

UNITED STATES
COURT OF MILITARY APPEALS COMMITTEE
REPORT

January 27, 1989

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I. **The Committee, Its Composition and Charter**

In October 1987, the United States Court of Military Appeals reestablished a Court Committee to study and make recommendations concerning the "Court's statutory role and mandate, status, organization, size, staff, administration and operations." A Court Committee had been initially established in 1953 and had provided valuable input into the Court's early years of operation. In determining to reestablish the Committee, the Court noted major developments in military justice and expressed the hope that the Committee would present valuable suggestions and recommendations which in turn "will be used by the Court in evaluating and improving its own administration and operations." 25 M.J. p. XCIX (Announcement of Court Committee)(See Appendix A).

The Committee, chaired by Associate Dean and Professor James Taylor, Jr., includes: Mr. Wayne J. Carroll; Mr. Robert M. Duncan; Professor A. Leo Levin; Professor Robert B. McKay; Professor Daniel J. Meador; Mr. Russell A. Rourke; Professor Stephen A. Saltzburg; and Mr. Henry J. Steenstra; the Reporter, Professor David A. Schlueter; and the Executive Assistant to the Committee, Mrs. Linda J. Michalski.

Over a period of 12 months the Committee met six times to consider written submissions and oral statements by a wide variety of individuals who have worked at the Court as judges or staff, and others, both civilian and military, who by the nature of their work have come in contact with the Court. The Committee also interviewed the judges of the Court and considered a lengthy report released by the Department of Defense (DOD) in July 1988 on the issue of Article III status for the Court.

In addressing the wide range of potential issues concerning the Court, the Committee condensed the areas of inquiry into the following:

1. Whether the Court has performed its intended role;
2. The relationship between the Court and the Department of Defense;
3. Appointment of judges, tenure, and designation of the chief judge;
4. The size of the Court;

5. The organization, function, and role of the Court's staff;
6. The Court's workload; and
7. Article III status for the Court.

The following discussion focuses on each of those subjects and provides the basis for the Committee's recommendations which follow.

II. Whether the Court Has Performed Its Intended Role

A. General

At the end of World War II, during which massive numbers of American citizens had experienced firsthand the military justice system, there was a hue and cry for reform. Schlueter, Military Criminal Justice: Practice and Procedure, at § 1.6 (2d ed. 1987). In responding to those complaints, Congress in 1950 enacted a comprehensive Uniform Code of Military Justice (U.C.M.J.) which was intended to create a fair system of justice with a civilian court at the top to guarantee that fairness. Viewing the Court's mandate in that broad sense, it is clear that the Court has performed the role intended by Congress.

The Court has filled a perceived need to exercise some detached, and in the minds of some, the only "legal" and impartial review of courts-martial convictions. Some of the early opinions of the Court reflect appreciation for the fact that in some military circles, such innovative and direct civilian review was unwanted. Nonetheless, it recognized the Congress' intent to effect changes within the system:

As we have stated in previous opinions, we believe Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system. Believing this, we are required to announce principles consistent therewith. United States v. Clay, 1 C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

Although in some instances the Court seemed to work around the edges of military justice as it felt its way into a sometimes hostile system, it also seemed mindful of comments made by several members of Congress that the new Court should be "strong" lest the system not be responsive to the Court's "recommendations." House of Representatives, Committee on Armed Services, Subcommittee No. 1, April 4, 1949, at p. 1271.

As some have observed, military justice has matured in the intervening decades. Judge Kenneth Ripple, Foreword to Military Criminal Justice: Practice and Procedure, *supra*. That is due in large part to the responsible leadership role the Court has assumed, especially in the last decade. In this maturing process, which in some respects demonstrates a "judicialization" of military justice, the Court has struggled with some difficult issues: Its place in interpreting applicable Supreme Court precedent; and resisting calls for change in the Court's structure and role when it seemed to "civilianize" military justice.

The maturation process is also due in part to the fact that the military justice system itself has become more sophisticated. In many instances it now mirrors the practice in federal criminal trials. The role of well-trained judge advocates has undoubtedly also contributed to forging the modern system. Increasingly, the applicable rules of evidence and procedure place a greater burden on counsel to raise issues or waive them. And as the Court itself has recognized, the role of the military judge has expanded -- in some instances at the suggestion of the Court. *See, e.g., Bouler v. Wood*, 1 M.J. 191 (C.M.A. 1975). Whether the original drafters of the 1950 Uniform Code of Military Justice actually envisaged the Court as it stands today is difficult to say. But as Federal District Judge Wayne Alley, one of the respondents to the Committee's inquiries, stated:

Despite grumbling about particular decisions within the military, there never was an effective or organized mutiny against the Court. Its dominant position in military justice is now so well imbedded that it is simply an accepted fact of institutional life.

Given the rather broad mandate from Congress in Article 67, U.C.M.J. to review certain opinions of the service appellate courts, now the Courts of Military Review, it is not surprising that the Court has assumed some latitude in implementing that mandate and fulfilling the intent of the drafters.

B. Specification of Issues for Review

In fulfilling the role of providing independent review of records of trial by courts-martial, the Court early in its existence adopted the internal policy of providing especially close scrutiny of each case with a view toward specifying issues for further briefing and argument which had not been raised by appellate counsel. Rules 5 (Scope of Review) and 19(d)(Supplement to Petition for Grant of Review) of the Court's Rules expressly provide for specifying issues.

The Committee recognizes the value of careful appellate review by the Court of the decisions of the lower courts -- both trial and appellate. See Everett, Specified Issues in the United States Court of Military Appeals: A Rationale, 123 Mil. L. Rev. 1 (1989); Early and Longstreet, USCMA and the Specified Issue: The Current Practice, 123 Mil. L. Rev. _ (1989). There is a real concern, however, that this approach reflects skepticism about the quality of military justice, creates frustration among both the bench and the bar, and contributes significantly to needless appellate delay. This practice, coupled with the perception that the Court pays too little attention to the work product of the service appellate courts, has created, in the Committee's view, some tension between the Court and the Courts of Military Review. The value of specifying issues seems even more questionable in light of the fact, as recognized in the foregoing articles, that in very few of those cases is any significant relief actually granted to the defendant. See also Fidell and Greenhouse, A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals, 122 Mil. L. Rev. 117 (1988). Moreover, it adds substantial work on the part of appellate counsel in briefing the specified issues, largely futile, in cases in which the result is not affected.

The practice of specifying issues for review has taken on a life of its own in that one of the tasks of the Court's central staff is to identify such points. Although the Court's annual statistical reports indicate that in FY 87 and FY 86 the percentage of cases in which the Court specified an issue was approximately 20 percent, in FY 84, 31 percent of the cases decided contained specified issues and in FY 85 the figure was 54 percent. See generally Fidell, The Specification of Appellate Issues by the United States Court of Military Appeals, 31 JAG J. 99 (1980). In specifying issues, the Court has gone far beyond the practice of any other appellate court in raising questions on its own motion.

There is certainly some value in assuring Congress and the public at large that the military justice system is receiving thorough scrutiny from civilian judges. See Everett, *supra* and Early and Longstreet, *supra*. And it is usually prudent for an appellate court to be sensitive to emerging issues which may not be known to either the trial or appellate courts. But such emerging issues are rare. This practice should be reevaluated with a view toward expediting review and limiting the specification of issues to those cases where the error might otherwise be viewed as plain error. The practice of specifying issues should become the exception rather than the rule.

Similarly, the Committee learned that a number of cases are submitted to the Court without any issues being raised at all but that those cases usually receive perfunctory review. As recommended in connection with specified issues, absent plain error the Court should not review these "no issue" cases.

C. Supervisory Role in the Military Justice System

One of the more delicate questions that has faced the Court is its potential supervisory role in the military justice system. While Congress intended to create a strong and independent court for reviewing courts-martial convictions, it is not as clear to what extent Congress intended to grant supervisory authority. Criticisms of the Court have usually intensified whenever the Department of Defense has concluded that the Court has gone beyond its mandate of simply reviewing courts-martial convictions. For example, in the late 1970's the Court undertook a supervisory function in areas which many believed to be well beyond its intended mandate. See, e.g., United States v. Booker, 5 M.J. 244 (C.M.A. 1978)(court imposed additional requirements for admissibility of nonjudicial punishment); McPhail v. United States, 1 M.J. 457 (C.M.A. 1976)(court granted extraordinary relief in case not otherwise reviewable). Cf. Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978)(court declined to review nonjudicial punishment procedures). See generally, Cooke, The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System, 76 Mil. L. Rev. 43 (1977).

The Committee concludes that every court has certain inherent powers to protect its legitimate jurisdiction and its judgments. The All Writs Act, 28 U.S.C. § 1651, recognizes the importance of protecting the jurisdiction of federal tribunals, and the Court has the same need for self-protection as other tribunals. It is important, however, that the Court exercise inherent or "supervisory" power only to preserve and protect the jurisdiction that Congress has conferred upon it and that such power not be used to expand jurisdiction by decision. The Committee recognizes that the lines that must be drawn between legitimate use of exceptional writs to protect valid jurisdiction and illegitimate judicial expansion of jurisdiction are, by their very nature, difficult to draw. The Court would do a disservice if it either failed to protect its jurisdiction or if it sought to expand impermissibly that jurisdiction. When line drawing is difficult, observers are likely to differ on the results of a particular case. As long as the Court is aware of the concern that a court with limited jurisdiction might be tempted to stretch its authority through use of extraordinary writs, it should explain carefully the use of these writs and demonstrate that it is committed to protect, not expand, its jurisdiction.

The Committee also recognizes that notwithstanding the absence of specific statutory authority, there may be cases where the Court may be an appropriate forum for resolving legal issues arising within the military community. See, e.g., United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 (C.M.A. 1988)(appointing Judge Cox as special master to inquire into issue of whether improper actions took place within lower court). But this is an extremely delicate area and the lines of authority are difficult to draw, in part, because the Court's statutory mandate is uncertain. Although the Supreme Court has recognized the authority of the Court of Military Appeals to apply the All Writs Act, 28 U.S.C. § 1651(a), Noyd v. Bond, 395 U.S. 683, 695, n. 7 (1969), it would be helpful if Congress made it clear that the All Writs Act applies to the Court.

D. Relationship to the Courts of Military Review

The Committee was informed by several respondents that some members of the service Courts of Military Review believe that the Court pays inadequate attention to the opinions of those courts and instead often gives the impression that it is providing de novo appellate review. Although there will always be some healthy tension between the levels of any court system, the Committee also recognizes that there are unfortunate examples of appellate decisions from the Courts of Military Review which challenged the Court's holdings. See, e.g., United States v. Nordstrom, 5 M.J. 528 (N.C.M.R. 1978)(CMA decision lacks "logic and meaning"); United States v. Lilly, 7 M.J. 701 (N.C.M.R. 1979)(CMA decision is "mystifying unless it can be written off as nothing more than an improvident and unfortunate mistake" [attributable to lack of briefs and arguments by counsel]). Such language obviously leads to needless tension although the present climate seems more amenable to scholarly respect on the part of both the Court and the lower appellate courts.

