ANNUAL REPORT
of the
UNITED STATES COURT OF MILITARY APPEALS

and
THE JUDGE ADVOCATES GENERAL
of the
ARMED FORCES
and the
GENERAL COUNSEL
of the
DEPARTMENT OF THE TREASURY

PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE

For the Period
January 1, 1966 to December 31, 1966

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 THE TREASURY

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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Contents

JOINT REPORT
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January 1, 1966 to December 31, 1966

The following is the 15th 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 the Treasury to meet annually to survey the operation of the Code and to prepare a report to the Committees on Armed Services of the Senate and of the House of Representatives, to the Secretary of Defense, the Secretary of the Treasury, 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 the Treasury, 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.

As noted in our last report, Senator Sam J. Ervin, Jr., Chairman of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, introduced 18 bills in the Senate on January 26, 1965. The stated purpose of the bills was to protect the constitutional rights of military personnel. Subsequently Senator

Ervin introduced the two bills referred to in previous reports of this Committee as the "G" and "H" bills. Hearings on all those bills were held in January and March, 1966, before joint sessions of the Subcommittee on Constitutional Rights and a Special Subcommittee of the Senate Armed Services Committee. All three Judges of the Court of Military Appeals and The Judge Advocates General, or their representatives, of the Army, Navy, and Air Force testified at the hearings. No legislation was reported out of committee following the hearings, but it is probable that a new bill embodying the recommendations of the joint subcommittees will be reported out early in the 90th Congress and introduced by Senator Ervin. The Code Committee reserves judgment on the proposed report and new legislation and looks forward to the opportunity to examine and comment upon those proposals. If all or a substantial portion of the 18 bills introduced by Senator Ervin are enacted the services will need a substantial increase in the number of military lawyers. Legislation should provide means to obtain and retain sufficient career lawyers to meet increased requirements for legal services.

In our last three reports we noted that the Department of Defense recommended, as substitutes for certain bills pertaining to military justice, legislative proposals designated as "F", "G", and "H", which were discussed and attached to our reports for the years 1963 and 1964 and also discussed in our last report. We note that during the 1966 Senate hearings the "G" and "H" bills were almost unanimously endorsed by witnesses who testified or submitted written statements in behalf of a number of civilian bar associations, veterans organizations, and other groups. The Code Committee continues to recommend legislation embodying the substance of those bills and feels there is now some degree of urgency in this regard. While the Uniform Code of Military Justice appears to be working satisfactorily in Vietnam, as it did in Korea, operations in Vietnam reinforce our belief that enactment of the proposals contained in the "G" bill, in particular, would have a salutary effect upon the administration of military justice in that area of conflict as well as generally throughout the armed services. Judge Ferguson continues to have reservations, as detailed in our report for the year 1962, concerning the desirability of some aspects of the proposals contained in the "F" and "G" bills.

Turning to developments in the House of Representatives, a bill designated as H.R. 16115, 89th Congress, was introduced on July 11, 1966, by Representative Charles E. Bennett of Florida. That bill embodied the "F" bill and most of the substantive provisions of the Senate bills but followed the "G" and "H" bills where the substance overlapped with those two bills. This is the first time that the "F" bill has been formally introduced in either House of Congress. A report on this bill, which has been prepared by the Department of the

Army on behalf of the Department of Defense, is presently being staffed within the Department of Defense.

On December 3, 1966, President Johnson signed Executive Order 11317, which increased from one year to ten years the maximum period of confinement which may be adjudged by a court-martial for the offense of misbehavior of a sentinel, in violation of Article 113, Uniform Code of Military Justice, when the offense is committed in any of the areas authorizing entitlement to special pay for duty subject to hostile fire as designated by the Secretary of Defense pursuant to 37 U.S.C. 310. These are the areas in which always critical sentinel duty takes on even greater importance. While Vietnam is the area of principal concern at this time, the Executive Order would have future application in any geographical area designated as a hostile fire area. This is the only change in the Table of Maximum Punishments which the commanders concerned have generally recommended or feel to be warranted as a result of the conflict in Vietnam. Suspension of the limitations on all offenses as to which the Table of Maximum Punishments was suspended during the Korean conflict was considered and rejected.

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 United States Court of Military Appeals.

Respectfully submitted,

ROBERT E. QUINN,
Chief Judge.

HOMER FERGUSON,
Associate Judge.

PAUL J. KILDAY,
Associate Judge.

ROBERT H. MCCAW,
The Judge Advocate General,
United States Army.

WILFRED HEARN,
The Judge Advocate General,
United States Navy.

ROBERT W. MANSS,
The Judge Advocate General,
United States Air Force.

FRED B. SMITH,
General Counsel,
Department of the Treasury.

EXHIBIT A

For the Period
July 1, 1965 to June 30, 1966

Court-Martial Cases

Army	38,613
Navy	26,936
Air Force	3,315
Coast Guard	310
Total	69,174

Cases Reviewed by Boards of Review

Army	1,092
Navy	2,411
Air Force	437
Coast Guard	14
Total	3,954

Cases Docketed with U.S. Court of Military Appeals

Army	407
Navy	234
Air Force	152
Coast Guard	3
Total	796

REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS

January 1, 1966 to December 31, 1966

In compliance with the provisions of the Uniform Code of Military Justice, Article 67(*g*), 10 USC § 867(*g*), the Chief Judge and Associate Judges of the United States Court of Military Appeals herewith submit their report on military justice matters to the Committees on Armed Services of the United States Senate and House of Representatives, the Secretary of Defense, the Secretary of the Treasury, and the Secretaries of the Departments of the Army, Navy and Air Force.

I

On April 28, 1966, President Lyndon B. Johnson forwarded to the United States Senate the nomination of Chief Judge Robert E. Quinn for reappointment for the term of fifteen (15) years, expiring May 1, 1981. The Committee on Armed Services of the United States Senate unanimously reported approval of the nomination on May 12, 1966. Without objection, the nomination was confirmed by the United States Senate on May 16, 1966. On that date, President Johnson, pursuant to the provisions of Title 10, United States Code, Section 867, designated Judge Quinn to be Chief Judge.

II

This report marks the completion of the fifteenth year of the Court's operations and the commencement of its sixteenth term. Its diminishing caseload marks not only a decrease in the overall court-martial rate in the Armed Services but also the rising sophistication of those who are charged below with the actual administration of military justice on its more basic levels. It is gratifying to note the increased attention being paid at the trial level—particularly among the professional law officers of the services—to procedural and substantive matters in order that the number of errors may be reduced and appellate reversals brought to an all-time low. Nevertheless, no system of justice is ever perfect, nor can it hope, by maintaining a static position, wholly to eliminate its faults. Hence, it is to be hoped that the Armed Services, guided by this Court, will continue to strive in every instance

for the fairness and impartiality which should be the hallmark of every American judicial proceeding.

III

During the past year, the United States successfully defended against an attack on the scope of the Court's appellate review powers under the Code, *supra*, Article 67. In *Gallagher* v. *Quinn et al.*, 363 F. 2d 301 (C.A.D.C. Cir.) (1966), the complainant alleged a denial of due process and equal protection of the laws in the requirement that an enlisted accused show good cause in order to obtain review by this Court, while a general or flag officer's case is automatically reviewed. The United States Court of Appeals for the District of Columbia Circuit in a decision rendered on May 24, 1966, rejected the contention, pointing out the reasons, historical and otherwise, for the distinction between the two classes of appellants. See Exhibit B for text of the Court's decision. On October 10, 1966, the Supreme Court of the United States denied appellant's petition for a writ of certiorari, thereby terminating the litigation (385 U.S.C. 881, 17 L. ed. 2d 108, 87 S. Ct. 167).

In like manner, certiorari was denied by the Supreme Court in *Crawford* v. *United States*, 380 U.S. 970, 14 L. ed. 2d 281, 85 S. Ct. 1349 (1965), in which an attack was leveled on this Court's decision that Private Crawford had not been denied his right to enlisted members on his court-martial through his convening authority's policy of selecting such members from noncommissioned officers of the first three grades. See *United States* v. *Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3.

IV

During fiscal year 1966, 796 cases were docketed with the Court. Twelve were forwarded on certificates of the Judge Advocates General of the Armed Services. No mandatory appeals involving death sentences or general or flag officers were filed. The Court granted 116 petitions, reversing in 51 of these cases.

During the calendar year 1966, the Court admitted 738 practitioners to its roll of attorneys, bringing the overall number admitted to 12,564. In addition, certificates of honorary membership in our bar were awarded to 8 attorneys of allied nations, working closely with the Armed Forces of the United States.

V

The Judges continued their practice of maintaining close liaison with officers in the field and others involved in the administration of military justice. Associate Judge Homer Ferguson met with judge advocate officers in Spain and Iran during a trip to Tehran as a dele-

gate of the United States Group to the Interparliamentary Union. Conferences were also held by the Judges on a number of occasions with the Judge Advocates General and other officers concerning military justice operations in the field. Mr. Alfred C. Proulx, Clerk of the Court, represented the Court at the Annual Meeting of the American Bar Association in Montreal, Canada, and participated in the hearings of the Ad Hoc Military Justice Committee.

On October 1, 1966, Commissioners Daniel F. Carney, Cabell F. Cobbs, David F. Condon, Jr., Jesse C. Davis, Benjamin Feld, William H. Sandweg, and Jerrold B. Ullman participated in a conference held by the Practicing Law Institute in New York, New York, on the impact of the Supreme Court decisions in *Miranda* v. *State of Arizona*, 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602 (1966), and *Escobedo* v. *State of Illinois*, 378 U.S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758 (1964), in the field of confessions and admissions.

During the year, the Court was honored by visits from a number of foreign dignitaries including Commodore Philip Opas, Q.C., the Judge Advocate General of the Australian Air Force; Colonel Nguyen Mong Bich, Director of Military Justice, Vietnamese Army; Major Phan The Ngoc, Chief, Legal Section, Vietnamese Army; and Colonel Johng Koo Kim, the Assistant Judge Advocate General, Republic of Korea Army.

VI

On March 1, 1966, the Chief Judge and Associate Judges appeared before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, United States Senate, in connection with the joint hearings on a number of proposed amendments to the Uniform Code of Military Justice. The Judges testified at length concerning improvements in the administration of military justice and the related field of administrative discharges from the Armed Forces. In general, their testimony favored enactment of the proposed legislation. Copies of their statements and testimony are included herewith as Exhibit C.

VII

In conclusion, it would appear that, in general, the administration of military justice has continued to improve during the past year. We are certain that, where faults are found and pointed out, immediate steps will be taken below to eliminate them. We shall proceed in our task of seeing that military discipline is fairly and justly maintained, confident in the support of the Congress and of the Armed Services in executing the responsibilities which have been settled upon the Court.

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.

PAUL J. KILDAY,
Associate Judge.

EXHIBIT A

STATUS OF CASES
UNITED STATES COURT OF MILITARY APPEALS
CASES DOCKETED

	Total as of June 30, 1964	July 1, 1964, to June 30, 1965	July 1, 1965, to June 30, 1966	Total as of June 30, 1966
Petitions (art. 67(b)(3)):				
Army	9, 625	471	402	10, 498
Navy	3, 968	245	229	4, 442
Air Force	4, 021	204	150	4, 375
Coast Guard	45	1	3	49
Total	17, 659	921	784	19, 364
Certificates (art. 67(b)(2)):				
Army	138	4	5	147
Navy	198	5	5	208
Air Force	70	5	2	77
Coast Guard	6	0	0	6
Total	412	14	12	438
Mandatory (art. 67(b)(1)):				
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	[1] 37
Total cases docketed	18, 108	935	796	[2] 19, 839

Footnotes at end of table.

COURT ACTION

	Total as of June 30, 1964	July 1, 1964, to June 30, 1965	July 1, 1965, to June 30, 1966	Total as of June 30, 1966
Petitions (art. 67(b)(3)):				
Granted	1,844	86	112	2,042
Denied	15,376	823	672	16,871
Denied by memorandum opinion	2	0	0	2
Dismissed	14	1	0	15
Withdrawn	332	6	6	344
Disposed of on motion to dismiss:				
With opinion	8	0	0	8
Without opinion	40	0	0	40
Disposed of by order setting aside findings and sentence	3	0	2	5
Remanded to board of review	153	10	5	168
Court action due (30 days) [3]	38	47	42	42
Awaiting replies [3]	25	20	18	18
Certificates (art. 67(b)(2)):				
Opinions rendered	401	12	14	427
Opinions pending [3]	1	2	2	2
Withdrawn	7	0	0	7
Remanded	2	0	0	2
Disposed of by order	1	0	0	1
Set for hearing [3]	0	0	0	0
Ready for hearing [3]	0	0	0	0
Awaiting briefs [3]	1	2	0	0
Mandatory (art. 67(b)(1)):				
Opinions rendered	37	0	0	37
Opinions pending [3]	0	0	0	0
Remanded	1	0	0	1
Awaiting briefs [3]	0	0	0	0
Opinions rendered:				
Petitions	1,587	83	98	1,768
Motion to dismiss	11	0	0	11
Motion to stay proceedings	1	0	0	1
Per curiam grants	30	6	4	40
Certificates	353	11	11	375
Certificates and petitions	46	1	2	49
Mandatory	37	0	0	37
Remanded	2	0	0	2
Petitions for a new trial	2	0	0	2
Petitions for reconsideration of:				
Denial order	0	3	2	5
Opinion	0	0	1	1
Petition for new trial	1	0	0	1
Motion to reopen	1	0	0	1
Petitions in the nature of writ of error coram nobis	0	0	1	1
Total	2,071	104	119	[4] 2,294

Footnotes at end of table.

COURT ACTION—Continued

	Total as of June 30, 1964	July 1, 1964, to June 30, 1965	July 1, 1965, to June 30, 1966	Total as of June 30, 1966
Completed cases:				
Petitions denied	15,376	823	672	16,871
Petitions dismissed	14	1	0	15
Petitions withdrawn	332	6	6	344
Certificates withdrawn	7	0	0	7
Certificates disposed of by order	1	0	0	1
Opinions rendered	2,063	104	119	2,286
Disposed of on motion to dismiss:				
With opinion	8	0	0	8
Without opinion	40	0	0	40
Disposed of by order setting aside findings and sentence	3	0	2	5
Writ of error coram nobis by order	1	1	0	2
Motion for bail denied	0	0	1	1
Remanded to board of review	154	10	5	169
Total	17,999	945	805	19,749

	Pending completion as of—		
	June 30, 1964	June 30, 1965	June 30, 1966
Opinions pending	20	10	17
Set for hearing	0	0	0
Ready for hearing	1	1	0
Petitions granted—awaiting briefs	10	9	7
Petitions—court action due 30 days	38	47	42
Petitions—awaiting replies	25	20	18
Certificates—awaiting briefs	1	2	0
Mandatory—awaiting briefs	0	0	0
Total	95	89	84

[1] 2 flag officer cases; 1 Army and 1 Navy.

[2] 19,521 cases actually assigned docket numbers. Overage due to multiple actions on the same cases.

[3] As of June 30, 1964, 1965, and 1966.

[4] 2,294 cases were disposed of by 2,275 published opinions. 120 opinions were rendered in cases involving 67 Army officers, 29 Air Force officers, 16 Navy officers, 5 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.

EXHIBIT B

United States Court of Appeals for the District of Columbia Circuit

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No. 19764

ROBERT G. GALLAGHER, APPELLANT

v.

ROBERT E. QUINN, ET AL., JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided May 24, 1966

Mr. Richard A. Baenen for appellant.

Mr. Richard S. Salzman, Attorney, Department of Justice, with whom *Assistant Attorney General Douglas*, *Messrs. David G. Bress*, United States Attorney, and *Morton Hollander*, Department of Justice, were on the brief for appellees. *Mr. Frank Q. Nebeker*, Assistant United States Attorney, also entered an appearance for appellees.

Before FAHY, BURGER and LEVENTHAL, *Circuit Judges*

FAHY, *Circuit Judge:* The appeal is from an order of the District Court dismissing a complaint for a mandatory injunction, and for other relief, to compel the Judges of the United States Court of Military Appeals to review on the merits the record of appellant's conviction, when a private in the army, of robbery in violation of the Uniform Code of Military Justice, 10 U.S.C. § 922. The conviction and sentence were affirmed by a board of review in the Office of the Judge Advocate General of the Army.[1] He petitioned the Court of Military Appeals to review the record. On consideration and reconsideration of his petition the court denied review. *United States* v. *Gallagher*, 15 U.S.C.M.A. 391, 35 C.M.R. 363. He contends now in the civil courts that he has been denied equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment because the Court of Military Appeals is required to review all cases in which a sentence, as affirmed by a board of review, affects a general or flag officer, whereas it is not required to review other cases, including his own, unless the sentence is death.

Thus, 10 U.S.C. § 867(b) provides:

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

[1] The sentence was confinement at hard labor for one year, a bad conduct discharge, forfeiture of pay and allowances, and reduction to the lowest enlisted grade. The Secretary of the Army suspended and later remitted the unserved portion of the sentence, including bad conduct discharge. This followed appellant's restoration to duty at his own request to enable him to "earn an honorable discharge." Appellant thereafter was released from active service as a specialist, 4th class (equivalent to corporal) with an honorable discharge.

