, during fiscal year 1968, is shown in the following table:

| | |
|------------------------------------|-----|
| Total number records received..... | 441 |
| For review under article 66..... | 355 |
| General court-martial records..... | 165 |
| Special court-martial records..... | 190 |
| Examined under article 69..... | 86 |

The boards of review modified the findings and/or sentence in 78 cases.

b. The workload of the boards of review was as follows:

| | |
|------------------------------------|-----|
| Cases on hand June 30, 1967..... | 58 |
| Cases referred for review..... | 355 |
| Total for review..... | 413 |
| Cases reviewed and dispatched..... | 360 |
| Cases on hand June 30, 1968..... | 53 |

c. During the fiscal year 74.0 percent of the accused, whose cases were referred for review under article 66, requested representation by appellate defense counsel before boards of review.

d. The following table shows the number of cases forwarded to the U.S. Court of Military Appeals pursuant to the three subdivisions of article 67(b); and the number of petitions granted during the period:

| | |
|--|------|
| Cases reviewed and dispatched by boards of review..... | 360 |
| Number cases forwarded to U.S.C.M.A..... | 115 |
| Cases petitioned..... | 111 |
| Cases certified..... | 4 |
| Percent total forwarded of total cases reviewed..... | 31.8 |
| Petitions granted | 15 |
| Percent grants of total petitioned..... | 20.2 |
| Percent petitions granted of total cases reviewed by boards of review..... | 4.1 |

e. During the fiscal year, the following numbers of courts-martial were convened in the Air Force.

| | |
|-----------------------------|-------|
| General courts-martial..... | 291 |
| Special courts-martial..... | 1,816 |
| Summary courts-martial..... | 895 |
| Total | 3,002 |

3. Reportable article 15 actions, fiscal year 1968:

| | Number of cases | Percentage of total number of cases |
|--|--------------------|---|
| Total cases | 28,164 | |
| Officers..... | 216 | 0.8 |
| Airmen..... | 27,948 | 99.2 |
| Punishments imposed: | | |
| Officers..... | 362 | |
| Airmen..... | 48,262 | |
| Restrictions (over 14 days): | | |
| Officers..... | 17 | 4.7 |
| Airmen..... | 5,654 | 11.7 |
| Quarters arrest/correctional custody: | | |
| Officers..... | 0 | 0 |
| Airmen..... | 4,485 | 9.3 |
| Extra duties (over 14 days): Airmen..... | 2,338 | 4.8 |
| Reduction in grade: Airmen..... | 18,451 | 38.2 |
| Forfeiture of pay: | | |
| Officers..... | 157 | 43.4 |
| Airmen..... | 15,937 | 33.0 |
| Detention of pay: | | |
| Officers..... | 0 | 0 |
| Airmen..... | 42 | 0.1 |

| | Number of cases | Percentage of total number of cases |
|-------------------------------|-----------------|-------------------------------------|
| Written reprimand: | | |
| Officers..... | 188 | 51.9 |
| Airmen..... | 1,355 | 2.8 |
| Mitigating actions: | | |
| Appeals taken..... | 1,302 | ¹ 4.6 |
| Officers..... | 9 | |
| Airmen..... | 1,293 | |
| Appeals denied..... | 1,094 | ² 84.0 |
| Officers..... | 9 | |
| Airmen..... | 1,085 | |
| Suspension of punishment..... | 10,387 | ¹ 36.9 |
| Officers..... | 2 | |
| Airmen..... | 10,385 | |
| Other action..... | 1,520 | ¹ 5.4 |
| Officers..... | 1 | |
| Airmen..... | 1,519 | |

¹ Of total cases (28,164).

² Of appeals taken (1,302).