The opinion-writing practice of the Court, however, appears to ignore to a considerable extent the work product of the Courts of Military Review. It has not been unusual, for example, for the Court to affirm a conviction and sentence without stating the reasons given by the Court of Military Review or without indicating whether the Court has rejected the reasons set forth by the lower court. Even when the Court reverses a decision of a Court of Military Review, it is often difficult to ascertain from the Court's opinion exactly which part of the Court of Military Review's analysis is being rejected.

This practice might reflect the Court's desire to emphasize the separation that must exist between military tribunals and a civilian court. But, the Committee believes that the Court's reviewing function is sufficient to demonstrate that civilian review is separate from and vital to military justice, and that the Court would perform a valuable function if it addressed the opinions of the Courts of Review in its own work product and indicated more often when it agrees with the lower courts and, where it does not, why it disagrees. If the Court paid greater attention to the Courts of Review, the Committee believes that those courts might better understand and accept decisions of the Court that reject positions taken below. In its "supervisory" role as the highest court in the military justice system, the Court is in an excellent position to encourage thoughtful analysis of military law by the Courts of Military Review and to recognize the value of unique roles and contributions of the intermediate appellate courts.

E. Role in the American Criminal Justice System

The Court's influence potentially extends beyond the narrow bounds of military criminal justice. As a federal court located in the nation's capital and one which often deals with cases of major import to the criminal justice community, its views and analysis might properly assist other courts, both federal and state, in their resolution of similar issues. In the last few years, the Court's opinions have received increasing national coverage in such publications as the BNA's Criminal Law Reporter. Such exposure can create a positive image and engender a certain degree of added prestige for both the military criminal justice system and the Court.

The Committee is aware, however, that the Court's work could receive greater attention with a change in the West key number system. All military appellate decisions covering military criminal law are currently indexed only under the topic "Military Justice." Thus, many valuable decisions, which in many cases track developing federal and state law, are hidden under a key number which will generally not be explored by the civilian bench and bar unfamiliar with the true breadth and depth of military criminal practice. Fidell, If a Tree Falls in the Forest ... Publication and Digesting Policies and Potential Contribution of Military Courts to American Law, 22 JAG J. 1 (1978). The Committee understands that the Court has urged the indexing of its opinions in the more widely used key topics, such as "Criminal Law." The Committee agrees and urges the Court to pursue aggressively these efforts to achieve such assimilation and recommends that the West Publishing Company adapt its application of the key number system accordingly so that the Court's opinions will be noted under both the "Military Justice" key numbers and under the more widely used key numbers for "Criminal Law". This will demonstrate that the Court is working to fulfill the Congressional mandate to place the military justice system on the "same plane" with the civilian criminal justice system. See United States v. Clay, supra.

III. The Relationship Between the Court and the Department of Defense

A. Legislative Intent

Since its inception, the Court has depended upon the Department of Defense for its administrative support. But it appears that originally Congress intended no more than a minimal connection between the two in order to ensure the Court's impartiality:

This [Court of Military Appeals] will be completely detached from the military in every way. It is entirely disconnected with (sic) the Department of Defense or any other military branch, completely removed from outside influences. It can operate, therefore, as I think every member of Congress intends it should, as a great, effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if [Article 67] is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military. Comments by Mr. Philbin, Congressional Record, May 5, 1949, at p. 5825.

It appears that the Court was placed within the Department of Defense "only to reduce expenditures for the administration of the relatively small staff of the Court ... [and] meant merely to furnish such things as telephone services, transportation facilities, and to purchase supplies." Mundy v. Weinberger, *supra* at 821 citing S. Rep. No. 806, 90th Cong., 1st Sess. (1967) p. 2. In subsequent Congressional considerations of the Court's structure, there have been repeated statements of concern that the Court remain independent. *Id.*

B. The Position of the Department of Defense

The 1988 Department of Defense (DOD) Report on the Status of the Court reflects the concern that the Court should not be separate from the military justice system:

COMA is a limited court serving a limited need. Albeit different, COMA is not unique among Art. I courts. Like other Art. I courts, COMA is not an independent instrument of justice. COMA is properly accountable to the Executive branch, for it is the President as Commander in Chief who bears ultimate responsibility for the enforcement, through courts-martial of the congressionally-adopted rules and regulations governing the military forces.

COMA is an integral part of the military justice system and should not be separate and apart from it. Care must be taken not to destroy [the] court's usefulness to the military judicial system. 1988 the DOD Report, A-5, 6.

C. The Need for an Independent Civilian Court

Although there have been some differences of opinion over the years about the proper role of the Court, its scope of authority, and personnel decisions which have resulted in some unpleasantness, for the most part the relationship between the Court and the DOD seems to have been constructive and marked with cooperation and accommodation. The Committee recognizes that the Court currently has access to generous DOD logistical support which in many instances guarantees travel for the judges and thus greater visibility for the Court. Several factors, however, suggest that in keeping with Congress' intent in creating an independent civilian tribunal, the better situation would be further logistical separation from the Department of Defense.

First, while there has been no suggestion that the Department of Defense, which has an interest in every case before the Court, has ever placed improper pressure upon the Court, there is at least the appearance to the impartial observer that the danger is real. See, e.g., Philpott, "CMA Chief, Services in Escalating Feud," Navy Times, May 7, 1979, p. 15, col. 1 (Joint Chiefs of Staff were critical of CMA rulings in testimony before Congress). One former judge on the Court observed that while there was never any "command influence" on the Court, he was ever mindful of the "brooding presence" of the Department of Defense. While providing for a system of impartial civilian review, Congress designated one of the litigants, the Department of Defense, as the administrative conduit for the Court. As the Court has recognized, command influence is the "mortal enemy" of the military justice system. United States v. Kitts, 23 M.J. 105 (C.M.A. 1987). A number of respondents to the Committee's inquiries noted that that same danger is present for the Court itself.

Second, under current practices, the Department of Defense exercises considerable influence in the selection of judges who are nominated. Thereafter, the nominations are considered by the Senate Armed Services Committee. Two former judges apparently believed that the Senate Judiciary Committee should have some role in the appointment of judges. Judge Quinn, who served on the Court for 24 years, indicated in 1974 that the "Judiciary Committee would give a little greater standing to the Court ... Armed Services is pretty closely associated with the military." Meyer, The Leaderless Stepchild of the Federal Courts, The Washington Post, Nov. 3, 1974, C p. 5. Similar views were apparently held by Judge Homer Ferguson who served on the Court on two occasions for a total of approximately 20 years. Id.

Third, as noted supra, the current arrangement apparently places in the hands of the Department of Defense a great deal of potential control over personnel decisions affecting the Court. For the Court to be truly independent, those decisions should rest in the hands of the Court itself. The tensions resulting from a disagreement some years ago over the authority of the Court to set the salary of one of its employees emphasize the point. Mundy v. Weinberger, 554 F. Supp. 811 (D.C.D.C.1982).

A majority of the Committee believes that cumulatively, these factors threaten the appearance of impartiality and potentially undermine the public's confidence in what should be a truly independent civilian court. A similar situation existed prior to 1939 when the federal judiciary depended upon the United States Department of Justice for logistical support. In an effort to create a greater degree of independence, Congress established the Administrative Office of the United States Courts as the vehicle for providing logistical support for the federal courts. 53 Stat. 1223 (Aug. 7, 1939); 28 USC § 601, et seq. See generally G. Fish, The Politics of Federal Judicial Administration (1973). Although the Administrative Office handles primarily the logistical support for the Article III courts, the Territorial Courts and the Claims Court also fall within its purview. Accordingly, the Committee recommends that Article 67, U.C.M.J. be amended to effect a greater degree of separation from the Department of Defense.

D. Alternative Models of Logistical and Administrative Support

To separate the Court from the DOD, Congress might look to the administrative arrangements employed for other Article I courts. There are two existing models.

One is the system used for the United States Tax Court. That court is an independent, autonomous body, but it deals with the Treasury Department, Postal Service and General Government Subcommittees of the House and Senate Committees on Appropriations. Although the Office of Management and Budget is provided the court's budget information, it cannot change the court's proposals which are sent directly to Congress. The Tax Court is not formally linked with the Administrative Office of the United States Courts, but Title 26 of the United States Code does link the Court with the Article III courts concerning salaries of the judges. Some Congressional committees, such as the Government Operations Committees, exercise some oversight in relation to the Court. But since 1969, the Court has not had any administrative relationship with the Treasury Department. Interestingly, in the legislative history accompanying proposed 1980 amendments to Article 67, U.C.M.J. concerning the Court of Military Appeals' independence, there was an expressed Congressional intent to place the Court on "equal footing" with the Tax Court. Mundy v. Weinberger, *supra* at 821 n. 33.

Another model is the system used for the United States Claims Court which is also an Article I court but is under the Administrative Office of the United States Courts. That court submits its budget requests to the Administrative Office which in turn presents the Claims Court budget as part of the judiciary's budget for approval first to the Judicial Conference and then to Congress.

The Committee recognizes that given the unique interest of the Department of Defense in the decisions of the Court, the Department under any administrative structure should have a significant role in the selection of judges for the Court. The topic of appointment of judges is discussed in greater depth at Section IV, *infra* but is noted here to emphasize that the Committee believes that logistical separation should not be viewed as precluding the views of the DOD from being fully and carefully considered on matters such as the qualifications of those selected for appointment as judges.

IV. Appointment of Judges, Tenure, and Designation of the Chief Judge

A. Judges' Tenure of Office and Removal

Initial proposals for the Court's composition included a provision for life tenure, but amendments to the legislation reduced the term to first, eight years, and then to the present 15 years. The reason for the change was that Congress was not really sure how the Court would work and hesitated to create a court consisting of life-tenured judges before knowing what sort of

workload or tasks ultimately faced the new court. Comments by Senator Kefauver, Congressional Record, Feb. 2, 1950, p. 1390. In the intervening years there have been proposals for life tenure. See Willis, The Constitution, the United States Court of Military Appeals and the Future, 57 Mil. L. Rev. 27 (1972)(noting that the House of Representatives has passed legislation on three occasions providing for life tenure, but the Senate has never agreed).

There are at least two problems with 15-year terms. First, the Committee perceives a problem in attracting qualified candidates who might otherwise consider an appointment to the Court but for the fact that they cannot be guaranteed anything more than a 15-year appointment at the end of which they would be too young to retire and too old to find other significant employment. The second problem is the concern that as a judge approaches the end of the 15-year term, the judge's independent and objective analysis of a particularly difficult case might be influenced, or might be perceived as influenced, by the underlying desire for reappointment. The Committee recognizes that the DOD might have a compelling and legitimate desire to see a particular judge's tenure not extended beyond the initial 15-year term. On balance, however, the Committee believes that this concern is outweighed by the public interest in attracting able judges to the Court and in assuring the appearance and reality of judicial independence.