(1) all cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

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

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

The first problem is whether the District Court had jurisdiction to dispose of the constitutional contention. While jurisdiction of the parties is not questioned, appellees urge that the civil courts are closed to anyone sentenced by a military tribunal except through petition for writ of habeas corpus to test the validity of an existing deprivation of liberty at the hands of such a tribunal.[5]

The cases principally relied upon by appellees are set forth in the margin.[4] None of these cases questioned on constitutional grounds the validity of the Act of Congress under which the court-martial or other military trial was held. They involved alleged errors in the conduct of the trials, the use of habeas corpus as a remedy;[5] and in two instances the creation of the tribunals[6] was one of the matters considered.

Appellant does not challenge the trial itself. He challenges only the constitutional validity of the Act of Congress which denies him review of right by the Court of Military Appeals when such review is accorded to a general or flag officer. In this respect he raises a question which more closely resembles that considered in *Ex parte Quirin*, than in the other cases cited, although the issue in *Ex parte Quirin* was raised by the time honored method of habeas corpus.[7]

It would seem clear that the District Court in our case could have decided the constitutional question were petitioner in detention under the sentence and were he proceeding by way of habeas corpus. The question is whether the court must disclaim jurisdiction to decide the question because it is raised by one not in confinement but whose case, nevertheless, is alive and presents a "case" or "controversy." None of the cases relied upon by appellees flatly holds that there is no jurisdiction in such a case; and none in which it is stated that in the area of military jurisprudence habeas corpus is the sole available route to challenge the proceeding involves a constitutional challenge to an Act of Congress.

The Constitution vests in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8,

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[3] 10 U.S.C. § 876 provides:

> . . . sentences by courts-martial following approval, review, or affirmation as required by [the Uniform Code of Military Justice] are final and conclusive . . . binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 . . . and the authority of the President.

However, in *Gusik* v. *Schilder*, 340 U.S. 128, 132, it is held that the language "binding upon all departments, courts, agencies, and officers of the United States," prescribes only "the terminal point for proceedings within the court-martial system," and does not deprive the civil courts of their jurisdiction of courts-martial in habeas corpus proceedings. And see *Burns* v. *Wilson*, 346 U.S. 137, 142.

[5] That the decision of a court-martial is open to collateral attack, other than by a habeas corpus proceeding, see, e.g., *Gusik* v. *Schilder*, 340 U.S. at 133 n. 3.

[4] *Burns* v. *Wilson, supra* note 2; *Gusik* v. *Schilder, supra* note 2; *In re Yamashita*, 327 U.S. 1; *Ex parte Quirin*, 317 U.S. 1; *Wales* v. *Whitney*, 114 U.S. 564; *Shaw* v. *United States*, 93 U.S. App. D.C. 300, 209 F. 2d 811; *Burns* v. *Lovett*, 91 U.S. App. D.C. 208, 202 F. 2d 331; *Goldstein* v. *Johnson*, 87 U.S. App. D.C. 159, 184 F. 2d 342, *cert. denied*, 340 U.S. 879.

[5] *Wales* v. *Whitney, supra* n. 4.

[6] *In re Yamashita, supra* n. 4 and *Ex parte Quirin, supra* n. 4.

[7] Habeas corpus is unavailable to appellant since he is no longer in custody. Yet the case is not moot since appellant's conviction stands and part of the sentence imposed upon him remains in effect.

and it is within this power that the Uniform Code of Military Justice, including the review provisions now challenged, resides. Proceedings under this Code are not required to conform with the Due Process Clause of the Fifth Amendment to exactly the same degree as proceedings in civil courts, *Burns* v. *Lovett*, *supra* n. 4, *aff'd sub nom.*, *Burns* v. *Wilson*, *supra* n. 2. Nevertheless, though greater latitude respecting due process is allowed military tribunals, due process is requisite. *Burns* v. *Wilson*, *supra* n. 2. And the right to due process would be lost if one deprived of it could not obtain redress because not in confinement.

The Supreme Court is the final arbiter of due process under the Constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or by certiorari a decision of the Court of Military Appeals. The consequence is that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal. The "separate and apart" military law jurisprudence, referred to in those terms in *Burns* v. *Wilson*, *supra* n. 2, at 140, would appear not to be separated so far from possible Supreme Court scrutiny.

Assuming as we do that the District Court, on the complaint of one not in confinement, may consider the constitutional validity of the review provisions of the Court of Military Appeals applicable to his case,[8] the "clear conviction" of unconstitutionality, held by the Supreme Court in *Ex parte Quirin*, *supra* n. 4, to be required before a civil court will upset the action of a military tribunal, fails to emerge.

Chief Justice Warren, writing for the Court, recently said:

> Equal protection does not require that all persons be dealt with identically, but it does require that a distinction may have relevance to the purpose for which the classification is made.

Baxstrom v. *Herold*, —— U.S. ——.

Appellant's petition for review was considered and reconsidered by the Court of Military Appeals prior to its denial. Moreover, petitioner is not without other though partial remedies within the military establishment. See *Gusik* v. *Schilder*, *supra* n. 2, and *Burns* v. *Wilson*, *supra* n. 4.[9] Though these remedies do not supply the complete answer to his constitutional challenge they do narrow the dimensions of the statutory distinction of which he complains; and the dimensions of the distinction bear upon the due process issue. The distinction is not comparable to the disadvantage imposed upon an indigent because of indigency condemned in *Griffin* v. *Illinois*, 351 U.S. 12; and see *Douglas* v. *California*, 372 U.S. 313, where the discrimination was also due to indigency.

The limited distinction here in question has a reasonable and relevant justification. As pointed out by the Court of Military Appeals in its exhaustive opinion on the constitutional issue raised by appellant, the President has been charged historically with the responsibility of approving any court-martial sentence involving a general or flag officer before execution of the sentence. This requirement is now embodied in Article 71(a) of the Uniform Code of Military Justice, 10 U.S.C. § 871(a). Appellant does not challenge the validity of this

[8] The complaint in its prayer for general relief may be construed as a request for a declaratory judgment and related relief. 28 U.S.C. §§ 2201–02. A declaratory judgment has been held available to obtain review of the procedure in a court-martial otherwise final where the defendant is not in custody. *Jackson* v. *Wilson*, 147 F. Supp. 296. *Cf. Kristensen* v. *McGrath*, 340 U.S. 162, 168–71. As to jurisdiction of the parties, uncontested here, see, also D.C. Code § 11–521 (Supp. V, 1966).

[9] The administrative remedy provided by 10 U.S.C. § 874 is not alone a satisfactory answer to appellant's problem; for he seeks as of right, on a constitutional ground, review by the Court of Military Appeals of his conviction and sentence. Other remedies available afford no authority to anyone to grant the only relief he seeks in this litigation.

Article. The Continental Congress in enacting the Articles of War on May 31, 1786, provided in Article 2 that no sentence in time of peace or war with respect to a general officer should be carried into execution until the whole proceeding shall have been transmitted to the Secretary of War to be laid before Congress for approval or disapproval, though other sentences could be confirmed and executed by the officer ordering the court to assemble, or by the commanding officer for the time being.[10] 30 Journal of the Continental Congress 317 (Library of Congress Ed. 1934). By Act of April 10, 1806, ch. 20, § 1, 2 Stat. 367, Congress provided, in Article of War 65, that such a sentence should not be carried into execution until the whole proceedings were laid before the President for his approval or disapproval, though other sentences could be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being. A similar provision with respect to general officers was enacted as Article 108, Rev. Stat. § 1342 (1875), and as Article 48, Act of August 29, 1916, ch. 418, § 3, 39 Stat. 658, and June 4, 1920, ch. 227, c. 2, 41 Stat. 796. And see the Elston Act of 1948, ch. 625, § 224, 62 Stat. 634–35. In view of this historical statutory responsibility in the President to approve the sentence of a general or flag officer, it is reasonable for Congress to afford the President the aid of a previous review of the case by the Court of Military Appeals. The Report of the Senate Committee on the bill establishing a Uniform Code of Military Justice states:

> Automatic review before the Court of Military Appeals is provided for all cases which must be approved by the President.

S. Rep. No. 486, 81st Cong., 1st Sess. 29 (1949). And see H.R. Rep. No. 491, 81st Cong., 1st Sess. 32 (1949).

The selection of general and flag officers is on nomination of the President, subject to Senate confirmation. These officers constitute only a fraction of one per cent of all officers, and a much smaller fraction of all military personnel. Where the President has participated in the appointment of those bearing the responsibility of a general or flag officer, the provision that he review any sentence by court-martial imposed upon his appointee is reasonable and, as we have said, is here unchallenged. The conviction and sentence the President reviews is not that of a civil court. It affects one with whom the Preside nt and Commander-in-Chief has a special relationship, different from that which pertains under the laws to other members of the armed services. The interests of the latter are not neglected by this difference; indeed, their interests are among the considerations which support the reasonableness of the different treatment here in question; for review by the President of cases involving general and flag officers cannot be separated from concern for the interests of those over whom they have been placed in positions of unusually great responsibility.

In the Uniform Code of Military Justice, enacted since World War II, establishing the new civilian Court of Military Appeals, Congress has been at great pains to afford to all members of the armed services review and correction of error or injustice. With this before us, and also bearing in mind the reticence civil courts observe with respect to the separate area of law governing the "land and naval forces," *Burns* v. *Wilson*, *supra* n. 2, and the continuing responsibility of the President to approve a court-martial conviction and sentence of a general or flag officer, the review provisions here challenged cannot be held to be so unreasonable or irrelevant as to violate the rights of appellant under the Due Process Clause of the Fifth Amendment.

Affirmed.

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[10] The First Congress under the Constitution provided that the troops should continue to be governed by the Articles of War previously established. Act of September 29, 1789, ch. 25, § 4, 1 Stat 96.

EXHIBIT C

MILITARY JUSTICE

Tuesday, March 1, 1966

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY, AND
SPECIAL SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Ervin and Javits.

Also present: Senator J. Strom Thurmond of South Carolina.

(There was a brief off-the-record discussion before the subcommittee went on the record.)

Senator ERVIN. We will proceed.

Our first witness is Robert E. Quinn, Chief Judge, U.S. Court of Military Appeals. Judge, it is a pleasure to welcome you here.

Judge QUINN. Mr. Chairman and members of the subcommittee it is a pleasure to be here.

I have a prepared statement and would like to submit it to the committee and unless the committee desires me to read the statement—may I place it in the record? In the interest of time it would be just as well to submit it for the record.

Senator ERVIN. We will leave it up to you—if you would rather submit your statement we will put it in its entirety into the record immediately after your testimony.

Statement of Robert E. Quinn, Chief Judge, U.S. Court of Military Appeals, Washington, D.C.

Judge QUINN. I am in agreement substantially with all the bills prepared for your consideration of those bills. I think they are a step in the right direction. I have indicated that in three or four instances I thought they should apply in time of war as well as in time of peace.

With those amendments I would be in hearty agreement with all of the proposed amendments to the Uniform Code of Military Justice.

Senator ERVIN. Judge Quinn, in this connection I have heard too much of persons in the military suggesting that the Uniform Code of Military Justice should be suspended in theaters of operation during times of war.

Do you have any comments on that?

Judge QUINN. If I may digress a minute—I see no need for any suspension. I think in time of war the need for protection is more necessary than in time of peace.

I think it is a great mistake to suspend it and I see no necessity to suspend it. It worked during the Korean war and it works during the war in Vietnam and I am quite sure it would work under any emergency that might be encountered in the future.

Senator ERVIN. Let the record show that Judge Quinn's statement will be printed in full in the body of the record at this point.

Judge QUINN. Thank you, sir.

(The statement of Judge Robert E. Quinn follows:)

STATEMENT OF HON. ROBERT E. QUINN, CHIEF JUDGE, U.S. COURT OF MILITARY APPEALS, REGARDING PROPOSED LEGISLATION ON CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL

Mr. Chairman and members of the committee, at the outset, I commend the respective subcommmittees conducting the joint hearings on the bills for their searching inquiries into this vast and important field of law. I commend them also for the monumental program of improvement they have recommended. If the work of all the subcommittees of Congress is as expert and as fruitful as the work of the subcommittees that have prepared the bills under consideration, the people of the United States may take comfort in the knowledge that Congress will continue to function effectively and efficiently in this age of multiple and complex legislation.

AS TO THE BILLS

S. 745. To provide for military judges for general courts-martial: The bill is generally desirable. A number of provisions may need further consideration.

a. Assignment by the Judge Advocate General: It would appear desirable to allow the Judge Advocate General to delegate responsibility to one of his principal assistants.

b. Eligibility: Extend ineligibility in a particular case to appearance as a witness for the defense, as well as for the prosecution, as now provided.

c. Eliminate consultation with court members on the form of findings as unnecessary and inconsistent with general criminal practice.

d. Eliminate the "time of war" exception as to assignments of nonjudical duties. The need for a full-time judge is perhaps greater at that time, than in peacetime, because of the probable increase in the caseload. Also, the provision raises a serious question as to its applicability during a time when Congress has not actually declared war, as provided in the Constitution. See *United States* v. *Ayers*, 4 U.S.C.M.A. 220, 15 C.M.R. 220. Under the *Ayers* case, the present situation in South Vietnam may be "a time of war."

e. As to the amendment of article 66: Grounds for disqualification of a board of review member might be enlarged to allow a party to move to disqualify the member for bias or prejudice or any other reason that would insure that the proceedings before the board of review be impartial. See Feld, A Manual of Courts-Martial Practice and Appeal (New York: Oceana Publications, 1957).

S. 746. *To provide for a Judge Advocate General's Corps for the Navy.*—This provision is generally desirable. In my opinion, the establishment of a separate Judge Advocate General's Corps will result in more efficient and effective legal service to the Navy.

a. If all law specialists of the Navy are redesignated judge advocates, the change will have to be reflected in the Uniform Code of Military Justice provisions referring to Navy law specialists, e.g., article 1(13), article 6(a), and article 27 (b)(1) and (c)(2).

b. A similar change may be necessary as to the term "legal officer," as it is used in the Navy.

S. 747. *Department of Defense Board for Correction of Military Records.*—This provision seems generally desirable.

a. It may be desirable to provide that the board may function in panels of three. (See S. 748, Court of Military Review.)

b. Instead of providing for finality of decision by the board, it would seem desirable to allow an appeal from an adverse decision to the U.S. Court of Military Appeals, by both the individual and the Secretary of Defense, on

the same basis as proposed in S. 753 (appeals to U.S. Court of Military Appeals from decisions of Boards for Correction of Military Records).

S. 748. *To provide for courts of military review.*—The bill is generally desirable.

a. Qualifications of judge.—The 6-year practice provision may need clarification. In its present form it suggests that only experience as trial or defense counsel in courts-martial is qualifying.

b. Tenure of civilians.—The provision is desirable, but it seems incompatible with the limited term provided for the judges of the U.S. Court of Military Appeals. The term of the latter should be changed to life tenure.

c. Change of name. To more clearly differentiate the Court of Military Review from the U.S. Court of Military Appeals, and to avoid confusion of the bar and the public, it may be desirable also to change the name of the latter tribunal to the U.S. Supreme Court of Military Appeals.

S. 749. *Reduce command influence.*—The purposes of the bill are commendable.

a. The danger of overly broad language. The present phraseology seems to prohibit criticism of counsel by the staff judge advocate for such unprofessional conduct as inadequate legal research and insufficient preparation for trial.

b. If article 37 is to be effective as a deterrent against improper command influence, it should perhaps be framed as a punitive article, expressly providing that willful conduct of the kind enumerated shall be punished as a court-martial may direct.

S. 750. *Limitation on bad-conduct discharge and discharge less than honorable.*—The bill is commendable. Again, however, I recommend elimination of the "time of war" exception. See comment *d* on S. 745. It is my opinion that the exercise of military power in time of war tends to be more arbitrary than in peacetime. In certain areas, the tendency may perhaps be necessary. However, the Uniform Code of Military Justice was occasioned by unacceptable practices developed during World War II.

S. 751. *Petition for new trial.*

a. The extension of the period within which to petition is desirable.

b. The grounds for the petition might perhaps be enlarged to include any reason that would promote the interest of justice. See my dissent in *United States* v. *Bourchier*, 5 U.S.C.M.A. 15, 17 C.M.R. 15.

S. 752. *Limitation on bad-conduct discharge.*—The basic proposals are desirable.

a. Again, recommend elimination of the "time of war" exception, for the reasons set out in comment *d* on S. 745, and the remarks on S. 750.

b. The amendment of article 26 should provide that the law officer is ineligible to sit if he is a witness for either the prosecution or defense.

c. I think it preferable to eliminate the closed session conference with the court members on the form of the findings. The practice would thus conform to that in the Federal courts.

d. In making the law officer's ruling on mental responsibility of the accused subject to objection by the court members, I would add the words "on the merits" to distinguish that situation from one affecting the accused's competency to stand trial.

S. 753. *Jurisdiction in U.S. Court of Military Appeals to review decisions of boards for correction of military records.*—The proposal is generally worthwhile. In the interest of conserving judicial time and expense, I recommend elimination of the provision limiting the action of the U.S. Court of Military Appeals to issues certified by the Secretary. On review by the court, other issues may appear which are dispositive of the case. The court should be empowered to deal with these issues.

S. 754. *Due process in administrative actions.*—Again, I question the advisability or desirability of excepting the new protections accorded by the proposed bill "in time of war." See my comments on S. 745, 750, 752.