4. Upon enactment of the Military Justice Act of 1968, the Air Force transmitted to the field a message outlining procedures implementing the amendments to articles 69 and 73 which became effective the date the act was signed. Air Force Manual 110-8, Military Justice Guide, and some other military justice directives were rewritten and consolidated into Air Force Manual 111-1, Military Justice Guide. It was published December 17, 1968, and distributed to the field to give judge advocates current guidance in relation to MCM, 1969, and the latest court decisions. Change 5 to AFM 110-5, Court-Martial Instructions Guide, was published December 18, 1968, and distributed to the field to give judge advocates current guidance in instructions in relation to MCM, 1969, and the latest court decisions. The Air Force also published and distributed to the field an unnumbered pamphlet entitled Air Force Summary of Changes in the Manual for Courts-Martial, 1969. This pamphlet made a paragraph by paragraph summary of the changes incorporated in the new MCM, 1969.

5. During this year the 10th volume of the Air Force JAG Law Review was published and distributed. The Law Review is a most

important medium for exchange of ideas, experiences, and information relating to important legislative, administrative, and judicial developments in military and related law fields. Of the six issues, four were special; three sponsored by major commands: SAC, volume 10, No. 1; OAR, volume 10, No. 2; and MAC, volume 10, No. 3. The fourth special issue was a symposium of the Manual for Courts-Martial, 1969, and contained articles written by leading JAG authorities in the military justice field. This issue was distributed in advance of normal publication date in order to give the latest information on the new Manual to judge advocates in the field. Several other articles of interest in the area of military justice were published during the year: "Court-Martial Jurisdiction Over Reservists," volume X, No. 4; "Enforced Retention of Contractor Employees," volume X, No. 5; "Fifth Amendment and Article 31, Admissibility of Bodily Fluid Test Results in Courts-Martial," Volume X, No. 5; "Impeachment of Witnesses by Evidence of Prior Misconduct," volume X, No. 4.

6. The Air Force JAG Reporter was published monthly during this year. This publication contains digests of the latest opinions of the Court of Military Appeals, selected opinions of the boards of review and Federal and State cases of interest to Air Force judge advocates. These digests are printed in the Reporter on 5- by 8-inch perforated card stock with descriptive word index lines to facilitate filing. Thus, they not only serve as an advance report of the latest developments in the law but also as a research tool in the interim between release of the opinion and its full text publication in permanently bound volumes. The Reporter also contains other opinions, notices, and directions for guidance to the judge advocates.

7. The Office of the Judge Advocate General acted as agent for all the Armed Services in administering a contract with a civilian law book publisher for publication of the Court-Martial Reports which contains the decisions of the U.S. Court of Military Appeals and selected decisions of the boards of review of the services. The contract heretofore provided for a separate volume containing a digest of selected opinions of the Judge Advocates General but this publication was discontinued in its present form, effective July 1, 1968.

8. On June 30, 1968, there were 1,223 judge advocates on duty. Of these, 633 were members of the Regular Air Force, 256 were Career Reserve officers (of this number, 109 entered active duty in Career Reserve status and have a 4-year active duty service obligation), and 334 were Reserve officers with established dates of separation. The Regular officer strength decreased by 17 between June 30, 1967, and June 30, 1968.

9. At the close of the period of this report, there were 78 commands exercising general court-martial jurisdiction.

ROBERT W. MANSS,
Major General, USAF,
The Judge Advocate General
U.S. Air Force.

REPORT OF THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION (U.S. COAST GUARD)

January 1, 1968, to December 31, 1968

Following is the annual report of the General Counsel of the Department of Transportation submitted pursuant to article 67(g) of the Uniform Code of Military Justice. Unless otherwise noted, the figures in this report are for the fiscal year beginning July 1, 1967 and ending June 30, 1968, the first complete year during which the Coast Guard was a part of the Department of Transportation. The average personnel strength of the Coast Guard during the year was 37,022.