To create a greater degree of independence the Committee recommends that judges be appointed for a term without limit of years, with mandatory retirement at a specified age which the Committee recommends to be the age of 70. A term without limit of years provides heightened assurance that unpopular decisions will not result in removal of an otherwise qualified judge. This assurance is especially important in the case of this Court which was intended by Congress to be an "independent" appellate tribunal to review cases in a system perceived by the public to carry a risk of command influence.

As part of the recommendation for tenure, the Committee believes there should be provision for attractive senior status and the opportunity for senior judges to sit with the Court as the need arises for additional help. Such senior status should be made attractive in terms of financial and logistical support. In this regard, the Committee recognizes the substantial improvements which have recently been enacted in the retirement provisions for the judges of the Court. National Defense Authorization Act, 1989, § 722, Pub. L. No. 100-456, Sept. 29, 1988.

The Committee recognizes that there may be those instances, as currently reflected in Article 67, U.C.M.J., where removal of a judge is warranted. The removal authority should remain in the Executive, as is currently provided in Article 67(a)(2), U.C.M.J. The present grounds for removal should be retained.

B. Designation of the Chief Judge

Under Article 67, U.C.M.J. the President designates "from time to time" one of the three judges to act as the chief judge. There is currently no requirement that Congress be involved in the process of selecting or designating the chief judge. As in the instance of selecting possible candidates for the position of judge, the Department of Defense is presumably consulted about the designation of the chief judge. To avoid the appearance of impropriety, however, it would be better to devise a system which provides for Presidential designation of a chief judge for five years with eligibility for redesignation for additional terms. This approach would provide for independence and continuity and avoid the appearance of undesirable political influences, particularly with respect to appointments which occur with changes in the Office of the President.

C. Appointment of Judges from the Same Political Party

Article 67(a)(1) provides that no more than two of the three judges may be from the same political party. That provision was apparently included, at least initially, to prevent the incumbent President in 1950 from appointing all three judges from his political party to the then new Court of Military Appeals. The Committee believes that the language regarding party affiliation is an anachronism and should be removed.

D. Role of the American Bar Association

In the appointment of Article III judges, the American Bar Association, through its Standing Committee on Federal Judiciary evaluates the candidate's professional qualifications. It would be appropriate and helpful for the nominees for the Court to undergo similar scrutiny by the American Bar Association. Such review would have the salutary effect of ensuring that judges of the Court meet the same standards of professional competence as other federal judges and of serving to inform the legal profession of the Court's significant role in the American legal system. This review would be particularly important if the judges were to be appointed for terms without years. Such review could be accomplished through the Standing Committee on Federal Judiciary or through such other committee as the American Bar Association may designate.

V. The Size of the Court

Since its creation as a three-judge court, the Court's size has been the subject of continuing discussion. In its 1949 hearings on the proposed Uniform Code of Military Justice, members of Subcommittee No. 1 of the House Armed Services Committee considered whether some special provision should be made for adding members to the Court in times of national emergency. There was also some concern whether three members would be sufficient to handle, what at that time, was an uncertain caseload. Hearings,

House of Representatives, Committee on Armed Services, Subcommittee No. 1, April 4, 1949, p. 1271 et seq. Nonetheless the committee ultimately recommended a membership of three judges noting that "... it would be sounder to limit the number to three until such time as the facts may warrant an increase in the number." House Report No. 491, 81st Cong., 1st Sess. (1949), p. 6.

In 1959, Secretary of the Army Wilbur M. Brucker appointed an ad hoc committee, chaired by Lieutenant General Herbert B. Powell and comprised of high-ranking officers, to study the Uniform Code of Military Justice. In its published report in 1960 (The Powell Report), the committee noted that the legislators had demonstrated "open minds on the subject of [the Court's] size and qualifications" and concluded:

Experience has now demonstrated, we believe, that a three-judge Court of Military Appeals is not sufficiently conducive to stable procedures and consistent administration of justice. The replacement of one judge in three has caused a dramatic reversal in the law. A five-judge court would be less susceptible to fluctuation. Because of the particular needs of a military community for stability we recommend legislation to increase the membership of the United States Court of Military Appeals to five judges.

The size of the Court was addressed again in the Report of the Military Justice Act of 1983 Advisory Commission. That Commission was appointed by the Secretary of Defense and consisted of five military and four civilian members. Although the charter did not include a request to review the issue, the Commission unanimously recommended that the Court be increased to five members. The Commission was concerned with the lack of continuity when major issues were decided by a two-to-one majority and one of the judges in the majority leaves the Court or changes his position. Likewise, the Commission recognized that during a vacancy the two remaining judges might remain deadlocked on a particular issue or case.

The most recent recommendation on the size of the Court was included in the Report of the Department of Defense Study Group on the United States Court of Military Appeals which was released in July 1988. Although the report focuses primarily on the question of whether the Court should be reconstituted as an Article III court, it contains a recommendation that "[a]n increase in the number of the judgeships on an Article I COMA Court (sic) to five is supported." Report at H-4.

The Committee agrees with these foregoing recommendations made over the span of four decades and believes that a number of compelling arguments support increasing the Court's membership to five.

First, increasing the number of judges to five would promote stability in the Court's decisions when a change in membership occurs. Four decades of experience have demonstrated that the change of only one judge on a court of three can have substantial impact on the course of military justice. For example, a shift in the Court's position on subject matter jurisdiction resulted from a change in the Court's composition in 1975, see, e.g., United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976)(considerably narrowed reading of Relford factors), and again in 1980, see, e.g., United States v. Trotter, 9 M.J. 337 (C.M.A. 1980). In Solorio v. United States, 107 S.Ct. 2924 (1987), the Supreme Court specifically noted this shift in positions. 107 S.Ct. at 2932. This is not to say that judges should not be free to change positions on an issue. But such a shift on the part of only one judge out of three can have enormous and unsettling effects on a worldwide system of justice which requires some predictability, consistency, and stability. While the Court's early years seem to have been more stable in terms of turnover of its membership, in more recent years there have been more frequent changes in membership and the accompanying possibility of doctrinal shifts. For example, of the 13 judges who have served on the Court since 1951, only three have completed their terms of office (Judges Quinn, Latimer, and Ferguson). The average tenure has been approximately ten years, although only five judges have served ten or more years.

Second, a court comprised of five members is more likely to keep abreast of its workload when a vacancy or absence occurs than is a three-judge court. As recognized by recommendations in the 1960 Powell Report and the 1988 DOD Report, in addition to potential changes in a court's position on a particular issue, there is the very real problem of handling the Court's workload when a vacancy occurs. This was the case recently when two vacancies existed on the Court, one for approximately seven months in 1979 and another for almost two years (1984-86), as noted in the Court's annual report for FY 86. 24 M.J. CXIV (1987). The Committee learned that during these lengthy vacancies the two sitting judges agreed that if one of them believed that a petition for review should be granted, the case would be reviewed on the merits. To the credit of the Court, there was concern that the vacancies might otherwise deprive a defendant of plenary review by the Court. But the vacancies also presumably delayed the disposition of a number of cases where the two judges could not agree. A review of the statistics provided in the Court's annual reports indicates that in FY 85 approximately 30 fewer signed opinions were issued by the Court than in FY 84 when the Court was at full membership. Again, to the credit of the Court, in FY 86 it increased its number of signed opinions to the FY 84 level even though it only had two sitting judges. USCMA Annual Report, FY 86, p. 19. Notwithstanding attempts to accelerate the appointment process, both expected and unexpected vacancies will occur and some are likely to be lengthy. The Court should not be in the position of again operating with only two judges for an extended period.

Third, increasing the membership to five could provide additional breadth of experience and variety of viewpoints to the Court.

Fourth, the American Bar Association Standard Relating to Appellate Courts § 3.01 (1974) recommends that the highest appellate court in a jurisdiction should have no fewer than five members.

Fifth, expanding the membership to five would permit the formation of panels to decide whether to grant petitions for review, thereby increasing the Court's ability to dispose of these petitions with more dispatch. Panels should not, however, be used to dispose of cases which have been accepted for plenary review. As noted in the Commentary to the American Bar Association Standard Relating to Appellate Courts § 3.01, a court acting as a "supreme court" should sit en banc in considering the merits of a case. Although the addition of two members might increase some internal delays in circulating matters among chambers, a point noted in the 1988 DOD Report, on balance it is not a convincing argument for limiting the Court to three judges.

There is, however, the question of whether increasing the Court to five members is cost-effective. Chief Judge Everett noted in 1981, that increasing the membership of the Court may be difficult to justify from an economic standpoint. Fidell, A Look at Chief Judge Robinson O. Everett, District Lawyer, Jul.-Aug. 1981, p. 37. In his view, such an expansion might be justified if there were an enlargement of jurisdiction. The Committee, however, believes that the cost even without expanded jurisdiction is justified. As noted supra and in other sections of this report, there are concerns throughout the system for the problems caused by changes in membership or vacancies as well as concerns for the delay in disposing of cases. On balance, increasing the membership to five is clearly warranted and should be accomplished without regard to a possible change in the Court's status or expanded jurisdiction (See Section VIII).

VI. The Organization, Function, and Role of the Court's Staff

The Committee has carefully reviewed the Court's internal organization, especially the central staff which plays such an important role in the Court's adjudicative business. The underlying rationale for this organization is sound and in theory is consistent with the established pattern of using a central legal staff within an appellate court. Such an organization normally promotes continuity and smoother administrative handling of the thousands of cases the court must process. The Committee is concerned, however, about several features of the current system.

First, and perhaps most important, there seems to be a real problem concerning speedy disposition of cases. Statistics provided to the Committee on processing times indicate that substantial time elapses before a decision is made whether to grant the petition for review (See Appendix B). Some of that time is attributable to the fact that many petitions are filed directly by the defendants and that they must then be referred to counsel in the appropriate appellate divisions for briefing. But some of the time seems to be attributable to the practice of the central legal staff in searching for and analyzing issues that have not been raised by the appellate counsel, pursuant to the Court's practice of specifying issues as described supra. For example, the Committee has learned that the staff reviews such matters as the providency of a guilty plea, the adjudged sentence, and whether the statute of limitations has run even though a petitioner has not raised those matters. Those are issues

which have presumably been examined at least at the intermediate appellate level. In the aggregate, this practice contributes to appellate delay that should not be tolerated. The issue of delay is also discussed infra at Section VII.