S. 755. *Prohibits efficiency rating of member of board of review by another member.*—This provision seems generally desirable, and is in accord with the views expressed by the U.S. Court of Military Appeals in *United States* v. *Deain*, 5 U.S.C.M.A. 44, 17 C.M.R. 44.

S. 756. *Broaden constitutional protection against double jeopardy.*—I recommend that the protection be extended to provide that no discharge other than honorable be given, if based upon alleged misconduct for which the individual was previously tried and acquitted in a *civil court*, as well as in a court-martial. The extension is especially desirable in light of S. 758

which authorizes an undesirable discharge when the individual is convicted by a civil court.

S. 757. *Pretrial conferences by law officer.*

a. This provision seems too broad. It appears to give the Government the right to obtain preliminary rulings on all evidence it proposes to introduce. I prefer to see adoption of the practice in the Federal district courts, that is, give the accused the right to move before trial to suppress evidence obtained as the result of illegal search or seizure. Perhaps, the Federal practice can be extended to provide for preliminary hearing on the admissibility of a contested confession.

b. The proposed bill provides that the law officer conducting the pretrial conference can change his ruling at the trial. The language seems to limit the right to the particular law officer who presided at the conference. There might be a change in law officers between conference and trial; consequently, it would be desirable to provide merely that the conference ruling can be changed by the law officer presiding at the trial.

S. 758. *Providing for right to request trial by court-martial when faced with separation with less than honorable discharge.*—The proposal is generally desirable, subject to the following:

a. A conviction in a civil court should be a basis for an undesirable discharge only if the conviction is for a serious crime. This might perhaps be defined as one which, if tried by a court-martial, would subject the individual to a punishment extending to a punitive discharge and confinement at hard labor for 1 year or more.

b. Waiver of the right to plead the statute of limitations should not result if the individual is tried and acquitted of misconduct in a civil court. See comment on S. 756.

c. Excepting the protection of the provision "in time of war" should be deleted.

S. 759. *Minor offenses; eliminate summary court-martial.*—The objective is desirable.

S. 760. *Compel attendance of witnesses (art. 46).*—The proposals are generally desirable. However, it would appear that some protection ought to be accorded a witness. The Uniform Code of Military Justice operates worldwide. A witness ought not be required to go across the country or to an outlying possession for the small witness fee that is usually paid. Perhaps, the statute should limit the compulsory feature to witnesses within 200 miles and located in the same State or Territory in which the subpena is returnable, rather than have the matter prescribed by regulations.

S. 761. *Liability of discharged personnel.*—This is a desirable objective.

a. There is, however, no useful purpose served in subjecting a discharged serviceman to a Federal court trial for a purely military type offense, such as unauthorized absence (if the table of maximum punishment is suspended, the offense is theoretically punishable by confinement at hard labor for life) or disobedience to a superior officer. In my opinion, the offenses should be redefined.

b. The discharged serviceman should not be tried if he was previously tried for the same offense in a foreign court, as well as in a court of one of the United States. This addition would be consistent with the double jeopardy provisions of existing Status of Forces Agreements.

S. 762. *Subjecting civilians to trial in U.S. courts for violations of Uniform Code of Military Justice outside the United States.*—The objective is desirable, but I have serious reservations as to its scope.

a. The class of offenses to which the bill applies should be materially narrowed. For example a Federal court should not be burdened with trying a drunken driving case (art. 111, Uniform Code of Military Justice) or punishing a civilian for being an accessory after the fact to an unauthorized absence (art. 78, Uniform Code of Military Justice).

b. Subjecting a civilian to the crimes and offenses provision of article 134, Uniform Code of Military Justice, seems unnecessary. If the crime is one of extraterritorial applicability, the wrongdoer is already subject to the statute; if the statute is not one of extraterritorial application, then the act should not be made criminal by article 134, and thereby materially alter the traditional American approach to criminal conduct.

Mr. CREECH. Jugde Quinn, I notice on page 2 of your statement that you suggest—enlarging the grounds for disqualification of a board of review member.

Considering S. 748 which would provide for these courts in more or less of an appellate court under the Uniform Code of Military Justice—and passing over your comments on that bill—

If this change were enacted would you still recommend an enlargement of the grounds for disqualification, or should the disqualification be based on the same principles as apply in ordinary civil courts?

Judge QUINN. I think perhaps it should be based on the same principles as in ordinary civil courts, Mr. Creech.

Mr. CREECH. Sir, you state with regard to S. 746 that in your opinion the establishment of a separate Judge Advocate General's Corps will result in more efficient and effective legal service to the Navy.

I wonder if you care to expand upon that statement.

Judge QUINN. Mr. Creech, it seems to me that the lawyers in the Navy are desirous of doing legal work and as far as I know, almost every lawyer in the Navy is in favor of a Judge Advocate's Corps.

It has worked well in the Army. The Air Force officers apparently feel that they do not want to separate—that they have the equivalent of a corps now.

Certainly, the lawyers that I have anything to do with in the Navy for many years have been in favor of a corps for the Navy. It seems to me that qualified lawyers should be used for legal work.

I was a deck officer in the Navy. I qualified under the law to take charge of a battleship, but I was not capable of doing it; and I do not think the Navy lawyers are really trained to do anything except legal work, for the most part.

In an emergency, lawyers can do many things, generally speaking. It seems to me, however, that their work should be confined to legal work of one kind or another. Therefore, I think, there should be a Judge Advocate Corps for the Navy.

Mr. CREECH. On page 3, S. 747, I note you say it would be desirable to provide that the Defense Board for Correction of Military Records under this bill function in panels of three.

I wonder if you would care to expand that statement.

Judge QUINN. The volume of work is sufficient that perhaps they would function more effectively if they were able to sit in panels of three—as do the Court of Appeals in the District of Columbia and the courts of appeal in many circuits of our country.

I think they would perhaps be able to do their work with greater dispatch and with greater efficiency; and that is why I suggest that I thought they should be able to sit in panels of three.

Mr. CREECH. You feel by requiring that the board be composed of as many as nine members that this is an inordinately large number and would cause the board to be less efficient.

Judge QUINN. I would think so, definitely.

Mr. CREECH. In your view limiting the membership to three members could be the ideal number.

Judge QUINN. It would.

Mr. CREECH. Sir, moving to S. 748 you refer to qualifications to provide for courts of military review.

Would it be preferable to leave the qualifications to the Secretary, defining only the general language to the effect that, of course, high-caliber, legal personnel are required?

You point out that the 6-year practice provision may need clarification and I wonder if you feel that it would be desirable or preferable to leave legal qualifications to the Secretary of the service, requiring only that high-caliber legal personnel be required.

Judge QUINN. I certainly feel that the highest caliber gentlemen should compose those boards of review. I think it would be well to leave this to the discretion of the Secretary of Defense, Mr. Creech.

Mr. CREECH. I notice also in speaking of the tenure provided that you indicate that you feel that the tenure is incompatible with that provided for the judges of the U.S. Court of Military Appeals and I wonder if you feel that on both the Court of Military Appeals and this proposed new court that the tenure should be based on good behavior or do you care to expand that statement?

Judge QUINN. I think it would be well to have tenure based on good behavior. I think it was a great mistake as far as the military is concerned to delete terms providing for good behavior.

As the bill for the Uniform Code originally went through the House of Representatives it provided that judges of the Court of Military Appeals would serve during good behavior. When it went over to the Senate, apparently there was some question as to the composition of the court. I am quite sure the discussion at that time indicated it was purely a military tribunal and that political hacks might constitute it.

After some discussion the term was cut to 15 years—with the first members serving 5, 10 and 15 years. That change has caused many difficulties during the course of the last 15 years and I think it was basically a great mistake to make it. Since that time, of course, the House of Representatives has again put through bills providing for tenure during good behavior, but the bills have never been considered by the Senate.

I think it is a great mistake. I certainly think the other Federal courts rather look down their noses at the Court of Military Appeals, and are inclined to think that it is not a court in every sense of the word.

The Court of Military Appeals deals with the lives and the fortunes of the flower of our American manhood—in other words, the Army, the Navy, the Air Force, the Marine Corps who guard our lives and liberties. Our work at the court is concerned solely with the lives and fortunes of those men.

While we do not deal in billions of dollars, we do deal in things that are more precious, in my opinion. I think our court should have equal standing with other Federal courts of the United States.

Mr. CREECH. With regard to the provisions of S. 748 pertaining to membership on the Courts of Military Review—of course it provides that any commissioned officer shall be appointed for a term of 3 years where with a civilian appointed to a court with civil service regulations which would be the effect of good behavior—which it sees fit here for serving with good behavior.

Do you feel, sir, that this will cause any particular problem to have the civilian serving under one criteria, whereas the duty for the military personnel is for only 3 years?

Judge QUINN. I think it would be preferable for both to have the same criteria apply to them, Mr. Creech.

Mr. CREECH. Do you foresee any problem in adjusting this so that the legal officers who are appointed from the military still remain in the military service and yet be in different status from that of civilian members?

Judge QUINN. I think it would be more realistic to require this separation of the members of the board of military review. It seems to me no insurmountable difficulties in letting part be civilians and part military will arise.

Mr. CREECH. Sir, in regard to S. 749 concerning the reduction of command influence you suggest making the exercise of command influence a part of article 37 of the Uniform Code of Military Justice.

The subcommittee has been told that as a practical matter it would be difficult to bring about a prosecution.

Do you think this is necessarily true?

Judge QUINN. No, I do not. It seems to me there could be prosecutions. There haven't been any, although we have had cases of command influence in the past. I think it has been eliminated substantially, but there are still some cases of command control at the present time.

There should be prosecution for a violation of article 37. That is the reason the article was put in the Uniform Code of Military Justice and there is no reason to ignore it. I do feel, however, Mr. Chairman, and Mr. Creech, that command control has been largely eliminated.

Mr. CREECH. The subcommittee has been told, Judge Quinn, that this is the case, that it has been largely eliminated though I believe that there have been cases and there are one or two cases pending before your court at this time concerning command influence.

Am I correct?

Judge QUINN. That is correct.

Mr. CREECH. Although it is largely eliminated—and perhaps the cases have been insignificant in number as compared to other cases, in the administration of military you continue to receive cases concerning command influence.

Is that correct, sir?

Judge QUINN. Yes, we do, not very many but there are still some.

Mr. CREECH. Sir, one of the issues which the subcommittee has been very much concerned about—as you know—is the matter of granting legal review of administrative discharges and S. 753, of course, will amend article 67 of the Uniform Code of Military Justice to allow the new Uniform Code of Military Justice to review results of military board decisions in the form of an appellate tribunal—on page 7 of your statement, sir, in commenting on this I believe it is your position that this would involve additional burden on the court and I wonder, sir, if you would care to expand on that statement.

Judge QUINN. Naturally it would require time and effort on the part of the court. But, personally I believe it would be a good thing. I am not so sure that my distinguished colleagues would agree with me in this matter, but I see no reason why we should not make that kind of a review. It is possible we would have to have some increase in the staff to assist us, but I certainly believe that the penalty that goes with a dishonorable discharge, bad conduct and undesirable discharge is of sufficient gravity to warrant a judicial review.

I have young men coming to my office day in and day out to tell me how difficult or impossible it is to get a job with any substantial concern because they have a bad conduct discharge, undesirable discharge or dishonorable discharge. Perhaps they should be penalized for getting themselves into a situation which requires that type of discharge. Although undesirable discharges are given administratively, they have severe penalties, and it seems to me some judicial review is necessary.

As far as I am concerned personally, Mr. Chairman and members of the subcommittee, I certainly would be willing to undertake that review if that is required of us.

I think my colleagues might be a little skeptical about our capacity to discharge the added responsibilities. I think we can do it and do it satisfactorily.

I would be willing to take responsibility.

Mr. CREECH. The Department of Defense has suggested that the burden would be very heavy, perhaps some 15,000 cases annually might be involved. What services exist for lightening the cases such as petition under present language of the bill?

Is there anything to prevent repeated petitions which would be overburdening the court.

Judge QUINN. I think it could be limited to good cause shown. We would have to examine the record to determine whether or not there was good cause shown.

Many things seem to be different from what they are on the surface. I remember when President Truman asked me to take this appointment. He said. "This is an impossible job. There are 8,500 cases staring you in the face, and no tribunal can ever get square with the board." We are square with the board.

We have no backlog. We have discharged our responsibilities. We are up-to-date with our calendar. While this added review might seem to be a large burden, I have no doubt we could discharge it if given the proper assistance.

Senator ERVIN. Someone who testified previously said all of these cases would be subject to review. But as a practical matter don't you agree with me that a very substantial percent of these men who were given less than honorable discharges might feel that they got off with rather light punishment.

In addition, at the administrative board they want the Secretary to have some review made.

Judge QUINN. We agree with you.

Senator ERVIN. Just from the standpoint of the administration of justice, a comparatively smaller percentage of cases which were disposed of at the trial court ever reach the appellate court.

Judge QUINN. Yes, that is very true.

Senator ERVIN. And that is the basis for the view that there will be any great difference in this respect in connection with less than an honorable discharge given by an administrative board and the administration of justice generally.

Judge QUINN. I would agree with you.

Senator ERVIN. I feel that those making those comments were conjuring up some ghosts that do not really exist.

Judge QUINN. I am inclined to think so. I do not think it would be an insurmountable burden for the court if Congress saw fit to add review of these discharges on the petitions for good cause shown.

Senator ERVIN. There is very little difference in it after punishment is received—there is very little difference between a dishonorable discharge given as a result of a court martial and the ultimate result of any discharge given by administration process of a nature less than honorable, isn't there?

Judge QUINN. I would say there is very little difference. As far as the civilian's ability to get a job, I would say there would be no difference.

Mr. CREECH. Judge Quinn, moving on to page 10 of your statement, sir—with regard to S. 758—current regulations restrict discharge for civil court conviction to matters which involve moral turpitude and the like—I see you recommend for confinement for 1 year or more as a punitive discharge.

Would you care to expand as to why you prefer this?

Judge QUINN. That would be a felony. In other words, I think it should be a felony rather than a minor misdemeanor to justify that action.

I don't think the traffic offense or other minor offenses should be the basis for any undesirable discharge. If the conviction is for a felony that might be a sufficient justification.

Mr. CREECH. Would you tell me, sir, where in that language it should specify then the intent of the 1 year punishment?

I realize that when you talk about discharge under UCMJ the conviction under states in which the statutory requirement with regard to felonies, misdemeanors differ—would you feel it reasonable to stipulate felonies rather than this limitation you specify here?

Judge QUINN. It seems to me that perhaps it would be preferable as a limitation. I think it amounts to the same thing, Mr. Creech.

(At this point Senator Javits enters the hearing room.)

Mr. CREECH. With regard to your comments on S. 760, on page 11, the need for protection of witnesses—do you think this protection is needed for others—military as well as civilians, and how should the case of a witness be handled who is more than 200 miles from the trial.

Should they be given larger witness fees?

Judge QUINN. For civilian witnesses, you would have to pay their expenses. I don't think it fair to have them come from more than 200 miles for the ordinary witness fee.

As far as the military witnesses are concerned, I don't think this is a problem. The military can supply transportation or can give them orders to come wherever they like.

Mr. CREECH. On the matter of administrative discharges the bill takes a number of different approaches.

First, they seek to add procedural protection to the hearing process.

Secondly, they allow the election of a trial which would contain additional protection.

Thirdly, they provide for legal review by a court of military appeal.

Do you regard these approaches as complementary? Or are all three necessary? Or if one or two is to be selected on what basis should they be selected?

Judge QUINN. I think they complement each other. I think generally speaking that a man who is going to be given a discharge of that nature should, under ordinary circumstances, be given the right to elect to either take a trial or the discharge after he has had proper legal counsel. I think in addition to that, he should be given the right to judicial review.

I think one protection complements the other; and all three are desirable.

Mr. CREECH. Sir, the representation has been made to the subcommittee with respect to procedural protections proposed for administrative hearings; that there is an advantage in having personnel in administrative actions as much advantage will be lost by incorporation of legal technicalities and the end result would be essentially identical systems for misconduct—the court and the board—and this is not a desirable thing.

Would you care to comment on this assertion?

Judge QUINN. I would be reluctant to accept that approach. It doesn't sound sensible to me.

It seems to me that all the protection that can be afforded to these young men should be given to them. They are facing a very serious situation. It seems to me that if indigent prisoners are entitled to counsel, and if we are to go along with the mandate of the Supreme Court we ought to give the same protection to the young people in the military service.

Senator ERVIN. It has been suggested by some of the witnesses that there should be a condition precedent to the power of the armed services to issue an administrative discharge less than honorable.

One of the conditions should be that the servicemen have some benefit of advice and counsel as to the consequences of their action before being given a discharge without these proceedings. He ought to sign a waiver which manifests his understanding of his rights and that he waives everything and is willing to accept the discharge.

I impart from your testimony that you would think some such requirements should be a condition precedent to the granting of an administrative discharge of less than honorable character.

Judge QUINN. I think it is a very serious consequence—a discharge of this character.

I agree that no young man should be required to accept an undesirable discharge unless he knows exactly what he is doing at that time. I don't think it is a fair thing to do.

Senator ERVIN. He ought not to be discharged and given a less than honorable discharge by administrative process unless first he is given a notice of the reasons which are assigned for possible action and the opportunity to receive advice from the military lawyer or, if he wishes, from a civilian lawyer of his own selection. After receiving such advice and being acquainted with his rights and the nature of the possible charge against him, he may then waive the right to resist such discharge.