The table below shows the number of court-martial trial records received for final review, or if final review had been completed in the field, for filing, during the year. For comparison purposes the figures for court-martial records received in the 4 previous years are also listed.

| | 1968 | 1967 | 1966 | 1965 | 1964 |
|-----------------------------|------------|------------|------------|------------|------------|
| General courts-martial..... | 0 | 2 | 3 | 1 | 3 |
| Special courts-martial..... | 91 | 68 | 95 | 95 | 89 |
| Summary courts-martial..... | 216 | 211 | 212 | 231 | 255 |
| Total..... | 307 | 281 | 310 | 327 | 347 |

The 91 special courts-martial in 1968 involved only five sentences to a punitive discharge. One of these was disapproved by the convening authority, so that only four cases required review by the board of review. In 70 of the 91 cases, the supervisory review by an officer exercising general court-martial jurisdiction was accomplished in the field. In 17 of the cases, the Commandant, U.S. Coast Guard, was the supervisory authority; the remainder were board of review cases. Twenty-nine of the special courts-martial were appointed by commanding officers of ships or oversea stations; 62 were convened by commanding officers ashore in the United States.

In view of the enactment of the Military Justice Act of 1968, a declared purpose of which is "to increase the participation of law officers and counsel on courts-martial", the extent of participation by

qualified lawyers in the Coast Guard's 1968 trials is of more than usual interest. A total of 138 lawyers took part in the 91 special court-martial trials. Nevertheless there were 24 cases tried without a lawyer in the courtroom. In 63 of the cases tried (69 percent) the accused was represented by a lawyer. However, the accused had a Coast Guard lawyer in only 53 cases; at six trials he had a Navy or Air Force judge advocate, and in four others his only attorney was the civilian lawyer retained by himself. Altogether nine civilian lawyers were retained; in five cases they shared the defense duties with assigned Coast Guard lawyers. At four of the trials, the only lawyer was the presiding member of the court-martial. A full set of lawyers—president, trial counsel, and defense counsel—functioned at only 17 of the trials (18.6 percent).

After August 1, 1969, the amended article 27(c) of the Code will require that the accused be afforded the opportunity to be represented by qualified counsel in every special court-martial, unless such counsel cannot be obtained on account of physical conditions or military exigencies. This provision should result in substantially greater than the past year's 69 percent professional representation for accused persons. Likewise the provision of article 19 prohibiting a bad-conduct discharge unless a military judge is detailed to the trial (except under certain conditions) should materially increase the percentage of trials utilizing a full set of lawyers.

The special court-martial trials of 1968 resulted in 85 convictions and six acquittals. Three of the convictions were set aside on review. Although 44 of the cases were uncontested, only 32 cases were affirmed without modification of either findings or sentence. Of the 82 sentences which survived appellate review, 38 were affirmed as imposed; 44 sentences were mitigated.

The 91 special court-martial trials disposed of 248 offenses. Those most frequently appearing were:

| | |
|--|----|
| AWOL or desertion..... | 59 |
| Larceny or wrongful appropriation..... | 27 |
| Marihuana offenses..... | 23 |
| Violation of regulation or orders..... | 20 |
| Drunk or disorderly..... | 13 |
| Missing ship..... | 13 |
| Breach of restriction..... | 12 |
| Willful disobedience..... | 10 |
| Disrespect to officer..... | 8 |
| Property damage..... | 7 |
| Drugs other than marihuana..... | 7 |
| Assaults | 6 |
| Others | 43 |

No Coast Guard accused petitioned the Court of Military Appeals for grant of review during either the fiscal or the calendar year. One

case, however, was certified to the Court by the General Counsel pursuant to 10 U.S.C. 867(b) (2). This was *United States v. Houston*, certified July 28, 1967, argued October 5, 1967, and decided November 17, 1967. The court's opinion is reported in 17 U.S.C.M.A. 280, 38 C.M.R. 78. In another 1968 Court of Military Appeals case, the Coast Guard filed an amicus curiae brief. This was *United States v. Bevilacqua and Braun*, 18 U.S.C.M.A. 10, 39 C.M.R. 10.

During 1968 15 graduates of accredited law schools received direct commissions in the U.S. Coast Guard Reserve under the active duty program for lawyers. They replaced a group similarly appointed in 1965, who this year completed their active duty obligation. The new officers were designated law specialists and commissioned in the rank of lieutenant junior grade as authorized by 14 U.S.C. 773.

R. TENNEY JOHNSON,
Acting General Counsel,
Department of Transportation.