A review of the credentials of the central staff indicates that emphasis has been placed upon prior military experience in making appointments. That rests in large part on the premise that such individuals have acquired valuable expertise in military justice which is helpful in the Court's work. Although such experience is certainly an asset, reliance solely upon a permanent staff with virtually identical backgrounds leads to staleness and malaise which in turn results in lethargy in a criminal justice system which should be extremely sensitive to speedy appellate review. The Court should work toward a blend of talent which combines the continuity provided by some of the experienced personnel with a systematic and regular rotation of newer personnel. As in most other federal appellate courts, the Court should consider filling some of the central staff positions with able, young law school graduates who might work at the Court for no more than one or two years, thereby continuously infusing the staff with fresh viewpoints and energy. While it would be retrogressive to abandon use of a centralized staff, change along these lines is essential.

Regardless of the background or experience of the counsel on the central staff, they should not be permanent Civil Service employees. Instead, the central staff should be structured in the same way as the central staffs in the United States Courts of Appeals where the attorneys hold their positions at the pleasure of the court. It is essential to the effective discharge of the Court's adjudicative business that the judges be able to engage attorneys who will be of maximum assistance to them and be able to dismiss quickly those whose performance falls short. It is even more important that each judge be able to appoint and remove freely a personal law clerk. Law clerks for the judges should likewise be outside the Civil Service system; instead they should be employed on the same basis as law clerks for the judges of the United States Courts of Appeals. While extended tenure as a law clerk is not precluded, it is rare. Rarer still is extended tenure for all of a judge's clerks.

The Committee recognizes that there may be certain benefits in having an experienced, and even "permanent," staff which can eventually anticipate the judge's thinking and habits. Such a staff, however, carries a real risk of undue delegation of authority that can lead to an encroachment upon the judge's obligation. For example, the Committee is concerned that there is the appearance that staff personnel may have, or may have assumed, the authority to register "chambers" votes. That is, a nonjudge legal assistant could vote on behalf of an absent judge on the assistant's assumption of how that vote would be cast by the judge. The Committee believes that such actions would permit nonjudge personnel to pollute the decisional process. That should not be tolerated.

Whatever internal system is adopted, neither central staff nor personal law clerks should replace meaningful and personal dialogue among the judges themselves. Nor should such legal assistants relieve the judges of individual responsibility for decisions on petitions for review and on the merits of the cases.

One of the Court's internal procedures which should be reexamined carefully is the "second-look" procedure. As the Committee understands the process, after the Court has granted a petition for review, the central staff conducts yet another review of the case to ensure that it is indeed appropriate for review. Although such a procedure may on occasion avoid improvident grants of review, as currently structured it appears to be an unwarranted use of staff time and inserts a substantial element of delay in a system which must be extremely sensitive to timely disposition. It should be severely restricted.

VII. The Court's Workload

A. General

One of the key topics which is relevant to other issues such as the size of the Court, is the Court's workload. Using statistical reports provided by the Court's staff and the Federal Court Management Statistics for 1987 published by the Administrative Office of the United States Courts, the Committee has drawn some comparisons between the workloads of the Court and the Federal Courts of Appeals. The Committee also examined the impact of individual judge's travel schedules on the Court's workload and the problem of appellate delay.

B. Overview of Court's Workload

The Court's annual reports for FY 81 to FY 88 indicate that the total number of petitions for review filed with the Court has generally declined from a high of around 3,200 in FY 84 to approximately 2,700 in FY 87. The consensus of individuals who have commented on the decline in petitions for review is that, at least for now, there are fewer trials by courts-martial and the services are using alternative means to discipline service members or to discharge them.

The number of cases terminated on the Master Docket has varied from a high of 318 in FY 87 to a low of 145 in FY 82. In the intervening years the number was approximately 250.

The number of signed opinions issued by the Court is considerably lower. With the exceptions of FY 87 when the Court (three judges sitting) issued 121 signed opinions on the Master Docket and FY 85 (two judges sitting) when the Court issued only 58 signed opinions on the same docket, the average is about 90 signed opinions each fiscal year. That is, the average number of signed opinions in recent years is about 30-35 per judge. The number of per curiam opinions issued by the Court has ranged from a high of 24 in FY 83 to a low of seven in FY 88.

C. Appellate Delay

Most respondents expressed concern about appellate delay. While delays may be inevitable in any appellate court and especially in one which has been marked with sometimes lengthy vacancies, every effort must be made to dispose promptly of cases. In a system which justifiably prides itself on timely disposition of charges at the trial level, particular attention should be paid at the appellate levels of the military justice system.

The Air Force provided the Committee with processing times for Air Force cases reviewed by the Court and decided from March 1987 to August 1988. Of the 77 cases listed, 14 were summarily disposed of by the Court, leaving 63 which were subject to plenary consideration pursuant to either a petition for review or certificate for review by the judge advocate general. The elapsed times from the date of the grant, or the filing of the certificate, to the date the Court acted in the cases are as follows: At least 100 days elapsed in 92 percent (58) of the cases; over 200 days elapsed in 82 percent (52) of the cases; more than one year elapsed in 36 percent (23) of the cases; and over three years elapsed in 7 percent (five) of the cases. Assuming that the average elapsed time from filing to grant for all of those cases was 181 days, the total elapsed time was intolerable.

Statistics provided by the Court (Appendix B) indicate that the following average times (days) for disposition from the filing of the petition for review to grant and from filing of the petition to a decision:

FY	Average Filing to Grant	Average Filing to Decision
1981	84	370
1982	85	420
1983	91	394
1984	118	339
1985	143	352
1986	141	501
1987	181	549
1988	151	538

These figures indicate that although the number of petitions for review has generally declined in recent years and the number of signed opinions has remained fairly constant, the delays in processing times have risen dramatically and have remained high. Although the FY 88 figures show a slight decrease, they are substantially higher than the 1981 figures. In contrast, the appellate delays in the Federal Courts of Appeals have generally declined over the last several years. The Committee believes that this matter must have immediate and continuing attention. In its future annual reports the Court should indicate processing times.

The charts also indicate that the time from sentence to decision in cases in which oral argument is heard has been unacceptably high. For example, in FY 88 the average time was 1,143 days, approximately three years. During the same fiscal year, 24 percent of cases argued took over 1,460 days from sentencing to decision. Clearly much of this time can be attributed to appellate processing in the Courts of Military Review. Thus, there seems to be a very real problem of delay within the military justice system. The Court should assume an active role in correcting the problem.

The American Bar Association's Criminal Justice Standard 21-3.4 addresses the problem of expediting appeals. Although the Standard does not establish any particular processing times, it does indicate that:

[A]ppellate courts should establish firm goals of the time to complete processing of appeals through the alternative routes to final decisions. Time schedules for each step in the process should be announced to the profession, continuously monitored, and vigorously enforced.

The Standard notes that a central staff can provide assistance in reducing processing times and the Commentary to the Standard notes a number of innovative steps that appellate courts have adopted in an effort to shorten appellate processing times without sacrificing the quality of appellate justice.

D. The Impact of Travel

Many respondents noted that the judges spend a great deal of time traveling to various conferences and legal education programs. A review of the judges' travel schedules for FY 87 indicates that although some of the travel involved only one- or two-day trips to neighboring cities, each judge took long overseas trips to visit installations and take part in conferences of judge advocates. An overlay of the schedules of the individual judges indicates that in the period January through November 1987 (approximately 47 weeks) there were only 14 weeks in which all three judges were present at the Court at the same time. In most weeks (approximately 37) at least one judge was absent for at least one day of the week and in a substantial number of weeks (approximately 18) at least two judges were gone at the same time for at least one day.

While much goodwill has been generated by these visits and the judges have become better informed about military service, there is a growing perception in the military community that too much time is spent away from the Court and too little time is spent in the disposition of cases that have lingered in the Court. As already discussed, reducing appellate delay should be a matter of immediate concern and action. Ironically, one of the reasons suggested for maintaining the present logistical relationship with the Department of Defense is the availability of ample travel funds and the amenities provided to the visiting judges.

One way to avoid interference with judicial business caused by judges' travel would be to schedule a regular annual term, as the Court recently did, and publish a schedule for oral arguments and court conferences similar to that used in the Supreme Court. Such a calendar, published and distributed in advance, could provide for those annual meetings and conferences which the judges deem important to attend. This would guarantee that the judges are together at the Court for the bulk of the year.

E. Comparisons with the Federal Courts of Appeals

Comparison of the workload of the Court with the workloads of the Federal Courts of Appeals is difficult. For example, the federal courts have additional resources in senior judges and in judges sitting by designation. Furthermore, the case mix is very different and the Court of Military Appeals has the obligation to select the cases it will review. There is a significant difference. Nonetheless, the Committee believes that it is useful to make some comparisons. The bases for comparison are the statistics provided in the Court's FY 87 annual report, noted above, and the Federal Court Management Statistics for 1987 prepared by the Administrative Office of the United States Courts. That report provides comprehensive statistics and summaries for each of the Courts of Appeals for a twelve-month period ending June 30, 1987 and overall national averages for the courts for the years 1982 through 1987. For comparison, only the 1987 national averages are mentioned here, although it is important to note that the federal courts over the last years seem to have increased their output and at the same time reduced appellate delay. Pertinent pages from the 1987 report are appended to this report as Appendix C.

The 1987 report provides overall statistics on each court as well as national averages for "actions per panel" and "actions per active judge." The report indicates that the average number of cases disposed of "on the merits" per each panel (through briefing and oral argument) which appears comparable to the Court's Master Docket, was 356 cases. That figure includes civil, criminal, prisoner, "other civil," and administrative cases.

The average number of cases terminated per judge on the merits was 323 and the average number of signed opinions per judge was 42. The average of unsigned opinions per judge was 57.

In summary, it appears that the number of cases terminated on the merits by the Court is much lower than the average number of per panel dispositions in other federal appellate courts. The number of signed opinions per judge is lower and the Court's number of per curiam opinions is substantially lower than the numbers registered in the federal appellate courts for "unsigned opinions." Although it does not appear that the Court of Military Appeals is "overworked," the Committee has recommended for a number of other compelling reasons, that the Court's membership be increased by two judges.

The final question considered by the Committee is whether the Court should be reconstituted as an Article III court. Proposals to that effect have been made in the past and legislation to that end was introduced in the 100th Congress. No action was taken, however, before Congress adjourned. Of the reports and recommendations that have been prepared on this subject, the cosigned report of the Federal Bar Association and the District of Columbia Bar Association to the American Bar Association (ABA) presents a good summary of the arguments in favor of Article III status. Although the recommendation by those bodies that the ABA recommend to Congress that the Court's status should be changed was not acted upon, there was considerable interest in the ABA in that issue. Summarized, the points made in that report are:

1. Article III status would lend prestige to the Court;
2. Lingering questions regarding the judicial powers of the Court would be answered;
3. Life tenure for the judges would provide adequate retirement;
4. Judges from other federal courts would be able to sit on the Court by designation; and
5. Judges of the Court could be called upon to sit by designation in other Article III courts.