Judge QUINN. I agree with that wholeheartedly.

Mr. BASKIR. The subcommittee has been informed about the Kitchen case, which I believe was before the court recently. This was evidently a quite serious case of command influence. I believe I am correct that you did find cause to send the case back.

Evidently from the information received by the subcommittee no disciplinary action was instituted—or at least the disciplinary action never came to the attention of this subcommittee.

Do you think that a punitive article in the code specifically on the subject would result in very many courts-martial?

Judge QUINN. I cannot discuss any case that might be coming back to the court but as far as I can see, it would result in few cases—I would say very few. We have had none up-to-date although there have been instances of command control.

As I have said, I think it has been substantially eliminated but we do find some cases where it still obtains. I do think if a deliberate attempt to exercise command control in any service is found there should be prosecution for it. Just because a general or admiral commits the offense, should not make him any the less amenable to prosecution than a private.

Mr. BASKIR. The effect of making violations of article 37 a court-martial offense would have a deterrent effect—would that in large measure be valid?

Judge QUINN. I think it might have.

Mr. BASKIR. S. 753, which has to do with the jurisdiction of the Court to review administrative discharges—on page 2 of that bill—it refers to review of all cases before a board established under sections 1552 and 1553.

The language apparently does not limit review only to discharge cases.

Do you believe the bill should be changed only to deal with discharge cases?

Judge QUINN. I would think it should be limited to that.

Mr. BASKIR. There is no need that you see for other kinds of cases that come before the board?

Judge QUINN. I am not an expert in that field. I am not qualified to answer the question.

Mr. BASKIR. It has been suggested that perhaps these cases should be limited to those certified by the Judge Advocate General because of the burden on the Court of numerous petitions by the applicant. But you suggest it should be eliminated.

Do you believe that would be necessary because of the language that appears on page 7, sir?

Judge QUINN. I am just reading it——

In the interest of conserving judicial time and expense, I recommend elimination of the provision limiting the action of the U.S. Court of Military Appeals to issues certified by the Secretary. On review by the court, other issues may appear which are dispositive of the case. The court should be empowered to deal with these issues.

I think they have said just the reverse of what you have indicated Mr. Baskir.

Senator ERVIN. I want to see if I interpret your previous testimony correctly——

Do you feel that the determination of whether there is good cause to review a particular case should be decided by the courts?

Judge QUINN. Yes, I do Senator.

Senator ERVIN. I think you would say that the right to petition for review should be made by the party affected as well as by the Secretary or some one acting for the Secretary.

Judge QUINN. I would say petitioner should have some rights; and that the court should determine whether or not there is good cause, not the Secretary.

The bill provision is in line with the suggestion by some of the Judge Advocate Generals in the earlier days of the court's existence, that they should be able to determine what good cause shown meant. That could have destroyed the court. The court has to determine what good cause is.

Senator ERVIN. In my opinion, and I think your views coincide with mine, the right to petition for review in a particular case should be granted in any event.

(Senator Thurmond enters the hearing room at this point.)

Senator ERVIN. I think such right is absolutely essential to the administration of justice.

Judge QUINN. That is right, Senator, that suggestion had been made.

Senator ERVIN. I am sorry—I attributed it to you.

Judge QUINN. I just made reference to it.

Mr. BASKIR. S. 758 was discussed a moment ago. It gives an election to a man about to be administratively discharged—a choice of electing to have a court-martial.

In earlier testimony a certain number of cases were referred to in which it was felt that perhaps this election would not be practicable; certain cases such as sex perversion—in which it would be impossible to get any testimony because the witnesses would be reluctant to come forward. There are other cases in which the individual had a long chain of petty offenses which indicated that he was not fit for military service—but none of which would be serious to warrant discharge under the code. There are other instances which because of certain legal technicalities prosecution would not be successful.

If a man demonstrated that he was not fit for military service would you suggest or would you approve of exceptions being written into the bill, S. 758, to cover the cases such as I just mentioned?

Judge QUINN. I think where a man has two left feet, or probably is unable to become a good soldier or a good airman or a good member of the naval service that perhaps the service should be able to give him some kind of separation, but I do not think he should get an undesirable discharge. I think he should have some election—some system should be worked out to give him a separation which would carry no unfavorable connotations.

Mr. BASKIR. In all these cases where the service record did not warrant an undesirable discharge——

Senator ERVIN. Would you yield to Senator Javits?

Mr. BASKIR. Yes, sir.

Senator JAVITS. Judge Quinn, thank you very much. I note with the greatest of interest the fact that the judges are here who happen to be the men whom I served in the House and the Senate.

I am very glad to see them and I am very pleased to see the interest directed toward our committee for bringing about these hearings which I think is very richly deserved.

You are on a subject which interests me and I would like to direct your attention beyond the legal side.

My experience as a legislator and attorney general of my State indicates that there is nothing worse than a discharge other than honorable. It is worse than punishment, than a jail sentence. A man can get over having been in a stockade for a time if it is within reason.

But a dishonorable discharge really hurts.

If we talk about billions of dollars that is one thing—I hope Judge Quinn that in your evaluation of what needs to be done and in your recommendations of what we ought to do in the law that you will give that the utmost consideration from the point of view of human experience and I suppose you would know as much as anybody on earth that it is a discharge other than honorable that causes a man to be ashamed of his record and affects everything he does in life.

This really is the worst punishment you could give him, far worse than a jail sentence.

Judge QUINN. I am in complete agreement with you, Senator Javits.

Senator JAVITS. I assume in your recommendations you would have placed that vital essential upon the administration of this power.

Is that correct generally?

Judge QUINN. I am quite sure that my written statement supports your observation, Senator.

Senator JAVITS. Thank you, very much. Basically in those instances which have been suggested where S. 758 would not work these were all instances of conduct where it was felt that a man's record would not warrant an honorable discharge.

It was suggested in these cases that an undesirable discharge should be allowed and election for court-martial should not be allowed.

Judge QUINN. I disagree; if he is given an undesirable discharge he should have the right to stand trial.

Senator JAVITS. The man should get a dishonorable discharge if he prefers not to have a court-martial.

Judge QUINN. I would be reluctant to hand out honorable discharges. I think an honorable discharge connotes honorable service in one of the military forces. A man, however, could be separated from the service without an undesirable discharge or discharge other than honorable, where the significance and connotation of undesirability would not go with it.

I think if the services are administratively going to give an undesirable discharge the individual should have the right to elect a trial if he saw fit to have it and that he should have proper legal advice before he is required to make a decision.

Senator JAVITS. May I identify myself with that. I am so pleased to hear you say that—that is the only way to do it.

Senator ERVIN. Judge, I believe you and I would agree with the military that no man should be entitled to receive an honorable discharge unless the service he has rendered has been in an honorable manner.

Judge QUINN. Yes.

Senator ERVIN. The military takes the position—and I think it is very sound—that one of the greatest distinctions a man can have in civilian life after he leaves the service is the fact that he receives an honorable discharge. That is as high a badge as the military can give a man notwithstanding the medal of valor for fine service.

Judge QUINN. It is a mark of distinction in my opinion.

Senator ERVIN. I think if we could struggle ourselves with all the circum-

stances that existed at the time that President Truman told you that you had undertaken an impossible task, we would have to agree with President Truman that there were many factors that made this so.

In the first place, legally trained people have the tendency—I am conscious of it myself—to have a vested interest in the status quo, whatever it may be.

The military have been handling all of the problems themselves for generations in this country.

You have won the complete confidence of the country and you have also made the people very confident, not only in the work of the Court of Military Appeals but also in the administration of justice within the military establishments.

You have removed the need for the existence of a court of military appeal and have removed any basis for the contention that in the military justice was not justice.

I think you and your associates deserve the thanks of the American people. I for one have always been under the opinion that those who exercise judicial function and decide matters arising under the Constitution or laws passed by the Congress pursuant to the Constitution and under the treaties should serve during good behavior.

I think the Constitution meant that, and I am an advocate of making that provision of the Constitution effective in military appeals as well as in other courts.

I trust we will get the Senate to go along with the House in that matter.

Judge QUINN. I thank you very much, Mr. Chairman. I have two distinguished associates—Judge Kilday and Judge Ferguson. They are not only distinguished gentlemen, but they are hardworking men and have contributed to the success of the administration of military justice.

Senator ERVIN. The thought has been expressed here by the witnesses that a man does not have the right to be retained in the military service if he is unfit for military duty.

I will ask you if you do not think that the civilians who are informed agree with the military on that proposition.

Judge QUINN. I think they agree with them on that.

Senator ERVIN. Do you think if the law was altered to allow judicial review by a court of military appeals of the question of discharges other than honorable, that there would be a tendency on the part of the military appeals to make decisions to retain men unfit for military service?

Judge QUINN. There would be no danger of that.

Senator ERVIN. The civilian population is interested in having fit men in the military service.

Judge QUINN. Certainly.

Senator THURMOND. I would like to be associated with the distinguished Senator from North Carolina in what he had to say about the Military Court of Appeals and members in the court being held in the highest esteem.

I have heard many civilian and military people express their heartiest esteem for the manner in which the work of the court is now conducted.

I would like to make this further observation, too.

That the stigma and it is a terrible stigma for a man to get a discharge other than honorable—it does affect him in whatever he goes into—I think we have to have some balance there because the man goes into the service and wears the uniform of his country and before we give him anything except an honorable discharge or a discharge in any case that his conduct has been anything but honorable—then we better be careful.

It is a very serious thing for a man to get a discharge other than honorable. I would not hesitate to see a man get a discharge other than honorable if the facts warranted it.

I think one thing today that concerns me is this leniency and compassion that is shown for the criminal. It is shown for the defendant rather than society.

To my way of thinking the rights of the individual must be given every consideration at the same time that there is a conflict.

I think the rights of society must prevail.

(Senator Javits leaves hearing room at this point.)

Senator THURMOND. And I think this is a matter we have to consider—I am sure this distinguished court and its able members will review this matter in terms of the country's service as well as the individuals.

Judge QUINN. I am in agreement with your statement completely, Senator.

Senator THURMOND. Thank you, very much.

Senator ERVIN. Judge, you made one observation during the course of your testimony in which I was very much interested. You expressed the opinion that military lawyers should be permitted to devote themselves exclusively to the performance of legal duties in the armed services.

We have some of the services still hanging on to the old view that an officer should be able to perform many duties that might involve his branch of the service.

That view was to orient the officer with many duties in the days when weapons were simple—they consisted of a rifle maybe and a bayonet and a very minimum of artillery.

Since that time we have developed very intricate weapons. We have had a drastic change in the duties of the military in respect of their functions.

I share your view entirely. We have gotten to the age of specialization. We no longer reasonably expect every officer who is in the military to discharge every duty that can involve an officer of his rank of service.

You stressed that opinion with reference to legal officers in the military and I think it applies to them as well as to the officers who have to have the knowledge and skills to operate intricate weapon systems that we have now.

We have reached the age of specialization in the military as we have in so many of the phases of civilian life.

Judge QUINN. I think that is about right.

Senator ERVIN. I think the Marine Corps says that legal officers should be able to do everything required of an officer.

Judge QUINN. I am not qualified to pass upon that.

I think generally speaking legal officers in the Navy are required to do legal work, which is as it should be because they are specially trained to do that.

Senator ERVIN. I will go along with the Marine Corps to this extent—I think it would be well to have every legal officer perform some other duty such as platoon duty but I would not keep them on one duty. I would assign them one duty and another duty through their military service.

I believe experience is the most efficient teacher of all things. I think that applies to military lawyers. I would endorse the fact that so many able men are devoting themselves to military service and I think you can expect a great increase in the quality of the service of a legal nature in the military forces for that reason.

Judge QUINN. I think the Judge Advocate General Corps for the Army is an indication that it would work equally as well for the Navy.

The Army first started the field judiciary and the Navy followed. Based upon that same idea, a judge advocates corps for the Navy would work out equally as well.

Senator ERVIN. Judge, the committee is indebted to you for giving us the benefit of your experience in this field and we want to thank you for coming here.

Judge QUINN. Thank you very much, Senator. It has been a pleasure.

U.S. COURT OF MILITARY APPEALS,
Washington, D.C., December 15, 1965.

HON. SAM J. ERVIN, Jr.,
Chairman, Subcommittee on Constitutional Rights,
Old Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: Thank you very much for your invitation to testify in connection with proposed legislation on constitutional rights of service personnel at the joint hearings in January 1966, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary and a special subcommittee of the Senate Committee on Armed Services. My brother judges and I welcome the opportunity.

At earlier congressional hearings, I pointed out that the U.S. Court of Military Appeals, which was established by Congress in the Uniform Code of Military Justice, 10 U.S.C. 801, et seq., has attempted to expunge the dictum in the military establishment that courts-martial are mere instrumentalities of the executive branch and, therefore, are not bound to accord to military accused the protections and privileges granted by the U.S. Constitution. By decision and discussion, the judges of the Court of Military Appeals have endeavored to demonstrate that military discipline is wholly compatible with, and encouraged by, equal justice under law. The war crimes trials after World War II established that, even in the field in time of hostilities, the military commander cannot disregard the rule of law.

Millions of Americans are committed to serve in our armed services in defense of our country and the free world. The preservation of their constitutional rights and privileges is imperative. I commend you, and the other committee members, for the intense interest you have shown, and the work you have done, in this important field of law.

As requested, Judges Ferguson, Kilday and I will separately send you a written statement of our respective views on the pending bills.

With warmest regards, I am,

Sincerely yours,

ROBERT E. QUINN, *Chief Judge.*

Senator ERVIN. Our next witness is Judge Paul J. Kilday.

Judge Kilday, on behalf of the subcommittee I wish to express our appreciation for your willingness to be here and to give us the benefit of your experience on these matters pending before the subcommittee.

Judge KILDAY. I am glad to have the opportunity to be here in connection with these hearings. I do have a statement I would like to submit for the record and I will summarize it.

Senator ERVIN. Let the record show that the entire statement submitted by Judge Kilday will be made a part of the record.

Statement of Judge Paul J. Kilday, U.S. Court of Military Appeals,
Washington, D.C.

Judge KILDAY. In this statement I state I am in substantial agreement with Judge Quinn. I think perhaps I should point out, too, that as to some of these bills, I doubt if I have an opinion of them because of my position as judge of this court as, perhaps, because of my prior experience as a Member of the House.

I know very little about the detail of proceedings for administrative discharge.

On the other hand, I know a good deal of the effect of administrative discharge upon the individual.

In my opinion an undesirable discharge is regarded by the civilian population as worse than a bad conduct discharge. They are likely to believe that a BCD indicates a failure to do something in a military sense.

If a man is totally undesirable—this is even worse than what he might have done to receive a bad conduct discharge.

As to whether the Navy should have a Judge Advocate Corps, I feel it should, and I endorse that legislation.

This is probably not derived from my position as judge of the court. The

Army has a rather detailed organization—in the Air Force they are all commissioned alike except the medics and the chaplains, and it has worked well in the Air Force.

In the Navy you do have the Supply Corps, Civil Engineers Corps, and so forth—I think it would be definitely to the advantage of the Navy to have a Judge Advocate Corps.

I will be glad to answer any questions.

Senator ERVIN. My recollection is that you spent a substantial period of time on the Armed Services Committee of the House prior to becoming a judge on the court.

Judge KILDAY. Throughout my service of a little less than 23 years I served on the Committee on the Military and then went to the Committee on the Armed Services which was created in 1947.

Throughout my service I was on a military committee.

Senator ERVIN. And you served on one of the committees at the time the committee was considering the Uniform Code of Military Justice.

Judge KILDAY. The Elston bill which revised the code which applied to the Army system of military justice. Mr. Elston, of Ohio, was the chairman of the subcommittee which wrote it, and the act was generally known as the Elston Act.

I was ranking minority member of that subcommittee. I was on the full committee which considered the report of the Subcommittee on the Uniform Code of Military Justice.

Senator ERVIN. You have been concerned with these problems for some time.

Judge KILDAY. Yes; for a long period of time.

Mr. CREECH. Judge Kilday, I note that in your statement you say you are in agreement with the observations on each bill as expressed by Chief Judge Quinn in his testimony before the committee.

I wonder if you would care to associate yourself with any of the answers or comments made by Judge Quinn and also if you care to expand upon any of the answers of Judge Quinn?

Judge KILDAY. Not unless there is some specific area defined. I heard Judge Quinn's testimony and I am in substantial agreement with it.

Mr. CREECH. Sir, apart from the statements made by the chief judge with regard to provisions of these bills in view of your long experience with the administration of military justice I wonder if you feel that there are areas other than those covered by those bills which the subcommittee should be appropriately considering at this time as an adjunct to a supplement to the legislation which is proposed in these bills?

Judge KILDAY. At the time the bills were offered I read all of them and felt they covered the situation rather thoroughly. I think more emphasis should be placed on some of them. This is true in the field of special courts-martial without lawyers.

Of course, those which come before us are practically all from the Navy because the Air Force supplies qualified lawyers and the Army does not keep the verbatim record so no BCD can be given.

I am sure the committee will give further attention to cases where no lawyer participates in BCD cases.

We see the Navy cases and they cause a great deal of difficulty. The Army report last year showed some 14,000 special courts. Our court saw none of them because no BCD can be given in an Army special court.

Recently we had a case at Salt Lake City where a young man was sentenced to 6 months in a stockade without a BCD. He filed for a writ of habeas corpus and was discharged on grounds that he did not have effective representation of counsel.

A veterinary and a young lieutenant, who had no experience with military law were appointed to defend him.

A little bit later a case arose at Leavenworth where a man was prosecuted for refusing to obey an order and was given 6 months and then prosecuted for refusing to obey an order in the stockade. He sued for a writ of habeas corpus. He had a year's confinement because of the accumulation of two special court sentences and was confined at Leavenworth in order to serve that time.

I think in this area of speical court-martial cases even though they do not involve a bad conduct discharge merit careful consideration.

Mr. CREECH. Sir, you indicated that whereas you are not entirely familiar with all of the procedures with regard to administrative discharges that you are very familiar with their effect and that you have had an opportunity through the years to be observing administrative discharges.

I wonder, sir, what your feeling is with regard to the board of the military appeals being given jurisdiction to review these discharges?

Judge KILDAY. Because of the effect these discharges have on individuals I think that a review is called for.

Until you mentioned this morning that possibly 15,000 of those cases existed I had no idea of what the number might be or as to what the impact might be upon the court.

If they should come to us on petition for good cause shown I have no doubt we can handle that workload. If we had to review all 15,000, and I take it it is an annual figure of 15,000—this would be a physical impossibility.

Mr. CREECH. Sir, the subcommittee has encountered with regard to complaints stemming from administrative actions in board proceedings and there have been a number of complaints received by the subcommittee—which indicate that this does happen from time to time—that individuals have received board action on the basis of alleged misconduct for which they have been acquitted in civil courts.

They have been subject to board action and in instances in which we have requested trial by court-martial it has been denied them.

As you know these are issues which the subcommittee has been very much concerned with and which would be covered by these bills.

I wonder whether in such measures where the individual requests trial by court-martial or refused trial by court-martial or gets board action—if you would care to comment on this or if you care to comment on actions taken by boards when someone's misconduct has been sufficient to justify a court-martial but an accumulation of misconducts which has brought about board action.

Judge KILDAY. For instance, you have a lot of fellows in civil life that everybody feels ought to be in jail but they are always just short of the line and you are not able to get them to a court so nothing is done as to them. So this is not peculiar to the military.

I seem to remember administrative discharges having been given for identical conduct of which a man has been acquitted by court-martial.

I understand this cannot happen in all cases. There is some limitation on it. I understand it does happen. A man could be court-martialed, acquitted, and be subjected to a less than honorable discharge administratively for what they do not sustain in court.

If you had judicial review this would not happen—that would probably reduce that 15,000 cases per year.

Mr. CREECH. I infer that you feel in the case of administrative board actions that individual situations should be on the same basis with that of a court-martial where if an individual accepts nonjudicial punishment in article 15 he is not given a court-martial. If he requests a court-martial he is given it.

Do you feel with regard to administrative discharges that if the individual is acceptable to administrative board action he can be given a BCD but to be given a court-martial should be afforded?

Judge KILDAY. I think he should have the opportunity.

Mr. CREECH. Would you feel he should have this opportunity in all instances or would there be certain actions that you feel should be taken by administrative boards and not be the subject of court-martial such as those instances in which an individual is accused of poor performance such as being late for reveille consistently, certain AWOL's, minor infractions of rules and regulations but which over a period of time tend to indicate his unsuitability for military service.

Judge KILDAY. I don't mean in every instance you would have to have an option. I think the nature of the discharge would have to indicate the effect on that—whether it is an undesirable discharge—he would have to carry the rest of his life—I am not against the elimination of substandard people at all.

We have cases which I feel should have been handled administratively rather than sent to the court-martial.

When it comes to the character of the discharge given that is a different proposition.

Mr. CREECH. Sir, we have had mention this morning the Kitchen case which I believe was handed down—I think it was handed down early in 1962.

I believe—I am correct in saying that in that case there was command influence but the court found that possibility was not so great that it was a basis for reversing that decision.

Judge KILDAY. And we did reverse it.

Mr. CREECH. In the majority of cases which have come before the court involving command influence—has it been possible to make an adjudication that this was actually command influence or is the reversal predicated upon the opportunity for it, an indication that there might have been?

Judge KILDAY. The chief judge indicated that this is a matter gradually disappearing from the military. There are those on the court who were there prior to my coming and they have more experience than I have. I arrived after the number of cases has diminished to a great extent.

There will always be cases recurring no doubt.

It is 15 years since the code went into effect. You have few men in the service now who 15 years ago were at such ranks that they had any major concern for military discipline. They were company commanders or lower at that time. They have come up under this new system and you do have the resistance of those clinging to the status quo—these people have been raised under this code and command influence has diminished a great deal.

Judge Quinn or Judge Ferguson can give you more.

Senator ERVIN. I interpret your testimony to the effect that you are in agreement with what Judge Quinn has said about the handicap which a man suffers throughout his life if he receives a discharge other than honorable.

Judge KILDAY. I agree thoroughly.

Senator ERVIN. And you are not averse to the proposition that some method of having judicial review of such discharges is desirable.

Judge KILDAY. I think there should be some review of it.

Senator ERVIN. I would like to ask whether or not you agree with me in the view that a great many people who have a discharge less than honorable accept such a discharge rather than undergo the possibility of court-martial?

Judge KILDAY. I am sure that happens in many instances.

Senator ERVIN. Do you agree with me that a very substantial percent of the cases where the unfitness of the man for further service by reason of his bad conduct or by reason of his general ineptitude—that in a great majority of those

cases a man will accept an administrative discharge as in the nature of a favor to him?

Judge KILDAY. Yes, he wants out.

Senator ERVIN. So the chances are the number of men who would seek judicial review against the receipt of a discharge other than under honorable conditions would be comparatively minor?

Judge KILDAY. You are quite right.

Senator ERVIN. Don't you believe that that would be particularly true if the military required a condition precedent to the granting of such discharge—that a man be advised as to the possible consequences of such a discharge and advised of his legal rights and be given an opportunity for a hearing if he saw fit to have a hearing?

Judge KILDAY. Yes, I agree.

Senator ERVIN. I think you also agree with me in the proposition that no man has a vested right to remain in the military if he has shown unfitness for military service.

Judge KILDAY. If he is a misfit they should get rid of him.

Senator ERVIN. Do you agree with me there is no real reason to prevent the Court of Military Appeals from having judicial review. The right to consider the legality and propriety of administrative discharges under less than honorable conditions in restricted circumstances?

The Court of Military Appeals has the same feeling that the military has about the desirability of having fit men in the military service.

Judge Kilday, I think as a matter of fact we can anticipate that under the very precarious conditions the world has been in since the First World War, the Second World War, the Korean war and now Vietnam—the men serving on the Court of Military Appeals are men with military experience and are acquainted to some extent with the problems of the military.

Judge KILDAY. Quite likely.

Senator ERVIN. Do you have any questions?

No questions.

On behalf of the subcommittee I wish to repeat our appreciation of your prepared statement and your appearance here and your kindness in giving us the benefit of your experience and observations in this field.

Judge KILDAY. Thank you.

(The statement of Judge Paul J. Kilday referred to follows:)

STATEMENT OF HON. PAUL J. KILDAY, JUDGE, U.S. COURT OF MILITARY APPEALS

Mr. Chairman and members of the committee, May 5, 1965, was the 15th anniversary of the approval by the President of the Uniform Code of Military Justice and May 31, 1966, will be the 15th anniversary of the effective date of that act. The original judges of the U.S. Court of Military Appeals were appointed June 20, 1951. Therefore, the court will have been in existence 15 years in June 1966.

It is pertinent to observe that the code was preceded by a revision of the system of military justice of the Army. That revision was generally known as the Elston Act, being Public Law 759, 80th Congress (62 Stat. 627), approved June 24, 1948. The act took its name from the chairman of the Legal Subcommittee of the Committee on Armed Services of the House of Representatives, Hon. Charles H. Elston, a member of Congress from Ohio. I served as the ranking minority member of that subcommittee. It need only be observed that, while the Elston Act was based upon, and constituted an amendment to the existing Articles of War, in many respects it represented a radical departure from former provisions of both substantive law and procedure.

As I have indicated the Elston Act was followed within less than 2 years by the Uniform Code of Military Justice, which had for its stated purpose the "unifying, consolidating, revising, and codifying the Articles of War, the

Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard." While I was not a member of the subcommittee which prepared the code, I was a member of the Committee on Armed Services which considered, in detail, the report of the subcommittee. (Hearings before House Committee on Armed Services, 81st Cong., 1st sess., on H.R. 4980, p. 1326 et seq.)

Both the Elston Act and the Uniform Code were inspired by and resulted from the many and bitter complaints, from those who had served in the armed services during World War II, against the manner in which military justice had been administered. These complaints gave rise to the consideration of these questions by a number of committees, commissions and boards, both officially appointed and privately convened. I need not go into detail with the committee as to the nature and specifics of those complaints. I do observe that many witnesses testified as to both bills and all details were well known to the congressional committees. It was the conscientious purpose of the committees to determine those complaints which represented legitimate shortcomings in the system of military justice and to take effective action to remedy the same.

For more than 4 years now, since September 25, 1961, I have served as a judge of the U.S. Court of Military Appeals. Thus, I have had the unique experience of evaluating the effectiveness of the action taken by Congress when viewed in the light of experience and the present state of military justice as revealed to me 17 years ago and, again, 15 years ago. It is with real gratification that I can report to you that the congressional enactment represents a job remarkably well done. When the provisions of the code, the Manual for Courts-Martial, and the decisions of the Court of Military Appeals are observed, and they are observed in the vast majority of instances, substantial justice is accomplished in a very high percentage of the cases; and the quality compares most favorably with that of civilian courts in the United States.

In the Michigan Law Review of November 1964 (vol. 63, no. 1), the following appears:

"* * * Courts-martial, unlike their civilian counterparts, are paternalistic and designed to deal with the internal affairs of the military when summary command discipline is inappropriate. The maximum limits on punishment, the stringent rules against self-incrimination, and the elaborate system of automatic and discretionary review found in military courts offer greater protection to a defendant before a court-martial than he would receive in civilian courts."

I challenge anyone to produce a comparable estimate of military justice in any publication of any law school of any major university prior to the adoption of the Uniform Code of Military Justice.

As recognized in the beginning, the code is not perfect and amendments and revisions, based upon 15 years of experience, are in order. After all, the Judiciary Act was adopted by the First Congress in 1789 and amendments are still found to be necessary or desirable. Federal appellate courts are still revising lower courts holdings of common law questions which existed in 1789.

Article 67(g) of the code recognized this necessity by providing that the court of military appeals and the Judge Advocates General of the armed forces shall meet annually to make a survey and report of the operation of the code "and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate."

I want to commend the committees for the searching and detailed examination they have made into the operation of military justice and to commend them upon the nature and the quality of the amendments proposed.

I shall not address myself to the individual bills, unless the committee should desire that I do so as to any designated proposal. I wish to be recorded as stating that I am in general agreement with the observations on each bill as expressed by Chief Judge Quinn in his testimony before the committee.

Senator ERVIN. Our next witness is Judge Homer Ferguson, U.S. Court of Military Appeals.

Judge Ferguson we are delighted to have you here with us.

Statement of Judge Homer Ferguson, U.S. Court of Military Appeals, Washington, D.C.

Judge FERGUSON. Thank you. I am glad to be here this morning and to hear testimony from previous witnesses and also the remarks of counsel and members of the committee.

I have, as the other two judges have indicated, filed a statement which I would be glad to answer any questions about which the committee or counsel may have.

Senator ERVIN. Let the record show that Judge Ferguson's statement which he prepared and submitted to the subcommittee will be presented in full in the record, at this point.

(The statement of Judge Ferguson referred to follows:)

STATEMENT OF HON. HOMER FERGUSON, ASSOCIATE JUDGE, U.S. COURT OF MILITARY APPEALS

Mr. Chairman and members of the committee, I appreciate the invitation of the subcommittee to make known my views on the suggested improvements in military justice matters pending before it. In so doing, I shall speak frankly of the matters which have come to my knowledge as a judge, which bear on the proposed legislation, leaving to the subcommittee its role of evaluating my testimony so that it may play its proper part. I think it foolish to say either that we cannot improve the code or that it is totally deficient. The truth lies somewhere between, and I hope my testimony will assist you in determining where it is.

I have read and studied the proposed bills amending the Uniform Code of Military Justice with much interest, in light of my experience during the past years as an associate judge of the U.S. Court of Military Appeals. I particularly applaud the attempt embodied therein to improve the stature and role of the law officer of general courts-martial. In my opinion, one of the most significant developments of the last 10 years in military justice was the institution by the Army and Navy of their law officer programs, with the removal of this trial judge from the supervision of the local staff judge advocate, who plays such an important role in the prosecution of the charges, and making him in truth an independent judicial officer, with full time to study, digest, and apply the increasing number of opinions interpreting the uniform code. I can safely say that no other single factor has served to reduce trial errors and improve courts-martial practice than this simple but effective plan. I urge its statutory implementation for all the Armed Forces, and I strongly recommend enactment of Senate bill 745.

Senate bill 746, in effect, reorganizes the Office of the Judge Advocate General of the Navy into a judge advocate general's corps in a manner similar to that of the Army. I do not have the technical expertise or experience to comment on the desirability of such action. I do point out, however, that the Navy Judge Advocate General is also deeply committed in the administration of military justice in the Marine Corps. I am informed that the Marines have consistently followed the practice of assigning their law specialists to tours of duty in the line and later perhaps returning them to legal duties. This does not permit these officers to proceed normally with a legal career or to keep up with developments in the law so as to provide the desirable high level of performance necessary to the proper administration of military justice. Such is sometimes reflected in the Marine Corps cases which come before us, and I suggest that the committee will perhaps wish also to consider the needs of the Marine Corps when revamping the structure of the Navy Judge Advocate General's organization.

Senate bill 747 provides a new system of review for administrative discharges, as well as punitive discharges imposed by courts-martial, by a nine-man board under the Secretary of Defense and a similar three-man board under the Secretary of the Treasury.

Again, the court has had little experience with administrative discharge—the general and undesirable certificates—as such are not adjudged by courts-martial. However, at one time, their use in lieu of courts-martial proceedings was encouraged in the Air Force by a former judge advocate general, in order to escape the protections thrown around an accused by the Uniform Code. It is undeniable that, so far as society is concerned, the impact of

a general or undesirable discharge is the same as that of a punitive discharge. In like manner, the latter punishment is so severe that it frequently marks the accused for the balance of his life, denies him job opportunities otherwise available, and, no matter how exemplary his subsequent conduct may be, bars almost every door to his future. The damage these discharges do fully justifies their review at a later time by a civilian board, with a view to mitigating the severity of the penalty after the passions surrounding a trial or board proceeding have subsided.

At the same time, it seems clearly more economical and just to have this board operate in the Defense Department as opposed to the three military departments. In that way, all cases will receive the same sort of treatment, without regard to individual service policies. Justice should not depend on whether a man was in the Army, Navy, or Air Force, but upon the merits of his petition for relief.

Senate bill 748 offers considerable improvement in the appellate administration of military justice by redesignating boards of review as intermediate appellate courts—which they are—placing the power of appointment thereto in the military Secretaries; providing for a civilian chief judge and a civilian member judge of each panel; setting definite terms for all member judges; and giving the panels the power to suspend sentences in whole or in part.

The boards of review do not presently have the power to suspend sentences. In accordance with the more advanced notions of appellate review of sentences, it seems desirable that this authority should also be conferred upon them. Frequently, a young man will be sentenced to a punitive discharge, and all indications are that he may be restorable, with the right to earn his honorable discharge by good conduct as a soldier. Yet, if the convening authority, who acts immediately after the trial, approves the sentence, the board is powerless to suspend it. Their only alternative is to disapprove it, and they may be reluctant to do so in face of his justly proven crimes. Having the power to suspend—which I consider intermediate between approval and disapproval—they, free from the influences below which so often dictate approval of a harsh penalty, can offer the man another chance to become a good citizen. If he does not behave, of course, the suspension may be vacated after hearing and notice under article 72, and the sentence placed in effect. In this connection, I wish to point out to the committee that I am not unaware of the Army's rehabilitation program at Leavenworth and the Amarillo project in the Air Force, but many accused, sentenced to punitive discharges and short terms of confinement, are not sent to these facilities and, hence, never get an opportunity for restoration. Thus, it is needful for the boards to have power to take action suspending the imposition of punishment in whole or in part. I so recommend.

With regard to the other amendments of article 66, I wholeheartedly believe they are justified and necessary to endow the boards of review with all the judicial character of intermediate appellate courts, which is now, and has always been, their function.