There does not seem to be any doubt that Congress has the authority to create an Article III court to review courts-martial convictions. Nonetheless, the Committee realizes that there is considerable resistance to a status change -- particularly from within the Department of Defense. The 1988 DOD Report covers a significant number of perceived practical problems. One of them is the issue of whether Article III status would necessarily expand the Court's jurisdiction.

A. Jurisdiction Under Article III

One of the chief concerns which should be addressed in conjunction with the issue of Article III status is the question of whether the reconstituted Court would have expanded jurisdiction. Should, for example, the Court's jurisdiction extend to reviewing administrative discharges, nonjudicial punishment, and other related issues such as denial of promotions or litigation between private citizens and the military? Congress originally intended for the Court to have jurisdiction only over review of courts-martial convictions. Although the Court has wisely declined to review nonjudicial punishment proceedings, *see, e.g., Dobzynski v. Green*, 16 M.J. 84 (C.M.A. 1983) (dismissed petition for extraordinary relief to review Article 15 punishment), *Stewart v. Stephens*, 5 M.J. 220 (C.M.A. 1978), there seems to be concern within the military community that the Court may unilaterally

extend its jurisdiction. This concern seems particularly acute when the topic of possible Article III status is raised. That is, there is a concern that too much authority might ultimately be vested in one court which may or may not be sensitive to the unique needs of the military community.

In considering possible expansion of the Court's jurisdiction, several issues surface. First, a service member who is the subject of nonjudicial punishment or adverse administrative action currently must seek judicial review in one of the other federal courts. Proponents of expanded jurisdiction argue that those courts presumably have less interest in the military and in recent years have been extremely deferential to the military's decisions. Centralizing some appellate review of those administrative decisions in a federal court highly familiar with the military system would thus be appropriate. The counter-argument is that review of military actions by a cross section of federal courts permits "percolation" of the issues.

The second point for consideration is whether a slight expansion of the Court's jurisdiction, either criminal or noncriminal, would provide a welcomed variety to the relatively specialized work for the judges and staff which in turn leads to early burnout. Similarly, expanded jurisdiction might provide a more attractive professional challenge for those interested in accepting an appointment to the Court.

Finally, there is the issue of the potential impact of transferring jurisdiction of various military-related litigation from the other federal courts to the Court. A brief statistical study of the last 10 years indicates that the various other federal courts have typically handled as many as 107 military-related cases and as few as 60 such cases each year. A WESTLAW search using the WEST key number for "Armed Services" for 1987 revealed 76 cases which involved a wide variety of military issues. Of the total, one case was decided by the Supreme Court (*Solorio v. United States*), 30 cases were decided in the Courts of Appeals, 26 were handled in the District Courts, and 19 were processed in the Claims Court. While only three cases involved review of court-martial convictions, and two cases were challenges to non-judicial punishment, 28 cases involved suits by service members challenging military administrative actions regarding status.

The subject of possible expansion of jurisdiction is obviously a sensitive matter and is properly a matter of careful consideration by Congress especially in any discussions concerning Article III status. While a change to Article III status would permit expansion of the Court's jurisdiction, such an expansion need not automatically or necessarily follow.

B. Independence and Article III

The point most clearly made throughout the 1988 DOD Report is that the Department of Defense believes that the Court should remain an Article I court accountable to the Executive. But it is not clear whether the original drafters of the Uniform Code of Military Justice intended for the Court to be accountable to the Executive. As noted in earlier sections of this

report, there was a clear indication that Congress intended for the Court to be independent and strong enough to deal with tough issues such as command influence.

While there would certainly be a tradeoff of benefits and costs for both the DOD and the Court if the latter were reconstituted as an Article III court, the key issue it seems is not so much whether there are practical problems but whether such a change would better serve the purpose for which the Court was created -- independent civilian review of courts-martial convictions. As noted in the DOD Report, judicial independence is a fundamental principle of our constitutional arrangement. The DOD Report at F-5. As also noted in that Report:

Although Congress has stated its intent that COMA be a court in every sense of the word, COMA is not as fully independent as an Article III court. A COMA judge has no protection against salary reduction; does not have life tenure for good behavior; and, can be removed by the President, upon notice and hearing, for malfeasance in office, neglect of duty, or physical or mental disability. A sitting Chief Judge of COMA can be replaced; and, COMA is still, to a certain extent, dependent upon the Executive branch for administrative support. The question which needs to be answered is whether any of these differences significantly impacts on COMA's ability to fulfill its judicial duties. Report at F-3.

The Report then discusses several reasons why the differences do not have a significant impact on the Court.

The Committee believes that at the core of the debate over Article III status is the issue of independence. Irrespective of the ultimate resolution of the Article III question, necessary safeguards to increase the independence of the Court should be implemented. As noted in preceding sections of this report, these safeguards would include greater logistical separation from the Department of Defense, appointment of judges for a term without years, and designation of the chief judge for a fixed term of five years. While "independence" is a relative term, the Committee believes that these added features will increase the Court's independence.

There are factors which argue against using Article III status to achieve the desired judicial independence. As recognized in other recommendations, the Executive has a substantial interest in a Court of Military Appeals which, for all of its necessary independence is an important instrumentality of the national defense; the military justice system is an integral part of the armed services, of which the President is the Commander-in-Chief. Thus, the Committee has recommended, for example,

continuation of the President's power to remove judges for cause, as specified by the Congress in Article 67. The Committee has also recognized the desirability of the President's authority to designate the chief judge. Neither of these Executive powers is consistent with the operation of Article III courts today.

After implementation of the safeguards recommended in this report is completed and their effect is evaluated, it would then be proper to reconsider whether Article III status is appropriate for the Court or whether, as a court of specialized jurisdiction, it should remain an Article I court.

The Committee believes that the most appropriate forum for reviewing courts-martial convictions is the Court of Military Appeals, regardless of its status as an Article I or Article III court. If Congress, however, should conclude that review of courts-martial convictions should be accomplished in an Article III forum, then Congress would have to decide what that forum should be. Such review could be provided, of course, by converting the Court of Military Appeals to an Article III court. But that would not necessarily follow. Congress could choose instead to confer jurisdiction to review courts-martial convictions in an existing Article III appellate court, perhaps the most obvious choice being the United States Court of Appeals for the Federal Circuit. That court already has nationwide jurisdiction over several categories of cases, its judges are drawn from a nationwide pool, and it reviews court-martial proceedings in appeals from the Claims Court in suits for back pay brought by former members of the armed services.

IX. Conclusion and Recommendations

It is clear to the Committee that on the whole the Court is accomplishing what Congress originally intended -- careful, objective, and judicious review of courts-martial convictions by a strong court of civilian judges. Due to its dedication in fulfilling that Congressional mandate, and to the equally dedicated efforts of many military and civilian practitioners, the Court and the military justice system have matured in the last four decades. Both the Court and the system are now recognized as legitimate and vital elements of American jurisprudence by the civilian bench and bar. After carefully reviewing the current operations and structure of the Court, the Committee believes that several improvements should be made.

One of the Court's most pressing problems is that of appellate delay. While it is difficult to pinpoint the exact cause of the delay, the Committee has not discovered any justifiable reason for it. It is therefore essential that the Court exercise judicial self-discipline and dedicate itself to not only drastically reducing appellate processing times but also to maintaining shorter processing times. The Committee is greatly encouraged by major steps taken by the Court in recent months to expedite its cases, including establishment of the Court's annual term. Further steps in that direction are essential.

The goal should be a first-rate appellate federal court and to that end the Committee has suggested a number of changes to bring the Court in line with other federal appellate courts. In addition to expanding the Court's membership to five judges, with review of the proposed nominees' qualifications by the American Bar Association, some internal restructuring seems in order. It is important that the Court be staffed by energetic and talented personnel who appreciate the mission of the Court and the military justice system. By the same token, the Court should have the flexibility to remove those who do not measure up to those standards, and to constantly infuse fresh and enthusiastic talent into the staff.

Finally, the Committee supports heightened independence for the Court and has identified a number of measures which it believes will create greater independence and yet recognize the unique role the Court plays in the military justice system.

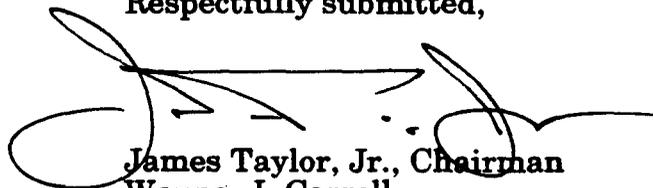
The Court merits praise for much excellent judicial work and for its sponsorship of this independent examination and critique. Although the Committee offers a number of suggested changes, it believes that the Court has performed its tasks with determination and purpose. The recommended changes are offered in the spirit that their adoption will serve to improve not only the Court, but also the public's confidence in the military justice system.

The Committee specifically recommends the following. The order of the recommendations generally follows the order in which the various issues or topics are discussed in this report:

- A. The practice of specifying issues not raised by appellate counsel should be limited to those few cases where plain error has occurred or where emerging issues require further briefing.
- B. The Court should substantially restrict use of its "second-look" procedure.
- C. Article 67, U.C.M.J. should be amended to make it clear that the All Writs Act, 28 U.S.C. § 1651(a), applies to the Court.
- D. The opinions of the Court should be indexed in additional key topics and numbers in the West key number system.
- E. Article 67, U.C.M.J. should be amended to effect a greater logistical and administrative separation between the Department of Defense and the Court.
- F. Article 67, U.C.M.J. should be amended to provide that judges on the Court be appointed for a term without years with mandatory retirement at age 70 and acquisition of senior status, subject to removal by the President on grounds specified in the statute.

- G. The chief judge should be designated by the President for a five-year term, with eligibility for redesignation.
- H. Article 67, U.C.M.J. should be amended by removing the "same political party" limitation in the appointment of judges.
- I. Nominees for judgeships on the Court should be evaluated for their professional qualifications by an appropriate committee within the American Bar Association.
- J. Membership of the Court should be increased to five active judges.
- K. Judges of the Court should appoint and retain law clerks as do judges of the United States Courts of Appeals.
- L. Members on the central legal staff should not be permanent Civil Service employees, but should instead be employed and removed at the pleasure of the Court.
- M. The Court should establish a regular term and publish a calendar of arguments and court conference dates, assuring that all judges are together at the Court for substantial portions of the year.
- N. The judges should carefully evaluate their travel schedules to assure that the judicial business of the Court is conducted efficiently and effectively.
- O. The Court should take immediate and substantial steps to reduce appellate delay.
- P. The Court should report its case processing times in its annual reports.

Respectfully submitted,



James Taylor, Jr., Chairman
Wayne J. Carroll
Robert M. Duncan
A. Leo Levin
Robert B. McKay
Daniel J. Meador
Russell A. Rourke
Stephen A. Saltzburg
Henry J. Steenstra
David A. Schlueter, Reporter
Linda J. Michalski, Executive Assistant

APPENDICES

- A. Appointment of Court Committee
- B. Processing Times for FY 81 to FY 88
- C. Excerpts from the Federal Court Management Statistics for 1987

APPENDIX A

APPOINTMENT OF COURT COMMITTEE

APPOINTMENTS

UNITED STATES COURT OF MILITARY APPEALS

APPOINTMENT OF COURT COMMITTEE

October 5, 1987

The United States Court of Military Appeals has reestablished a Court Committee to study issues and make recommendations concerning the Court's statutory role and mandate, status, organization, size, staff, administration and operations. The Committee will meet as determined by its Chairman, and, at least annually will report to the Court about its activities and recommendations. Serving on the Committee will be:

- | | |
|----------|---|
| Chairman | — James Taylor, Jr., Professor and Associate Dean, Wake Forest University School of Law; Major General, USAF (Retired); former Deputy Judge Advocate General of the Air Force; |
| Members | — Wayne J. Carroll, Esquire, of Ewen, MacKenzie and Peden, Louisville, Kentucky; former Assistant Attorney General, Commonwealth of Kentucky; Assistant United States Attorney, Western District of Kentucky; and Lecturer, University of Louisville School of Law; |
| | — Robert M. Duncan, Esquire, of Jones, Day, Reavis and Pogue, Columbus, Ohio; former U.S. District Judge, Southern District of Ohio; Chief Judge of U.S. Court of Military Appeals; and Justice of Ohio Supreme Court; |
| | — A. Leo Levin, Professor, University of Pennsylvania School of Law; recently re- |

NOTICE: Court rules and related materials supplied by the courts are included. Since all rules and amendments may not have been supplied, the clerk of the appropriate court should be consulted to determine the current rules.

APPOINTMENTS

- tired Director of the Federal Judicial Center; and former Director, National Institute of Trial Advocacy;
- Robert McKay, Professor and former Dean, New York University School of Law; member, American Bar Association Board of Governors; former President of the Association of the Bar of the City of New York; and former Executive Director, Institute of Judicial Administration;
 - Daniel J. Meador, Professor, University of Virginia School of Law; Chairman, American Bar Association Standing Committee on Federal Judicial Improvements; and former Assistant Attorney General of the United States;
 - Russell A. Rourke, Esquire, of Orion Group Ltd.; Colonel, United States Marine Corps Reserve (Retired); former Secretary of the Air Force; Assistant Secretary of Defense for Legislative Affairs; and Special Assistant to President Ford;
 - Stephen A. Saltzburg, Professor, University of Virginia School of Law; Reporter on the Federal Rules of Criminal Procedure and the Federal Rules of Evidence; and author of various books and articles on criminal law and procedure and rules of evidence;
 - Henry J. Steenstra, Esquire, Manager of Congressional Relations, TRW Inc.; Colonel, U.S. Air Force (Retired); former Legislative Assistant to U.S. Senator Dan Quayle;
- Reporter** — David A. Schlueter, Professor and Associate Dean, St. Mary's School of Law; former counsel to the Supreme Court of the United States; and author of books and articles on court-martial practice and procedure and on the Military Rules of Evidence;
- Executive Assistant to the Committee** — Mrs. Linda J. Michalski, Director of Professional and Public Relations, Wake Forest University School of Law.

The original Court Committee, established in January 1953, consisted of eight distinguished attorneys and was chaired by Whitney

APPOINTMENTS

North Seymour. It provided advice and suggestions that greatly aided the Court of Military Appeals in the early days of its existence.

Recently, several major developments have occurred in the field of military justice. Some, such as the creation of Supreme Court certiorari jurisdiction to review certain court-martial convictions, have directly affected the Court of Military Appeals. Others, such as the recent expansion of court-martial jurisdiction by the Supreme Court in *Solorio v. United States*, ___ U.S. ___, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), and the enactment of legislation broadening court-martial jurisdiction over reservists, will have indirect, but nonetheless significant, effects on the Court.

Because of such developments, the Court decided the time had come to reestablish the Court Committee, which had expired many years ago. In this way, valuable suggestions will be obtained from a group of distinguished lawyers and law professors, who have diverse and extensive legal and military experience. In turn, the Committee's advice and recommendations will be used by the Court in evaluating and improving its own administration and operations.

APPENDIX B

PROCESSING TIMES FOR FY 81 TO FY 88

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/80 Ending Date: 09/30/81
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	0- 60	61- 120	121- 180	181- 365	Over 365	
1. Sentence to CA action	83.3	72.0	37.97	49.17	7.60	4.42	.83	2170
2. CA action to CMR decision	192.4	149.0	8.85	29.56	22.34	31.84	7.39	1705
3. CMR decision to CMA filing	71.2	39.0	73.78	18.69	3.31	2.80	1.40	2140
4. CMA filing to CMA petition grant	84.3	77.0	6.04	89.93	2.01	1.34	.67	149
5. CMA filing to CMA petition denial	83.9	68.0	26.41	71.23	1.56	.57	.20	1912
6. Total of #4 and #5 above	83.9	69.0	24.93	72.58	1.60	.63	.24	2061
7. Petition grant to Oral Argument	324.9	313.5	.00	1.38	2.77	77.77	18.05	72
8. Oral Argument to CMA decision	135.6	113.5	6.06	46.96	30.30	16.66	.00	66
9. Pet. grant to decision with no OA	234.8	188.0	15.78	15.38	15.38	38.46	14.97	247
10. Pet. grant to decision with OA	525.4	425.5	.00	.00	4.54	19.69	75.75	66
11. Grant to decision in all cases	296.1	242.0	12.46	12.14	13.09	34.50	27.79	313
12. Filing to decision -- Grants	370.8	314.5	.00	7.98	13.73	36.10	42.17	313
13. Filing to decision -- OA Cases	603.9	503.5	.00	.00	.00	13.63	86.36	66
14. Filing to decision in all cases	124.5	70.0	22.63	62.21	3.27	5.73	6.14	2231

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	0- 365	366- 730	731- 1095	1096- 1460	Over 1460	
15. Sentence to Petition denial	445.1	367.5	49.37	48.12	1.56	.31	.62	640
16. Sentence to decision: Grants	789.0	481.0	25.00	50.00	.00	.00	25.00	4
17. Sentence to decision -- OA Cases	1904.0	952.0	.00	.00	.00	.00	100.00	1
18. Total of #15 and #16 above	447.2	368.5	49.22	48.13	1.55	.31	.77	644

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/81 Ending Date: 09/30/82
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	0- 60	61- 120	121- 180	181- 365	Over 365	
1. Sentence to CA action	98.2	68.0	42.40	47.21	7.23	2.10	1.07	2809
2. CA action to CMR decision	211.3	152.0	9.79	29.48	20.19	31.71	8.81	2778
3. CMR decision to CMA filing	77.8	44.0	69.81	23.29	3.42	2.45	1.00	2687
4. CMA filing to CMA petition grant	85.4	77.0	8.83	79.00	11.04	1.10	.00	181
5. CMA filing to CMA petition denial	72.7	67.0	35.42	57.69	6.45	.37	.04	2385
6. Total of #4 and #5 above	73.6	69.0	33.55	59.19	6.78	.42	.03	2566
7. Petition grant to Oral Argument	339.7	325.5	.00	1.40	1.40	77.46	19.71	71
8. Oral Argument to CMA decision	200.0	128.0	1.36	41.09	31.50	9.58	16.43	73
9. Pet. grant to decision with no OA	241.9	179.5	28.57	12.33	9.09	26.62	23.37	154
10. Pet. grant to decision with OA	548.4	461.0	.00	.00	.00	6.75	93.24	74
11. Grant to decision in all cases	341.4	346.5	19.29	8.33	6.14	20.17	46.05	228
12. Filing to decision -- Grants	420.4	426.5	.87	16.22	7.01	20.17	55.70	228
13. Filing to decision -- OA Cases	626.4	529.5	.00	.00	.00	1.35	98.64	74
14. Filing to decision in all cases	103.7	70.0	32.31	53.91	6.60	2.13	5.03	2621

**** Total review time: sentence to final action ****

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	0- 365	366- 730	731- 1095	1096- 1460	Over 1460	
15. Sentence to Petition denial	376.0	335.0	57.03	39.18	3.04	.47	.26	2297
16. Sentence to decision: Grants	586.3	522.5	18.38	51.47	27.94	2.20	.00	136
17. Sentence to decision -- OA Cases	853.3	848.0	.00	10.52	84.21	5.26	.00	19
18. Total of #15 and #16 above	387.7	344.0	54.87	39.86	4.43	.57	.24	2433

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/82 Ending Date: 09/30/83
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	0- 60	61- 120	121- 180	181- 365	Over 365	
1. Sentence to CA action	83.5	57.0	54.09	37.37	5.69	1.92	.93	3128
2. CA action to CMR decision	186.2	143.0	9.80	29.96	22.83	29.89	7.49	2987
3. CMR decision to CMA filing	71.8	45.0	66.95	26.39	3.62	2.18	.83	3114
4. CMA filing to CMA petition grant	91.0	81.0	8.04	76.92	11.88	3.14	.00	286
5. CMA filing to CMA petition denial	73.8	70.0	29.66	63.39	5.86	1.03	.03	2508
6. Total of #4 and #5 above	75.6	71.0	27.45	64.78	6.47	1.25	.03	2794
7. Petition grant to Oral Argument	321.7	316.0	.00	1.56	3.12	67.18	28.12	64
8. Oral Argument to CMA decision	171.5	107.0	3.03	60.60	10.60	15.15	10.60	66
9. Pet. grant to decision with no OA	190.4	63.5	49.56	10.43	6.95	13.91	19.13	115
10. Pet. grant to decision with OA	506.7	475.0	.00	.00	1.51	15.15	83.33	66
11. Grant to decision in all cases	305.8	302.5	31.49	6.62	4.97	14.36	42.54	181
12. Filing to decision -- Grants	394.3	419.5	1.10	26.51	6.07	13.81	52.48	181
13. Filing to decision -- OA Cases	593.7	556.5	.00	.00	.00	3.03	96.96	66
14. Filing to decision in all cases	95.8	71.0	27.69	60.83	5.86	2.00	3.60	2694

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	0- 365	366- 730	731- 1095	1096- 1460	Over 1460	
15. Sentence to Petition denial	388.5	333.0	59.58	37.03	2.50	.45	.41	2395
16. Sentence to decision: Grants	768.1	741.0	10.32	38.06	34.83	15.48	1.29	155
17. Sentence to decision -- OA Cases	995.1	986.5	.00	9.61	63.46	23.07	3.84	52
18. Total of #15 and #16 above	411.5	342.0	56.58	37.09	4.47	1.37	.47	2550