Several years ago, it came to our attention that chairmen of boards of review were writing efficiency reports on their fellow members, a practice which can but lead to abuse. Again, I understand that this has been abandoned and, in the Army at least, a serious attempt has been made to organize the boards into a separate appellate judiciary, free from all connotations of control and influence from any source, and which works to increase public confidence in all stages of military justice. Last fall, however, it came to our attention that Air Force boards of review were required to submit ther opinions—prior to publications or promulgation to counsel or the accused—to a senior officer who, acting on behalf of the Judge Advocate General, was empowered to edit them, point out corrections based on the record and the law, and, in general, supervise the board's opinions in almost every aspect. The Air Force insisted that, in the years during which this examination division existed, no attempt was made in any way to correct or change a single board of review opinion. We in fact found no prejudice to the accused in this particular case, and the Air Force, I understand, has since revised its procedure to permit only examination for correction of clerical mistakes. Nevertheless, there is a great potential for harm in any procedure which requires a supposedly independent judicial body to submit a copy of its opinion to the Judge Advocate General or his assistants in advance of the promulgation of that decision. Conceding the practice has never

led to actual changes, it has the appearance of evil and one wonders the effect upon a board member of knowing his work is going to be so scrutinized in private prior to action being taken thereon. It at least impinges on freedom of judicial action, is unheard of in any other court system, and offers a sound basis for reorganizing the boards into a more independent body.

With particular reference to tenure for board members, I emphatically state my belief such is desirable. In one case which involved important board action, we found approximately a dozen members had participated in the review of the case, they being relieved from time to time for reassignment to other tasks or retirement, et cetera. A sound judiciary can never be developed unless there is some continuity of action in the same case by the same people. A judge cannot be made by an appointment. He must learn by sitting, reading records, and educating himself until he has attained the ability to balance the effect of errors, the appropriateness of sentences, and the myriad of other matters that go to make up appellate examination of trials below. He will never gain this without a definite tenure during which to serve, without fear of being removed on short notice and shipped elsewhere for some totally unrelated task.

In like manner, I do not see any basis for objecting to the use of civilian board members. From our scrutiny of the records, they have worked well in the Navy, although the other services have traditionally limited themselves to commissioned officers. Service interests and specialization is met by providing only one civilian judge for each panel, thus leavening the military approach with the more detached viewpoint of the outside bar. In connection with tenure for such members during good behavior, I might remind you that legislation to the same effect for this court passed the House last year, but was not considered by the Senate. I judge it both feasible and desirable to afford it not only to the court but to the civilian members of the board of review.

Finally, in the interests of economy and the ever proceeding concept of eliminating duplication of effort among the armed services, I suggest you may wish to consider combining the boards of review and placing them under the Department of Defense. All services could be represented by the various panels thereof, thus removing any difficulties afforded by technical matters peculiar to one armed force. At the same time, by being completely removed from the military departments, their independence as judical tribunals would be assured. Moreover, the triplication of administrative facilities to support three different groups of boards would be eliminated, and one might expect a more uniform interpretation of what is, after all, a uniform code, as well as the elimination of grave disparities in sentences for the same offense, depending upon the service of which the accused is a member.

Senate bill 749, amending article 37 of the code, 10 U.S. Code § 837, prohibits pretrial instruction of court members under the current Manual for Courts-Martial (paragraph 38), extends the prohibition against command control to staff officers, and seeks to protect defense counsel against reprisal by means of low efficiency reports.

As to pretrial instruction of court members, I have set forth my views at length in opinions which, unfortunately, were insufficiently persuasive to cause such matters to be forbidden under the present law. Though the Army has since put out a Chief of Staff directive against these indoctrinations, it has been disregarded on occasion. For example, we now have at least two cases pending before the court on this subject. I heartily recommend enactment of this provision.

Concerning the extension of the strictures against command control to staff officers, I can honestly say that it is these overzealous individuals who are usually responsible for violations of article 37. Seldom does one see a case in which a military commander directly takes issue with a court-martial or attempts to interfere with it. Instead, we find in almost every instance a staff judge advocate tampering with the court in order to obtain a more favorable ratio of convictions and sentences. Case after case heard by the court indicates this, and I believe it imperative that the statute be amended expressly to reach the real source of trouble.

I equally favor express prohibition of unfavorable efficiency reports for defense counsel whose zeal in the performance of their duty earn the acrimony of their rating officer, but I believe the law should be further strengthened by its conversion to a punitive article and providing for the

mandatory dismissal of any officer who attempts so to pervert justice, or, as was originally proposed under the code, constituting such command control an offense punishable in the Federal courts under title 18.

We became expressly aware of this matter in *United States* v. *Kitchens*, 12 U.S.C.M.A. 589, 31 C.M.R. 175, where it appeared that the staff judge advocate retaliated against counsel's effort to serve his client by giving him a totally unsatisfactory efficiency report. I am informed our opinion in that case, reversing it on other command control issues, led to an investigation which established the accuracy of defense counsel's averment that the bad reports resulted from his defense of his client. Yet, to my knowledge, no action was taken by the Army against the offending staff judge advocate.

Recently, we had another case, *United States* v. *Perry and Sparks*, in which a senior staff judge advocate similarly gave extremely bad efficiency reports to two young defense counsel and had both of them transferred, one actually being relieved from active duty. Upon this becoming known, the Secretary of the Army ordered these cases reviewed in another jurisdiction. They were set aside on the basis of other errors, but a lengthy investigation of the matter again came to naught, with no action, to my knowledge, being taken. On the retrial, the new defense counsel was intimidated by the same staff judge advocate and ended up with an equally bad efficiency report for defending his client with vigor. Yet, despite this repetitive violation, we are aware of nothing that has been done.

The situation creates quite a dilemma for military justice. If the defense counsel, in the best traditions of our bar, ignores the efforts to influence him and stands up and fights for his client, he gets a bad efficiency report which can absolutely ruin his military career. Yet, the court can do nothing, for, if the influence is ineffective, the accused has had his day in court and there is no basis for reversal. That is what happened in the *Perry* and *Sparks* case. If, on the other hand, counsel is in fact fearful for his career, we will hear nothing about it, for the record will be totally silent in the matter. The dice, therefore, are loaded in favor of the sycophant, and something should and must be done by the Congress. As I suggested above, the specific deterrent of a punitive article and mandatory dismissal from the servie might have that effect, providing one can ever get a man who has violated the code in this manner brought to trial. To date, I understood there have been no such prosecutions. Thus, I suggest you may also wish to provide for civilian prosecution of this violation.

Senate bill 750 provides, inter alia, for legally trained counsel in all bad-conduct discharge cases. I very much favor this legislation. The public does not distinguish between dishonorable and bad-conduct discharges, nor between those awarded by a general court-martial or a special court-martial. Indeed, except in a relatively unimportant area, the Veterans' Administration makes no such distinctions in withholding veterans' benefits. The non-lawyers special court-martial cases we have received, all of which, at the appellate level, involve bad-conduct discharges, are frequently farcical. Where the penalty is so terrible and long lasting, the accused should receive the benefit of legally qualified counsel. The Air Force has recognized this by detailing lawyers to almost all bad-conduct discharge cases. The Army long age forbade the appointment of court reporters and preparations of verbatim records in special courts-martial, thereby prohibiting imposition of bad-conduct discharges except by general courts-martial. The Navy and Marine Corps should likewise be compelled to recognize what experience has taught the other services.

The provisions of Senate bill 750 regarding provision of counsel in administrative board hearings which consider the imposition of undesirable discharges is likewise commendable. As I have already noted, most of the Nation simply does not distinguish between an undesirable discharge and a punitive discharge. All have the effect of barring the individual concerned from most areas of employment and advancement. Steps should, therefore, be taken to insure that members of the service are given that due process of law in administrative proceedings which they would find in dealing with any other branch of the Government.

Senate bill 751 increases the time of petitioning for new trial from the present 1 year after the action of the convening authority to 2 years. Such is very necessary. A petition for new trial is an extraordinary remedy, designed to supplement and add to accused's normal appellate rights on special grounds. At the present time, appellate review is normally not completed by the time the 1-year period has expired. The remedy, therefore, frequently

becomes meaningless. The Federal rules of criminal procedure, rule 33, authorize a period of 2 years for such petitions on newly discovered evidence in the Federal courts. The same period should be made applicable in courts-martial.

At the same time, I wish to call the committee's attention to a controversy which has swirled about the Court of Military Appeals almost since its inception. That is the question whether it, as an appellate court, has the authority to entertain a writ of error in the nature of coram nobis and correct certain fundamental injustices in a court-martial which either could not be or were not found by it in the normal course of review. The United States has consistently denied we had such authority, except for a recent instance in which the accused had sought such a writ from the local Federal courts. Then, the Government urged the case properly belonged to us on a similar writ. The local judge so ruled, in effect, but when the case came before us, the Government switched its position and argued we did not have the authority to entertain it. As this case is still sub judice, I will not comment further on it, but it indicates a problem which should be resolved and I think it could be most suitably ended by an additional amendment to article 66 of the code to provide expressly that:

"The Court of Military Appeals shall have power to entertain a writ of error in the nature of coram nobis in all court-martial cases to which its appellate jurisdiction originally extended and grant such relief to the petitioner as it may deem required."

Senate bill 752 envisions the addition of a law officer to a special court-martial, with authority, as in the Federal courts, for the accused to waive trial by the court members and be tried by the law officer alone. In line with what I have said above concerning the imposition of bad-conduct discharges by special courts-martial and the serious nature of such a penalty, I believe such would be an advantage, if the bad-conduct discharge is to be authorized as a penalty. I suggest, however, that it is anomalous to permit an accused to be tried before a law officer alone in special courts-martial and not afford the same procedure for the military judge of a general court-martial, whose independence and capabilities the proposed bills otherwise reinforce. I believe the service representatives will bear me out in saying that the majority of general courts-martial now embrace guilty pleas made on pretrlal deals with the convening authority for a limited sentence. Much time and effort is now lost by the court members having to stand idly by during the law officer's in-chambers examination of the plea and the court's subsequent automatic voting on findings and deliberations on the sentence. All this could be eliminated by trial before the law officer alone, with him fixing the sentence as in our civil courts. In addition, it would seem much more judicial to me to have pleas entered before him and sentences imposed on the basis of the recommendation of the prosecutor (but not governed by such recommendation) than to continue in effect the present pretrial agreement whereby the convening authority "contracts" with the accused in advance for a certain limit on the sentence. This latter "contract" has undoubtedly led to improvident pleas by accused who fear a greater sentence more than the opportunity to be heard on their innocence. With these extensions, I support the concept of the law officer being applied in special courts-martial. I also strongly recommend enactment of the amendments to article 41, permitting him to rule finally on challenges. I suggest article 51 should also be amended to make final his rulings on mental competency to stand trial and the legal sufficiency of the evidence. These are questions for a judge, not the jury.

Senate bill 753 extends the appellate jurisdiction of the Court of Military Appeals to include appeals on legal issues from decisions of discharge review boards and boards on correction of military records regarding administrative discharges. If it were limited to due process questions, as is the case presently in the U.S. courts, I would have no objection to this enlargement of our jurisdiction. If not so limited, however, I believe we would be inundated with appeals to the detriment of our handling of the more serious court-martial questions. And, I wish to point out to the committee that legal issues seem rarely to be of import in these administrative proceedings, if the accused in fact has received a fair hearing. As I understand it, most of the controversy arises over the factual basis for an unsatisfactory discharge, particularly after the individual has been separated and finds how serious are the obstacles which he now faces. Moreover, I would remind the committee that the boards on correction of military records are empow-

ered also to set aside court-martial convictions and sentences, even though approved by the court on appeal. If the court's jurisdiction is to be so extended, then I suggest that its decision should be made expressly final and binding on the correction boards in order to avoid any doubts about the final disposition of these matters.

Senate bills 754, 756, and 758 provide further safeguards in administrative discharge proceedings. For the reasons already stated, I favor their enactment.

Senate bill 755 prohibits any member of a board of review from rating the efficiency of another board member. The purpose of this legislation is obvious, and it shocks me to find that these rating procedures have been followed in judicial bodies, whose independence ought to be unquestioned. I recommend the speedy implementation of this legislation.

Senate bill 757 authorizes a pretrial conference by counsel and the accused with the law officer of a general court-martial, to settle issues, interlocutory motions, and other matters, including the providence of guilty pleas. If, as I have suggested above, the law officer, upon application of the accused, is allowed to try him and sentence him alone, much of the impact of this section would be reduced. Nevertheless, the section itself will be of the greatest assistance in the speedy disposition of military criminal trials, for records now reflect that days are sometimes lost by court members who must stand around and wait while an out-of-court hearing settles some complicated interlocutory problem. As the boards of review and court will review the decisions taken in such conferences as a part of the record, there is no danger of abbreviating the accused's rights. I recommend the enactment of this procedure.

Senate bill 759 eliminates the summary court-marital. In light of the greatly increased powers of commanding officers under article 15 of the code, 10 U.S. Code § 815, it has become useless, for the commander, particularly if he is of field grade, may himself impose practically the same punishment as a summary court. If I recall correctly, it was the intention of those who sought these increased powers for the commander to do away with the summary court-martial. I think this should now be done.

Senate bill 760 extends the present subpena powers of courts-martial to pretrial investigating officers and administrative discharge boards. The former have suffered for years from being unable to summon witnesses for a general court-martial preliminary hearing. I suspect the latter will seldom need to have civilian witnesses, as they are usually concerned with military fitness. In any event, however, the power should be there to be exercised in case of need. I favor the amendments.

Senate bill 761 extends the jurisdiction of U.S. district courts to violations of the code by persons who have been discharged from the service without trial therefor (and who, by virtue of such discharge, are no longer subject to military jurisdiction), while Senate bill 762 extends such jurisdiction to civilian offenders who were camp followers at the time of their alleged crimes.

All these persons are now people who cannot be punished by law, though they may be admittedly guilty of serious crimes. For the most part, this power vacuum has existed since the Supreme Court's decision that one must have a military status to be subject to trial by court-martial, which struck down several civilians' convictions on the basis that a trial by court-martial deprived them of the right to indictment by a grant jury and trial by a jury. The proposed legislation will fill this void, afford such defendants in the future their constitutional rights, and make it improbable that they will escape deserved punishment. I wholly favor the new legislation.

In sum, then, I generally support the bills before the committee with the additional amendments which I have suggested—particularly that strengthening the penalty attached to violations of article 37 and those increasing the power of the law officer of a general court-martial. I believe they will do much to improve the administration of military justice, both in peace and war, as, in fact, did the code in the Korean war. We no longer deal with what I've heard called the old Army or Navy, or Air Force, but with what are really young armed services, made up of the flower of our youth, who either volunteered or were conscripted to defend their country and the rights it represents. In doing so, every effort should be made to see that they do not lose those same rights because they have donned the uniform.

Thank you for the opportunity to present this statement. I would be happy to appear and offer any additional information you may desire.

Judge FERGUSON. Judge Quinn indicated that some of the members of the court may not agree with him on the one question of giving power to the Military Court of Appeals of jurisdiction over the undesirable discharges or discharges not brought by court-martial.

I share his view in relation to the question of the importance and the real stigma and real harm that such discharges are and have been causing and, as I think I indicated in my statement, if the questions that reach our court were limited to jurisdictional questions or constitutional questions that we could probably handle the cases as we are handling them now.

My only idea was that I would not think it was good for the court or good for either the military or our citizens, the people, if our court got behind in the decisions that it is requried to render now under the law.

We are very fortunate, I think, that we are up-to-date and I think that speedy justice is a good thing if you are properly deciding the cases, giving them due consideration but most of these questions are of fact that would come up on these discharges. The questions of fact sometimes take a long time to get straightened out, and I just would think that if the fact-finding duty was given first to the board of review which will be renamed—I hope—indicating that they are courts and then some final review given to our court—we would not swamp the court in such a way as to interfere with the administration of justice.

Another subject that I might comment on is command control.

I think that the law should be improved on command control—that it doesn't apply only to the convening authority but that it ought to apply to the staff judge advocate or the judge advocate himself. It is a thing that is not easy to discover from the record as indicated by the questions counsel asked.

Command control is something that can happen but for the lawyer down below to be able to raise it sufficiently in the record to show that there has been a real command control is a difficult thing.

I share the view that there ought to be a penalty so that an officer could be directly disciplined for really exerting command control on the investigation of the court-martial or the lawyers in the case.

I think the Kitchen case was an example, and we have had cases since that that have disturbed me because of the nature of command control.

I hope that the committee and the Congress will deal with this question of command control.

Another question that comes up from time to time is the question of coram nobis, the right of this court to deal with the question, and giving the power to the court—definitely by congressional authority—to review its cases.

Now, the Government has indicated before the civilian court that it did apply in the military but before the Court of Military Appeals that it doesn't apply.

I think a definite statute would be good to settle this for all the courts now and for the military and probably among some civilian lawyers.

I think that is a question that ought to receive consideration by the Congress.

Senator ERVIN. Judge, is your view with respect to the undesirability of vesting in the Court of Military Appeals the power to review administrative discharges under less than honorable conditions based upon the premise that the workload alone might be such as to impair the work of the court?

Judge FERGUSON. Yes; that is correct. That is the only reason.

If there could be some way to act on those cases first screened by say the board of review, or an equal lower judicial process and not put them immediately in the stream of the court—let's say of military justice which the Court of Military Appeals now has the duty to oversee.

Senator ERVIN. I certainly share your view that you have just expressed on that point.

It would seem to me that there should be a channel of review.

In other words, above the administrative level there should be a requirement that it is first passed upon by an intermediate board. In any event I believe having too many cases impairs the capacity of the court to maintain a high quality of judicial work.

This is not something we really have to have too much to do with because I think the majority of the men who are separated from the service by administrative discharges less than honorable are men willing to take their discharges and in fact have been dealt with kindly rather than unjustly.