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/83 Ending Date: 09/30/84
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	0- 60	61- 120	121- 180	181- 365	Over 365	
1. Sentence to CA action	81.6	59.0	51.03	38.72	7.58	1.51	1.17	2389
2. CA action to CMR decision	191.8	122.0	17.15	32.38	18.33	21.94	10.18	3153
3. CMR decision to CMA filing	78.2	56.0	54.82	36.43	5.65	1.77	1.31	3203
4. CMA filing to CMA petition grant	118.5	112.0	9.00	48.03	33.94	8.54	.46	433
5. CMA filing to CMA petition denial	82.8	73.0	44.14	31.52	19.67	4.66	.00	3090
6. Total of #4 and #5 above	87.2	80.0	39.82	33.55	21.43	5.13	.05	3523
7. Petition grant to Oral Argument	308.6	278.0	.00	3.22	3.22	74.19	19.35	31
8. Oral Argument to CMA decision	216.8	162.5	.00	33.92	21.42	30.35	14.28	56
9. Pet. grant to decision with no OA	196.6	145.5	21.85	17.48	20.82	24.93	14.91	389
10. Pet. grant to decision with OA	522.0	446.0	.00	.00	1.78	14.28	83.92	56
11. Grant to dec- ision in all cases	237.6	164.0	19.10	15.28	18.42	23.59	23.59	445
12. Filing to dec- ision -- Grants	339.7	285.0	.22	6.51	14.15	39.10	40.00	445
13. Filing to dec- ision -- OA Cases	621.2	567.0	.00	.00	.00	1.78	98.21	56
14. Filing to dec- ision in all cases	116.1	84.0	38.42	28.26	18.94	9.17	5.18	3552

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	0- 365	366- 730	731- 1095	1096- 1460	Over 1460	
15. Sentence to Petition denial	400.4	344.0	54.50	40.91	3.48	.60	.50	2987
16. Sentence to decision: Grants	715.9	602.5	9.52	57.82	25.62	4.98	2.04	441
17. Sentence to dec- ision -- OA Cases	1055.3	977.5	.00	14.28	51.78	23.21	10.71	56
18. Total of #15 and #16 above	441.0	372.0	48.71	43.08	6.33	1.16	.70	3428

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/84 Ending Date: 09/30/85
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	0- 60	61- 120	121- 180	181- 365	Over 365	
1. Sentence to CA action	103.1	54.0	58.23	33.59	4.82	1.64	1.72	1161
2. CA action to CMR decision	214.1	109.0	18.57	36.99	16.25	17.14	11.03	2030
3. CMR decision to CMA filing	125.2	66.0	45.85	33.37	10.79	5.90	4.07	2676
4. CMA filing to CMA petition grant	143.7	121.5	5.66	43.77	18.11	32.07	.37	265
5. CMA filing to CMA petition denial	66.9	45.0	65.58	20.14	6.79	7.47	.00	2502
6. Total of #4 and #5 above	74.2	48.0	59.84	22.40	7.87	9.83	.03	2767
7. Petition grant to Oral Argument	426.2	413.0	1.12	1.12	.00	33.70	64.04	89
8. Oral Argument to CMA decision	116.5	103.5	6.00	62.00	20.00	12.00	.00	50
9. Pet. grant to decision with no OA	157.5	104.0	32.84	20.09	16.66	19.11	11.27	204
10. Pet. grant to decision with OA	542.3	552.0	2.00	.00	2.00	12.00	84.00	50
11. Grant to decision in all cases	233.2	142.5	26.77	16.14	13.77	17.71	25.59	254
12. Filing to decision -- Grants	352.7	263.5	1.57	11.41	12.59	39.37	35.03	254
13. Filing to decision -- OA Cases	660.8	681.0	.00	.00	2.00	2.00	96.00	50
14. Filing to decision in all cases	93.6	48.0	59.57	19.34	7.31	10.46	3.29	2761

**** Total review time: sentence to final action ****

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	0- 365	366- 730	731- 1095	1096- 1460	Over 1460	
15. Sentence to Petition denial	415.5	322.0	61.01	31.40	4.09	.65	2.82	2442
16. Sentence to decision: Grants	735.3	638.5	6.74	50.79	27.38	12.30	2.77	252
17. Sentence to decision -- OA Cases	1094.0	1073.0	1.96	1.96	58.82	27.45	9.80	51
18. Total of #15 and #16 above	445.4	340.0	55.93	33.22	6.27	1.74	2.82	2694

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/85 Ending Date: 09/30/86
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	Up to 60	Up to 120	Up to 181	181- 365	Over 180	
			*(1)	*(2)	*(3)	*(4)	*(5)	
1. Sentence to CA action	88.2	57.0	53.27	91.69	97.78	1.18	2.23	2465
2. CA action to CMR decision	184.7	101.0	22.05	59.18	76.87	17.11	23.10	2752
3. CMR decision to CMA filing	81.4	55.0	55.89	89.39	94.43	3.33	5.55	2698
4. CMA filing to CMA petition grant	141.3	131.5	3.40	39.76	81.04	18.18	18.93	264
5. CMA filing to CMA petition denial	63.1	47.0	68.38	86.69	97.60	2.25	2.37	2309
6. Total of #4 and #5 above	71.2	50.0	61.71	81.88	95.91	3.88	4.07	2573
7. Petition grant to Oral Argument	330.5	294.0	2.85	5.70	9.98	60.00	90.00	70
8. Oral Argument o CMA decision	220.7	179.5	3.12	23.43	49.99	32.81	49.99	64
9. Pet. grant to decision with no OA	294.2	208.0	21.10	37.68	45.21	19.59	54.76	199
10. Pet. grant to decision with OA	574.7	531.0	.00	.00	3.12	12.50	96.87	64
11. Grant to dec- ision in all cases	362.4	348.5	15.96	28.50	34.96	17.87	65.01	263
12. Filing to dec- ision -- Grants	501.3	487.5	1.90	4.94	14.44	25.09	85.54	263
13. Filing to dec- ision -- OA Cases	711.3	659.5	.00	.00	.00	3.12	99.99	64
14. Filing to dec- ision in all cases	109.3	50.0	61.34	78.07	88.79	4.68	11.18	2582

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	Up to 365	Up to 730	Up to 1096	1096- 1460	Over 1095	
			*(1)	*(2)	*(3)	*(4)	*(5)	
15. Sentence to Petition denial	353.9	287.0	68.45	95.08	98.61	.66	1.36	2260
16. Sentence to decision: Grants	953.8	961.5	8.42	34.85	59.75	28.73	40.22	261
17. Sentence to dec- ision -- OA Cases	1187.5	1210.5	.00	10.44	40.29	37.31	59.69	67
18. Total of #15 and #16 above	416.0	307.0	62.23	88.84	94.59	3.57	5.39	2521

*Columns (1) thru (3) are progressively cumulative
Column (4) is cumulative with column (5)

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/86 Ending Date: 09/30/87
The Requested Service Branch is - All Branches

Description	---- Days --- (Percent Completed Within # Days)							# Cases
	Ave- rage	Med- ian	Up to 60	Up to 120	Up to 181	181- 365	Over 180	
-----	-----	-----	-----	-----	-----	-----	-----	-----
			*(1)	*(2)	*(3)	*(4)	*(5)	
1. Sentence to CA action	101.4	55.0	56.56	91.84	96.88	1.68	3.12	1250
2. CA action to CMR decision	145.5	94.0	23.82	64.47	81.79	15.33	18.19	2061
3. CMR decision to CMA filing	99.3	56.0	55.21	85.52	90.51	4.92	9.47	2702
4. CMA filing to CMA petition grant	181.2	173.0	5.28	22.46	55.94	41.40	44.04	227
5. CMA filing to CMA petition denial	80.9	55.0	57.93	80.49	89.69	9.86	10.29	2748
6. Total of #4 and #5 above	88.6	57.0	53.91	76.06	87.11	12.26	12.86	2975
7. Petition grant to Oral Argument	335.2	280.0	2.12	3.18	6.37	67.02	93.61	94
8. Oral Argument to CMA decision	236.0	200.5	3.12	17.70	41.65	48.95	58.32	96
9. Pet. grant to decision with no OA	297.6	209.5	23.88	36.31	44.27	23.38	55.71	201
10. Pet. grant to decision with OA	586.7	522.5	1.04	1.04	1.04	12.50	98.95	96
11. Grant to decision in all cases	391.1	363.5	16.49	24.90	30.28	19.86	69.69	297
12. Filing to decision -- Grants	549.2	515.0	.33	4.37	10.76	20.87	89.22	297
13. Filing to decision -- OA Cases	736.6	685.0	.00	1.04	1.04	1.04	98.95	96
14. Filing to decision in all cases	127.3	58.0	52.10	72.80	81.76	11.08	18.21	3057

Description	**** Total review time: sentence to final action ****							# Cases
	Ave- rage	Med- ian	Up to 365	Up to 730	Up to 1096	1096- 1460	Over 1095	
-----	-----	-----	-----	-----	-----	-----	-----	-----
			*(1)	*(2)	*(3)	*(4)	*(5)	
15. Sentence to Petition denial	392.0	292.0	65.98	93.92	97.94	.92	2.02	2705
16. Sentence to decision: Grants	945.2	887.0	5.40	36.14	65.19	19.93	34.79	296
17. Sentence to decision -- OA Cases	1164.3	1126.0	1.01	7.07	45.45	29.29	54.54	99
18. Total of #15 and #16 above	446.5	313.0	60.01	88.23	94.72	2.79	5.25	3001

*Columns (1) thru (3) are progressively cumulative
Column (4) is cumulative with column (5)

United States Court of Military Appeals
Event Time Lag Report

The Requested Reporting Period is:
Beginning Date: 10/01/87 Ending Date: 03/09/88
The Requested Service Branch is - All Branches

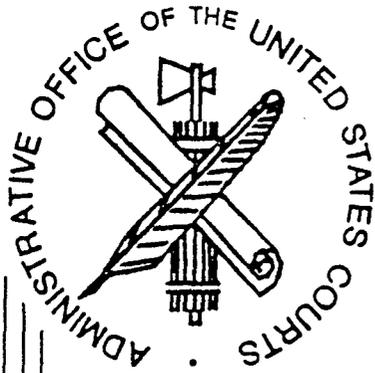
Description	--- Days ---		(Percent Completed Within				# Days Over 365	# Cases
	Ave- rage	Med- ian	0- 60	61- 120	121- 180	181- 365		
1. Sentence to CA action	58.6	50.0	61.02	35.59	3.39	.00	.00	59
2. CA action to CMR decision	125.6	91.0	22.91	46.61	15.88	10.41	4.16	384
3. CMR decision to CMA filing	86.7	59.0	51.37	38.53	4.93	2.86	2.29	872
4. CMA filing to CMA petition grant	151.1	149.0	1.72	27.58	43.10	27.58	.00	58
5. CMA filing to CMA petition denial	66.3	50.0	66.06	21.32	8.80	3.80	.00	999
6. Total of #4 and #5 above	71.0	52.0	62.53	21.66	10.69	5.10	.00	1057
7. Petition grant to Oral Argument	194.6	177.5	6.66	.00	42.22	48.88	2.22	45
8. Oral Argument to CMA decision	244.9	197.5	12.50	4.16	25.00	37.50	20.83	24
9. Pet. grant to decision with no OA	299.3	248.0	25.92	5.55	5.55	25.92	37.03	54
10. Pet. grant to decision with OA	518.9	482.5	4.16	4.16	.00	16.66	75.00	24
11. Grant to decision in all cases	366.0	363.5	19.23	5.12	3.84	23.07	48.71	78
12. Filing to decision -- Grants	538.8	564.5	.00	7.69	7.69	15.38	69.23	78
13. Filing to decision -- OA Cases	693.5	653.0	.00	4.16	4.16	.00	91.66	24
14. Filing to decision in all cases	101.2	52.0	61.26	20.29	8.71	4.63	5.09	1079