I have been impressed as a member of the Senate Armed Services Committee and also as a member of the subcommittee dealing with these questions with the high caliber of men serving on the boards of review and the high caliber of military lawyers. I think a great majority of the cases where the appeal was taken from an administrative ruling would be handled in an adequate manner by the board sitting as a court of review.

I believe if Congress would adopt suggestions made by Judge Quinn that the Court of Military Appeals not be required to review all appeals that might come from the board to the court but have the power to determine as a prerequisite that reasonable grounds for review or good cause must be shown, to use Judge Quinn's expression, that the number of cases would be small as compared with the number of administrative discharges given.

I think as time went by less appeals will appear simply because the courts will hand down authoritative opinions which would be accepted and followed by the boards and also those granting administrative judgments.

Judge FERGUSON. I may be wrong and I would hope that I am wrong about the number of cases that would come up—I do feel that the court now is examining all courts-martial properly and giving due consideration to many of the grave questions we have, many constitutional questions are presented from time to time.

But if the act requires the board of review—or whatever name they might give it—to make a finding of fact and a finding of law and then, in some way on good cause shown, it would come to the court by a proper screening, it would cut down the amount of work that the court might have to do. Also, the requirement that a lawyer must show good cause should be included and not like we do at the present time, merely say I appeal on the merits to justify the petition asking for appeal, even though the present rule of law is that he must show good cause.

The court has been very lenient along these lines and has looked at cases entirely rather than to take it just for granted that no cause exists if the man said I appeal on the merits or not cite any errors and merely file the petition.

I think some kind of factfinding which some States require when a judge passes upon a case could be used in this kind of a case.

Senator ERVIN. I certainly agree with you in the thought that persons are required to specify the basis on which the decision of review of the matter rests.

You cannot operate on any other basis. It would be impossible for the court to operate on any other basis.

Judge FERGUSON. I merely mention that Congress would want to deal with that kind of a problem.

I think generally the committee has done a fine job on bringing these bills to this action now before the committee. They are needed and it has been a real service and I hope that you can accomplish that service by getting it through Congress.

Senator ERVIN. I would certainly think a precedent established by one of our celebrated lawyers. Off the record.

Judge FERGUSON. I am a great believer in counsel. I think the duties of counsel require him to aid the court in every way he can so that the court is not just relying upon its own opinion but has the aid of counsel.

On the question of counsel I may say I am a great believer in the right of counsel for these men in the service. I think that before a man is disciplined, he ought to get counsel and I do not mean just an officer.

I mean a lawyer that has been admitted to a bar of repute who should be able to advice his client properly.

I also feel that same way on bad conduct discharges. Before a special court, a man should really have legal counsel before he gets a bad conduct discharge.

Senator ERVIN. That is a matter for Congress.

I would allow counsel to keep down the number of appeals.

I had the privilege of sitting on the appeals court in the State of which every one has a right to appeal as a matter of law and for the most part the lawyers were intellectually honest and I can say with a good deal of pride I think the court had the reputation of handing down decisions soon after argument. I would say your court is pretty nearly in that class, too.

I would hope to see an act of Congress in which the Court of Military Appeals would not lose its capacity to do the high caliber of judicial work that it has been doing.

Senator THURMOND. Judge Ferguson, we are delighted to have you here. As I understand it, most of the members of the court are together on most of these bills.

Judge FERGUSON. That is correct.

Senator THURMOND. Are there any points of difference or any significance of what it means?

Judge FERGUSON. I cannot recall any except the question that I have expressed here on the right of appeal and I give some reasons here today.

If the protections are had and the court is not swamped, then I would share their view.

I think we generally agree on the various questions.

I think we are in agreement on the other matters.

I have seen a trial judge being swamped. I was a judge on the bench where the trial of cases were 45 months and 13 days behind and I have always considered that a real denial of justice in many cases.

These men in the military are not on bond. We must remember that and they are entitled to a speedy trial along the lines you provide in the code that the Government charges must file within a certain length of time. That is a good thing and you even require our court to pass upon a petition within 30 days after it is filed.

Sometimes in July and August that isn't a good thing but I think it is a good law. I merely mention even in July and August, we must keep within the 30 days and I am not objecting to that law at all but I say give leeway in the summer—it may be better—we are getting along and doing it anyway.

Senator THURMOND. Again, thank you. I want to express my appreciation for the high standard for work you and the other members of the court are doing.

Senator ERVIN. We certainly appreciate your appearance and your kindness in giving the subcommittee the benefit of your observations and experience in this highly important field.

Thank you.

Judge FERGUSON. I am very glad to have been able to appear.

Senator ERVIN. The subcommittee will stand recessed until 2:30.

(Thereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 2:30 p.m., Tuesday, March 1, 1966.)

REPORT OF
THE JUDGE ADVOCATE GENERAL OF THE ARMY

January 1, 1966, to December 31, 1966

COURT-MARTIAL ADMINISTRATION

The number of persons tried by courts-martial for fiscal year 1966 (average strength total Army, 1,096,803) follows:

	Convicted	Acquitted	Total
General	1,386	90	1,476
Special	22,169	952	23,121
Summary	13,169	847	14,016
Total	36,724	1,889	38,613

Records of trial by general court-martial received by The Judge Advocate General during fiscal year 1966:

For review under article 66	1,123
For examination under article 69	293
Total	1,416

Workload of the Army Boards of Review during the same period (persons tried):

On hand at the beginning of period	90
Referred for review	*1,209
Total	1,299
Reviewed	1,092
Pending at close of period	207
Total	1,299

*This figure includes 18 cases which were referred to Boards of Review pursuant to Article 69, Uniform Code of Military Justice, and 22 cases on rehearing or reconsideration.

Actions taken during period 1 July 1965 through 30 June 1966 by Boards of Review:

Affirmed	719
Sentence modified	328
Rehearing ordered	1
Charges dismissed	12
Findings disapproved in part	5
Findings and/or sentence disapproved in part	22
Findings and sentence disapproved in part, rehearing ordered	5
Total	1,092

Of the 1,092 accused whose cases were reviewed by Boards of Review pursuant to Article 66 during the fiscal year, 782 (71.6%) requested representation by appellate defense counsel. Records involving 407 accused were forwarded to the United States Court of Military Appeals pursuant to the three subdivisions of Article 67b. Of these 407 cases, 402 were forwarded on petition of accused and five were certified by The Judge Advocate General.

The actions taken by the Court of Military Appeals on Army cases for fiscal year 1966 were as follows:

Opinions on petitions:	
Affirmed	26
Reversed	25
Certification:	
Affirmed	1
Reversed	3
Mandatory review:	
Affirmed	0
Reversed	0
Petitions denied	343
Petitions granted	53

During fiscal year 1966, 377,373 nonjudicial punishments were imposed under Article 15 of the Uniform Code of Military Justice upon a total of 171,365 persons. An additional 2,326 persons who refused punishment under Article 15 were tried by summary court-martial.

UNITED STATES ARMY JUDICIARY ACTIVITIES

In July 1966, the United States Army Judiciary in conjunction with The Judge Advocate General's School conducted a seminar for mobilization designees assigned as Law Officers to the United States Army Judiciary. In addition to the ten mobilization designees, five officers newly assigned as Law Officers to the United States Army Judiciary and two Law Officers from the Navy Trial Judiciary attended the seminar.

In October 1965, a new Judicial Circuit (Area VII, Circuit 22) was created in Vietnam. Its present strength is two Law Officers.

Complying with the mandate of Article 6(a), Uniform Code of Mil-

itary 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.

LEGISLATION AND MILITARY JUSTICE PROJECTS

Hearings on pending Senate legislation (discussed in the 1965 Annual Report) were held in January and March, 1966, before joint sessions of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, and a Special Subcommittee of the Senate Armed Services Committee. Brigadier General Kenneth J. Hodson, Assistant Judge Advocate General for Military Justice, Department of the Army, testified in behalf of the Department of Defense concerning the military justice aspects of that legislation. No legislation was reported out of committee as a result of those hearings during the 89th Congress, but a bill is expected to be reported out of committee in the Senate early in the 90th Congress. On 11 July 1966, Representative Charles E. Bennett of Florida introduced a bill in the House (H.R. 16115, 89th Congress) incorporating most of the substantive provisions of the Senate bills and the Department of Defense sponsored bills generally known as the "G" and "H" bills. Those two bills were previously introduced as H.R. 273 and H.R. 277, 89th Congress. The Army was assigned responsibility for preparing the Department of Defense report on H.R. 16115. The proposed report is being staffed within the Department of Defense.

In early 1966 a new departmental policy was adopted concerning the filing and disposition of records of nonjudicial punishment imposed under Article 15 of the Uniform Code of Military Justice. The main purpose of the new policy, which is reflected in appropriate changes to AR 27–15 and other directives, is to limit to one year the time in which records of nonjudicial punishment may be considered in connection with promotion of the person punished. Further, the officer imposing punishment may preclude use of the record of punishment in any promotion action by an appropriate statement on the face of the record.

PERSONNEL

The 67 officers appointed in the Regular Army during fiscal year 1966 more than offset the loss of 49 officers, a loss rate that will continue for the next few years. At the end of the 1966 fiscal year, the Regular Army strength was 557 and career-reservists numbered 82; a total of 1,203 officers were on active duty, the balance being three and four year "obligated tour" officers. I am hopeful that a continued high rate of Regular Army appointments will bring our career-officer strength closer to the authorized Regular Army strength of 786.

The need for legal services in Vietnam has brought our strength there to 85 judge advocates. These Vietnam increases, together with greater

CONUS requirements at training centers and service schools, will bring our procurement for fiscal year 1967 to 350 officers—an increase of 200 over fiscal year 1966. At present, the supply of well-qualified applicants for commissioning in The Judge Advocate General's Corps is so much greater than our requirements that only those candidates who agree to serve on active duty for four years are selected.

The Excess Leave Program, by which up to 35 young career officers are selected each year to attend law school at their own expense and without military pay or allowances, is now our largest source of Regular Army officers. Competition for selection under this program is keen; approximately three highly qualified applicants apply for each vacancy. During 1966, 34 officers joined our Corps after obtaining their law degrees under the Excess Leave Program.

EDUCATION AND TRAINING

The Judge Advocate General's School, United States Army, provided resident instruction for 880 students during the calendar year 1966. This instruction was presented in 15 courses.

Two cycles of the 10-week basic course (formerly called the special class) were completed during 1966. The 44th Special Class of 69 students, including two allied officers from Iran, was graduated on 22 April. The 45th Basic Course of 127 students, including three Royal Thai Army officers, one Republic of China officer, and one Republic of Korea officer, was graduated on 21 December.

The Fourteenth Judge Advocate Officer Career Course (now known as the Advanced Course) was graduated from the School on 20 May 1966. Among its 31 officer students were two officers from Iran and one from Argentina. The Fifteenth Advanced Course began its class of instruction on 6 September 1966 and will be graduated from the School on 19 May 1967. It is composed of 28 students, including one officer from the United States Navy and two officers from the United States Marine Corps.

In addition to these two general courses, a number of short functional courses were conducted during the calendar year 1966. These courses were: Law in Vietnam; Procurement Law (three cycles); Civil Law; Civil Affairs; International Law; Foreign Law; the Judge Advocate Refresher Course; Military Justice; Military Affairs; and the Law Officers' Seminar. Attendance numbered over 525 students, including representatives from the Navy, Marine Corps, Air Force, Coast Guard, National Aeronautics and Space Administration, Department of Defense, National Science Foundation, Federal Aviation Agency, National Security Agency, Post Office Department, General Accounting Office, and the Department of Commerce.

Five issues and an index to the *Procurement Legal Service* were published and distributed in 1966. Twelve issues are planned for calendar

year 1967. In addition, two texts have been revised and published, DA Pam 27–11, *Military Assistance to Civil Authorities*, and DA Pam 27–187, *Military Affairs*.

A Judge Advocate General's Reserve Component Training Conference was held at the School from 7 to 9 February 1966. Participants included the Assistant Executive for Reserve Affairs, Office of the Judge Advocate General; the Legal Advisor of the National Guard Bureau; the Deputy Staff Judge Advocate, Continental Army Command; and representatives from the five continental Armies.

Four issues of the *Military Law Review* were published during 1966, including the Annual Survey of Military Justice which was included in the April issue. The 1966 Review contained articles with topics ranging from "The Code of Conduct in Relation to International Law" to "Judicial Review in Military Disability Retirement Cases." Other articles concerned foreign military law, the law of war, appellate procedure and the settlement of claims.

During the calendar year, 33 issues of the Judge Advocate Legal Service were published. The Legal Service insures that judge advocates are aware of all recent developments which may affect the military legal field by digesting pertinent opinions of the United States Court of Military Appeals, the boards of review, and civilian courts.

Another project of the School was to provide script coordination and technical advice during the filming of the new training film, "The Uniform Code of Military Justice." This film will be shown to all soldiers when they enter on active duty.

ROBERT H. MCCAW,
Major General, USA,
The Judge Advocate General,
United States Army.

REPORT OF
THE JUDGE ADVOCATE GENERAL OF THE NAVY

January 1, 1966, to December 31, 1966

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 1966, contains, unless otherwise indicated, statistical information covering fiscal year 1966.

Complying with the requirements of Article 6(a), Uniform Code of Military Justice, the Judge Advocate General visited overseas bases in the Pacific and Western Pacific areas, the Deputy Judge Advocate General visited overseas bases in Europe, 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.

Courts-martial of all types—general, special and summary—convened within the Navy and Marine Corps totaled 26,936 in FY 1966 as compared with 24,565 in FY 1965. This is a definite reversal of the downward trend in courts-martial cases which has existed for several years. The increase is principally in special courts-martial, in which bad conduct discharges were not adjudged, and in summary courts-martial. The indications are, therefore, that the increase in misconduct has been principally in the misdemeanor category. The presence of substantial numbers of Navy and Marine Corps personnel in the combat area of Vietnam has apparently not contributed to this increase. As a matter of fact, although the total number of cases in Vietnam has materially increased along with the large increase of personnel in that area, the current fiscal year rates per thousand of serious offenses in Vietnam has been invariably lower, and in some cases substantially so, than rates for the same period in all locations other than Vietnam.

Navy Boards of Review received for review during FY 1966 249 general courts-martial and 2,141 special courts-martial as compared with 264 general courts-martial and 2,158 special courts-martial during FY 1965. Of the 2,390 cases received by Boards of Review during FY 1966, 60% of the accused requested counsel (1,311 cases). A more detailed statistical report is attached as Exhibit A.

As mentioned in my last report, the administration of military justice under the combat conditions of Vietnam has been watched carefully to determine whether any of the procedures and concepts which were new to the Navy and Marine Corps with the Uniform Code of Military Justice are infeasible or have a seriously adverse impact upon the conduct of combat operations. Initial indications are that if the legislation proposed in the "G" and "H" bills (discussed in the 1964 annual report), together with other minor changes in the law which are presently being studied by the Navy and Marine Corps, should be enacted, the Uniform Code of Military Justice will be a most workable instrument during periods of limited war.

As mentioned in my previous reports, an Ad Hoc Committee consisting of representatives of the Judge Advocates General of the Army, Navy and Air Force has been preparing an updated Manual for Courts-Martial with a view to having it published in loose-leaf form. With very few minor reservations, the Judge Advocate General of the Navy has approved the new draft of the Manual except for the chapter on Rules of Evidence, redraft of which has not yet been fully completed by the committee. An early resolution of all remaining differences of opinion is anticipated.

The Secretary of the Navy's Task Force on Military Personnel Retention recommended and the Secretary of the Navy approved this year 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. The necessity for such centers is to be found in the substantial increase of legal workloads which has occurred in recent years and which promises to develop into a "legal explosion" in the not too distant future.

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 this year. Inasmuch as a total of 281,200 active duty naval personnel, retired naval personnel, and dependents of each are located in the Norfolk complex, this location was considered most appropriate as a testing area for the untried organization, procedures and policies of the new law center. It is anticipated that the test and evaluation period will extend for approximately six months.

During the last year, a Joint Subcommittee of the Committees on Constitutional Rights and Armed Services of the Senate conducted extensive hearings regarding 18 bills variously pertaining to military justice. The Judge Advocate General personally attended and testi-

fied during these hearings. Additionally, answers to two extensive questionnaires regarding various aspects of military justice and administrative discharge procedures were submitted by the Judge Advocate General after coordination of replies with the Navy and Marine Corps. Although an omnibus military justice bill was introduced in the House of Representatives no hearings were conducted.

The U.S. Navy-Marine Corps Judiciary Activity, in operation since 1 July 1962, has continued to provide specially selected officers to sit as law officers on all general courts-martial convened within the Naval Establishment. The complement of judiciary officers assigned to the East Coast has been reduced by one officer because of the decrease in general courts-martial convened in Naval Districts on this Coast. The general court-martial case-load serviced in the Western Pacific shows a marked increase during 1966, due to the military build-up in Vietnam. In May 1966, a branch office was established in Vietnam. This office has proven to be of significant assistance in disposing of general court-martial cases convened in that area. A surveillance of the case-load in the Western Pacific is maintained regarding the possible need for the assignment of an additional judiciary officer to that area.

The Navy-Marine Corps judiciary program of providing specially selected officers to serve as law officers continues to be effective and efficient. With less experienced law officers, the need for corrective action due to legal errors would, in all probability, have been substantially greater, to the detriment of military justice. In addition to the foregoing, judiciary officers serve as presidents of special courts-martial when their respective GCM dockets permit. This also contributes to the overall improvement in the quality of military judicial proceedings.

The U.S. Naval Justice School, operating under the technical supervision of the Judge Advocate General, continued to offer intensive instruction in the fundamental principles of military justice. During the fiscal year, the School afforded instruction in military justice, legal clerk duties and court reporting for a grand total of 2,297 officers and enlisted personnel of all the armed forces. Six regular seven weeks' classes were convened at the Justice School in Newport, Rhode Island, and one class was convened at Camp Pendleton, California. Six hundred thirteen officers of the Navy, Marine Corps and Coast Guard completed the regular non-lawyer courses of instruction offered by the Naval Justice School during the fiscal year. Two hundred ten officer lawyers of the Navy, Marine Corps and Coast Guard completed the seven weeks' officer lawyer course referred to in my report of last year. Four hundred thirty-four enlisted members of the Army, Navy, Air Force, Marine Corps and Coast Guard were trained to perform legal clerk and court reporting duties for their respective sevices. Fifty-three enlisted and civilian personnel, principally Army, received train-

ing in closed microphone court reporting. Six hundred fifty-seven officers of the Navy, Marine Corps and Coast Guard were given instruction specifically designed to meet the needs of senior officers, and three hundred thirty junior line 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.

WILFRED HEARN,
Rear Admiral, USN,
The Judge Advocate General,
United States Navy.

EXHIBIT A

Fiscal Year 1966

General courts-martial:	
Received for review under article 66	249
Received for review under article 69 and acquittals	106
Total	355
Special courts-martial:	
Received for review under article 66	2,141
Received for review under article 65c	0
Reviewed in the field	12,506
Total	14,647
Summary courts-martial:	
Received for review under article 65c	0
Reviewed in the field	11,934
Total	11,934
Total all courts-martial	26,936
Board of Review actions:	
On hand for review 1 July 1965	143
Received for review during FY 1966	2,390
Total on hand	2,533
Reviewed during FY 1966	2,411
Pending review on 30 June 1966	122
Total	2,533
Findings modified by boards of review during FY 1966	98
Requests for appellate counsel	1,311
Court of Military Appeals actions:	
Petitions forwarded to USCMA	229
Cases certified to USCMA by JAG	5
Total cases docketed with USCMA	234
Petitions granted by USCMA	42
Petitions denied by USCMA	193
Total petitions acted upon by USCMA	235

REPORT OF
THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE

January 1, 1966, to December 31, 1966

1. Colonel James S. Cheney, the Director of Military Justice, was promoted to the grade of Brigadier General, effective 1 June 1966, and has continued to serve as Director.

2. In accordance with the provisions of Article 6(a), Uniform Code of Military Justice, Major General Robert W. Manss visited Air Force legal facilities at overseas bases in the United States Air Forces in Europe, the Pacific Air Forces, the Alaskan Air Command and numerous bases within the United States. Brigadier General William H. Lumpkin inspected the legal activities of bases in the United States. Both Generals Manss and Lumpkin attended Bar Association meetings, and addressed numerous civic, professional, and military organizations during the year. The Judge Advocate General hosted a world-wide Major Command Staff Judge Advocates Conference at Headquarters United States Air Force in November 1966.

3. 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 1966, is shown in the following table:

Total number records received	524
For review under article 66	425
General court-martial records	166
Special court-martial records	259
Examined under article 69	99

The Boards of Review modified the findings and/or sentence in 68 cases.

b. The workload of the Boards of Review was as follows:

Cases on hand 30 June 1965	67
Cases referred for review	425
Total for review	492
Cases reviewed and dispatched	437
Cases on hand 30 June 1966	55

c. During the fiscal year 71.7% 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 United States 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	437
Number cases forwarded to USCMA	152
Cases petitioned	150
Cases certified	2
Percent total forwarded of total cases reviewed	34.8
Petitions granted	16
Percent grants of total petitioned	10.7
Percent petitions granted of total cases reviewed by Boards of Review	3.7

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

General courts-martial	258
Special courts-martial	1,825
Summary courts-martial	1,232
Total	3,315

4. Reportable Article 15 Actions, FY 1966.

	Number of cases	Percentage of total number of cases
Total cases	26,251	
Officers	268	1.0
Airmen	25,983	99.0
Punishments imposed: [1]		
Officers	227	
Airmen	44,231	
Restrictions (over 14 days):		
Officers	6	2.2
Airmen	4,418	17.0
Correctional custody:		
Airmen	4,521	17.4
Extra duties (over 14 days):		
Airmen	2,570	10.0
Reduction in grade:		
Airmen	17,404	67.0
Forfeiture of pay:		
Officers	98	36.6
Airmen	14,504	55.8

See footnotes at end of table.

	Number of cases	Percentage of total number of cases
Punishments imposed—Continued		
Detention of pay:		
Officers	0	0
Airmen	79	.3
Written reprimand:		
Officers	123	45.9
Airmen	735	2.8
Mitigating actions:		
Appeals taken	1,050	[2] 4.0
Officers	15	----------
Airmen	1,035	----------
Appeals denied	892	[3] 85.0
Officers	14	----------
Airmen	878	----------
Suspension of punishment	8,738	[2] 33.3
Officers	6	----------
Airmen	8,732	----------
Other action	1,470	[2] 5.6
Officers	2	----------
Airmen	1,468	----------

[1] Break-out by officers and airmen not reported until last 6 months of FY 1966.
[2] Of total cases (26,251).
[3] Of appeals taken (1,050).

5. During 1966, the Air Force continued its long established policy of furnishing qualified lawyers to all persons tried by special courts-martial. This policy was conceived and has been adhered to in line with the Air Force theory that an enlightened and progressive administration of military justice will, on a long-range basis, enhance the status of military discipline. It is believed that the very low, and still decreasing, court-martial rate in the Air Force bears out this theory. Inasmuch as court-reporters are also employed in Air Force special court-martial trials, bad conduct discharges adjudged by such tribunals may be approved, if determined to be appropriate. As there is a substantial difference in the disabilities suffered under a bad conduct discharge adjudged by a special court-martial and one adjudged by a general court-martial, the full and proper employment of special courts-martial redounds to the benefit of those accused airmen whose conduct warrants punitive discharge, but not the additional disabilities resulting from trial by general court-martial. Summary

courts-martial in the Air Force are rarely utilized as an original course of action, but are generally convened only when an accused demands trial upon being offered punishment under Article 15. Since appearance before a summary court-martial is thus an elective action, and since counsel is furnished before special and general courts-martial, it is rare that an accused person in the Air Force is involuntarily brought to trial before any court-martial without qualified legal representation.

6. Another important result of this policy is that a considerable number of special court-martial cases must be reviewed by a Board of Review in the Office of The Judge Advocate General. This review affords an insight into the conduct of special court-martial cases generally and a review of the quality of justice dispensed by such courts. This information has proved invaluable to me in the discharge of my statutory responsibilities of supervising the administration of justice in the Air Force and insuring high quality in that administration.

7. The Air Force has not adopted the so-called "field judiciary" concept being tested by some of the other services. The status of discipline in the Air Force has progressed to such a high degree that the number of general courts-martial convened within the Air Force make such an operation economically unfeasible. Only 258 general court-martial cases were tried in the Air Force during 1966. Under the Air Force system a much larger number of officers receive valuable experience serving as law officers than would be so under a field judiciary system. Such a cadre of experience will facilitate rapid expansion in the event of a build-up in Air Force strength. There has been apparent no loss of efficiency, and no impairment of the judicial process under the Air Force system. Additionally, experience as law officer enhances the judge advocate's development, growth and capacity in other aspects of his work. Nevertheless, the Air Force does periodically re-examine its position on the desirability and practicality of a judiciary system, as well as of other methods and procedures, to determine if such other methods of operation would produce a better result. Where changed environments, conditions and circumstances indicate the feasibility of changes, the Air Force responds promptly to insure the continuation of an enlightened administration of military justice.

8. The Air Force responded promptly to recent decisions of the Supreme Court to insure that accused airmen receive the protection of Constitutional rights accorded the civilian populace. Pending clarification of the application in military law of the principles laid down by the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 Sup. Ct. 1772, decided 13 June 1966, all Air Force investigators were directed to comply with the rules established by the Supreme Court in that decision. Staff Judge Advocates were directed to furnish a qualified lawyer to all military suspects who requested

counsel upon being advised of that right during investigation. This action caused little change in the Air Force, for in 1964 the Air Force had adopted a policy of having its investigators advise an accused, at the outset of any interrogation, of his right to consult counsel. To obtain clarification of the application of Miranda in military law, the decision of the Board of Review in the case of Airman Michael L. Tempia (ACM 19638), tried on 14 June 1966, in which certain issues involving the application of Miranda were raised before the Board of Review was certified to the Court of Military Appeals on 23 November 1966.

9. Numerous methods were utilized to keep Air Force judge advocates throughout the world currently informed of legal and other pertinent developments. Distribution was made weekly of decisions of the Boards of Review and the Court of Military Appeals. Publication of the JAG Reporter was continued. This is a technical internal publication containing digests of opinions of the Boards of Review and the Court of Military Appeals, so prepared that the sheets may be divided and kept in standard card files. Other opinions, notices and directions are also contained in this publication. Recurring Errors Letters and Special Subject Letters are disseminated to all judge advocates for their guidance in military justice matters.

10. Publication of the Air Force *JAG Law Review*, now in its eighth year, was continued. In addition to its distribution within the Air Force and the Department of Defense, the *Law Review* is also distributed to about 170 law libraries throughout the country. The Superintendent of Documents considers the *Law Review* to have sufficient public interest and educational value to warrant its inclusion on the select list of Government publications for distribution to depository libraries (PL 87–579). It is currently furnished to and maintained at more than 250 such depository libraries on behalf of the Superintendent of Documents.

11. The *JAG Law Review* is thus a potent medium for dissemination of information on military law. The May–June 1966 issue (Vol. VIII, No. 3) was a Special Military Criminal Law Issue, containing nine highly informative articles on matters of contemporary interest in the military justice area. These articles were prepared by officers and lawyers of the Military Justice Directorate of the Office of The Judge Advocate General. Examples of the subjects treated were "Time of War and Vietnam," "Trial Preparation and Trial Briefs in Courts-Martial," and "Air Force Clemency and Rehabilitation."

12. To assist judge advocates in their law officer work, the Air Force during the year undertook the preparation of a completely new and comprehensive law officer instruction guide. This manual will be published in the first quarter of calendar year 1967. In another effort to improve the performance of Air Force judge advocates,

preparation of an orientation and indoctrination course for newly commissioned judge advocates was commenced. This course consists of a series of monographs to be studied and lessons to be completed by such new officers as they undergo on-the-job training under the guidance of trained supervisors. It is anticipated that this course will be in use in the second quarter of calendar year 1967.

13. Enactment of the bills discussed in the current Joint Report, and in the reports for previous years, as the "F", "G", and "H" Bills, will markedly improve military justice procedures and, as a result, the quality of justice. I hope, and I strongly recommend, that measures embodying the substance of these bills will be enacted by the current Congress.

14. The Office of The Judge Advocate General has continued to supervise and arrange, on behalf of all of the Armed Services, for the publication of Decisions of the United States Court of Military Appeals and Selected Decisions of the Boards of Review of all the Services in the Court-Martial Reports. The same service was also performed in regard to publishing legal opinions of the Armed Services and opinions of the Army and Air Force Exchange Service in the Digest of Opinions.

15. On 30 September 1966, there were 1,247 Judge Advocates on active duty. Of these, 675 were members of the Regular Air Force, 171 were Career Reserve officers, and 401 were Reserve officers with established dates of separation. The Regular officer strength decreased by 12 between 30 September 1965 and 30 September 1966.

16. At the close of the period of this report, there were 79 commands exercising general court-martial jurisdiction.

ROBERT W. MANSS,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

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

January 1, 1966, to December 31, 1966

The following is the 15th annual report of the General Counsel of the Treasury Department submitted pursuant to Article 67(g) of the Uniform Code of Military Justice. It is also his final report since the Coast Guard will soon be transferred from the Treasury Department to the new Department of Transportation established by Public Law 89–670 approved October 15, 1966. Accordingly, this report contains a summary of the figures relating to the total court-martial business of the Coast Guard under the Treasury Department.

From the effective date of the Code, 31 May 1951, to the close of fiscal year 1966, the records of 11,965 courts-martial tried or reviewed under the UCMJ were received at Coast Guard Headquarters. These comprised 181 general courts-martial, 2,912 special courts-martial and 8,872 summary courts-martial.

Of the cases received during this period, 669 were reviewed by the Coast Guard Board of Review pursuant to the provisions of Articles 66 and 69 UCMJ. Fifty-six Board of Review decisions were submitted for further review to the United States Court of Military Appeals, 50 by petition of the accused and six by certificate of the General Counsel. All six Board of Review decisions certified by the General Counsel were affirmed by the Court of Military Appeals. Of the 50 petitions for grant of review, the Court accepted eight and denied 42. In the eight cases accepted by the Court, the action of the Court affirmed two and remanded five; one case is now pending. Although opinions of the Court of Military Appeals in cases originating in the Coast Guard constitute less than one percent of the body of opinions published by the Court, some leading cases are numbered among them, including *United States* v. *Rinehart*, 8 USCMA 402, 24 CMR 212; *United States* v. *Yerger*, 1 USCMA 288, 3 CMR 22; *United States* v. *Allbee*, 5 USCMA 448, 18 CMR 72; *United States* v. *Nichols*, 2 USCMA 448, 18 CMR 72, and *United States* v. *Merrow*, 14 USCMA 265, 34 CMR 45. A total of 254 Coast Guard case decisions have been published in the 35 volumes of the official Court-Martial Reports which have appeared during this period.

Under the provisions of Articles 26 and 27 of the Code, 264 lawyers have been certified as qualified for duty as law officers or as trial and

defense counsel for general courts-martial. Of this number only 61 are presently on active duty. The Coast Guard, unlike the other services, does not have a separate judge advocate corps or branch; the majority of its lawyer-officers occupy non-legal billets, and they may not always be available for court-martial assignments. During the past fiscal year, 12 young lawyers were commissioned as lieutenants (junior grade) in the Coast Guard Reserve for active duty in newly established legal billets.

Over the years the Coast Guard has consistently sought to provide enlisted persons tried by special court-martial with qualified attorneys. In Law Bulletin 264 of March 1958, commanding officers in the field were informed that Coast Guard Headquarters would, upon request, furnish lawyers for both the prosecution and the defense in other than routine cases. In the past fiscal year 60% of the accused tried by special court-martial were represented by lawyers; in 80% of the cases in which a bad conduct discharge was adjudged, the accused had lawyers; in only one case reaching the Board of Review did the accused *not* have a lawyer.

In the fiscal year ending June 30, 1966 there were received at Coast Guard Headquarters the records of three general courts-martial, 95 special courts-martial and 212 summary courts-martial. Fourteen cases were referred to the Board of Review. During the year, three cases were docketed with the Court of Military Appeals.

The table below shows the number of cases received in each of the last five years:

	1966	1965	1964	1963	1962
General courts-martial	3	1	3	6	4
Special courts-martial	95	95	89	139	148
Summary courts-martial	212	231	255	448	683
Total	310	327	347	593	835

In the 98 principal cases (general and special courts-martial) the accused had professional counsel in all but 38 instances; 16 of these were cases tried aboard ship or overseas. Sixty-four lawyers participated as defense counsel in 60 cases; 54 were Coast Guard officers, six were civilians, three were Navy judge advocates and one was an Air Force judge advocate.

There were 94 convictions and four acquittals; two of the acquittals were gained by non-lawyers. Of the 94 convictions, 51 were guilty plea cases. In 23 of the guilty plea cases, the accused had a pretrial agreement; eight of these were negotiated by non-professional defense counsel.

A sentence was adjudged in 93 of the 98 cases. The punishment was either reduced, commuted, suspended or disapproved, in whole or in part, by the convening authority or by subsequent authority in 60 instances—64% of the sentence cases.

Of the 14 Board of Review cases, 10 were contested and four were guilty pleas. The Board of Review set aside the findings and sentence in two cases, and disapproved the bad conduct discharge in two others, one of which was a guilty plea case. The accused petitioned the Court of Military Appeals in two of the current 14 Board of Review cases; the Court denied one and granted the other, which remains pending.

Bad conduct discharges were adjudged in 15 trials. One was disapproved by the convening authority; one was set aside by the supervisory authority and four were disapproved by the Board of Review. Of the remaining nine, one was commuted to a different punishment, four were remitted on probation by the convening authority, and one was suspended by the General Counsel. Thus only three punitive discharges survived the appellate process unsuspended.

On June 13, 1966 the Supreme Court handed down its decision in *Miranda* v. *Arizona*, 348 U.S. 436, 86 S. Ct. 1662, enunciating concrete constitutional guidelines for the interrogation of persons suspected of crime. On June 15, district legal officers of the Coast Guard were advised that in view of the *Miranda* decision, whenever an Article 31 warning was given, the suspect so warned was also to be informed that he had a right to consult a lawyer before being questioned, and to be told specifically: "You have the right to have the lawyer or the counsel designated for you present with you during the interrogation." The Coast Guard was thus the first armed force to embrace the *Miranda* rules.

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