**** Total review time: sentence to final action ****

Description	Ave- rage	Med- ian	**** Total review time: sentence to final action ****				Over 1460	# Cases
			0- 365	366- 730	731- 1095	1096- 1460		
15. Sentence to Petition denial	356.4	280.0	70.49	23.39	3.96	1.11	1.01	983
16. Sentence to decision: Grants	1000.3	914.0	5.19	28.57	25.97	15.58	24.67	77
17. Sentence to decision -- OA Cases	1223.5	1204.0	4.34	4.34	26.08	30.43	34.78	23
18. Total of #15 and #16 above	403.2	293.0	65.75	23.77	5.56	2.16	2.73	1060

APPENDIX C

EXCERPTS FROM THE
FEDERAL COURT MANAGEMENT STATISTICS
FOR 1987



FEDERAL COURT MANAGEMENT STATISTICS

1987

Prepared by the Administrative Office of the United States Courts

INTRODUCTION

The 1987 edition of the **Federal Court Management Statistics** contains key statistics on the workload of Federal judges during the years ended June 30, 1982 through 1987. Statistical reports submitted by the clerks of the U.S. courts provide the basis for the information on the following pages.

The data selected and the general format of this report were approved by the Judicial Conference Subcommittee on Judicial Statistics. The data also provide the basis for the Biennial Judgeship Survey conducted by the Subcommittee. The profile pages devoted to each court supply six years of statistical data on the condition of the dockets.

On July 1, 1984, the statistical reporting criteria for the court of appeals was revised to provide a more precise summary of the workload and practices of the 12 regional courts of appeals. The first page of the two page profile for the courts of appeals shows overall workload statistics and actions per active judge while the second page shows actions per panel, median time, and other workload per judgeship. Court of appeals workload statistics are shown as actions per panel because cases are generally handled by panels of three judges, while district court workload statistics are divided by the number of authorized judgeship positions in each court to provide the workload per judgeship. The per panel and per judgeship figures virtually eliminate the influence of court size and allow comparison between courts of different sizes.

The Federal Courts Improvement Act of 1982 established a new court of appeals under Title 28 U.S.C. Section 41, the U.S. Court of Appeals for the Federal Circuit. This court, which was created by joining the appellate division of the U.S. Court of Claims with the U.S. Court of Customs and Patent Appeals, began operations on October 1, 1982. Because of the unique nature of the workload of the court, its statistics are not included in this publication.

The national profile for the regional courts of appeals appears on the foldout on page 29. The national caseload totals and averages for the district courts are displayed on the last page of this report. Use caution when comparing these national averages to the averages for a particular court. Unique circumstances which could cause a court to vary substantially from the national average are not reflected in the individual court profiles. Some of the factors which could have an impact are long-term judgeship vacancies, an unusual case in progress requiring the full-time service of one judge, a relatively high number of senior judges augmenting regular judgeship strength, or administrative burdens of chief judges in the large metropolitan courts.

The following three pages provide detailed explanations on the data contained in the statistical profiles for the appeals and district courts. Pages 29 and 167 present additional information on specific judicial workload statistics. Refer to these pages before using the statistics in this report.

September 1987

**EXPLANATION OF THE JUDICIAL WORKLOAD PROFILES
(OVERALL)
FOR UNITED STATES COURTS OF APPEALS**

**OVERALL
WORKLOAD
STATISTICS**

A P P E L S	Total		APPEALS PLACED ON THE GENERAL DOCKET	Total appeals filed, includes reopened and reinstated appeals	
	Prisoner			Civil — State and Federal prisoner petitions only	
	All Other Civil			Civil — all other, includes original proceedings and bankruptcy reviews	
	Criminal			All criminal appeals	
	Administrative			All administrative agency petitions for review and applications for enforcement	
	Percent Change in Total Filings — Current Year		Over Last Year ▶	Percentage change in total filings — current year over previous	
			Over Earlier Years ▶	Percentage change in total filings — current year over two, three, four and five years ago	
	T E R M I N A T E D	Total		APPEALS PLACED ON THE GENERAL DOCKET	Total cases disposed of during profile years
		Consolidations & Cross Appeals			Includes cross appeals and appeals terminated through consolidation with a lead case (the lead case will be included below as applicable)
		Procedural			Includes all dispositions (with and without judicial action) not based on the merits of the case
ON THE MERITS¹		Total	Total dispositions by full panels based on the merits of the case		
		Prisoner	Prisoner petition dispositions based on the merits of the case		
		Other Civil	Other civil dispositions based on the merits of the case		
		Criminal	Criminal dispositions based on the merits of the case		
		Administrative	Administrative agency dispositions based on the merits of the case		
		Percent by Active Judges	Percent of cases terminated on the merits by active judges		
PENDING APPEALS			Pending cases at the end of the reported period		
Terminations on the Merits			Dispositions based on the merits		
Procedural Terminations			Dispositions after judicial action not based on the merits of the case including jurisdictional defects, settlements and defaults		
ACTIONS PER ACTIVE JUDGE²	Written Decisions	Total	Written opinions or orders in cases disposed of on the merits		
		Signed	Any opinion written in support of a specific decision, authored and signed by a judge writing the majority opinion		
		Unsigned	Unsigned opinions of the court which state the legal and factual elements and judgment rationale		
		Without Comment	Unsigned opinions/orders which do not state the legal and factual elements and judgment rationale		

¹See Page 29.

²Includes only judges active during the entire 12 month period.

**EXPLANATION OF THE JUDICIAL WORKLOAD
PROFILES (ACTIONS PER PANEL)
FOR UNITED STATES COURTS OF APPEALS**

		Number of Judgeships/ Number of Panels	Authorized judgeships (does not include senior judges)/ Authorized three-judge panels	
		Number of Sitting Senior Judges	Number of court's own senior Judges participating in case dispositions	
		Number of Vacant Judgeship Months	Number of months during profile year that an authorized judgeship was not filled	
ACTIONS PER PANEL	A P P E L S	Total		Total appeals filed, includes reopened and reinstated appeals
		Prisoner		Civil — State and federal prisoner petitions only
		All Other Civil		Civil — all other, includes original proceedings and bankruptcy reviews
		Criminal		All criminal appeals
		Administrative		All administrative agency petitions for review and applications for enforcement
	T A E P M E I A N L A S T E D	Total		Total cases disposed of during profile years
		Consolidations & Cross Appeals		Includes cross appeals and appeals terminated through consolidation with a lead case (the lead case will be included below as applicable)
		Procedural		Includes all dispositions (with and without judicial action) <i>not</i> based on the merits of the case
		ON THE M E R I T S	Total	Total dispositions by full panels based on the merits of the case
			Prisoner	Prisoner petition dispositions based on the merits of the case
			Other Civil	Other civil dispositions based on the merits of the case
			Criminal	Criminal dispositions based on the merits of the case
			Administrative	Administrative agency dispositions based on the merits of the case
		PENDING APPEALS		Pending cases at the end of the reported period
		MEDIAN TIME	Median Time from Filing Notice of Appeal to Disposition	Includes only those cases terminated on the merits of the case. This figure shows the time interval, in months, for the middle (median) case
OTHER WORKLOAD PER JUDGESHIP*	Applications for Interlocutory Appeals	FIGURES AVAILABLE SINCE 1985 ONLY	Disposition of applications for interlocutory appeals	
	Pro Se Mandamus Petitions		Disposition of pro se mandamus petitions	
	Petitions for Rehearing		Petitions for rehearing by panel or en banc	

*See Page 29.

**CIRCUIT'S
NUMERICAL
STANDINGS**

All twelve circuit courts of appeals have been arranged in a ranked order with respect to the statistical indices of workload or performance found on the profile. This shows where an individual court of appeals workload condition stands in relationship to all other circuit courts of appeals.

**NU
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**United States Courts of Appeals
National Judicial Workload Profile (Actions Per Panel)**

		ALL COURTS OF APPEALS							
		1987	1986	1985	1984	1983	1982		
Number of Judgeships/ Number of Panels		156/52.0	156/52.0	156/52.0	132/44.0	132/44.0	132/44.0		
Number of Sitting Senior Judges		50	41	45	50	50	47		
Number of Vacant Judgeship Months		123.4	163.0	275.0	23.9	53.3	103.1		
A P P E L S	Total	676	659	642	716	673	635		
	Prisoner	163	134	126	136	121	110		
	All Other Civil	360	365	359	400	373	346		
	Criminal	101	99	96	111	109	108		
	Administrative	52	61	61	69	70	71		
*ACTIONS PER PANEL	T E R M I N A L E D	Total	662	650	604	709	651	636	
		Consolidations & Cross Appeals	51	55	52	90	95	96	
		Procedural	255	245	237	293	256	251	
		O N T H E M E R I T S	Total	356	350	315	326	300	289
			Prisoner	70	64	55	49	47	42
	Other Civil		192	190	177	180	159	157	
	Criminal		64	68	59	67	65	58	
	Administrative	30	28	24	30	29	32		
	PENDING APPEALS		500	486	476	518	511	489	
	M E D I A N T I M E	Median Time from Filing Notice of Appeal to Disposition	10.3	10.3	10.3	10.8	11.1	11.5	
O T H E R W O R K L O A D P E R J U D G E S H I P*	Applications for Interlocutory Appeals	2	2	2	NA	NA	NA		
	Pro Se Mandamus Petitions	6	6	5	NA	NA	NA		
	Petitions for Rehearing	32	33	34	NA	NA	NA		

*See Page 29.

United States Courts of Appeals
National Judicial Workload Profile (Overall)

		ALL COURTS OF APPEALS							
		1987	1986	1985	1984	1983	1982		
A P P E A L S	Total	35,176	34,292	33,360	31,490	29,630	27,946		
	Prisoner	8,488	6,992	6,532	5,964	5,327	4,834		
	All Other Civil	18,705	18,979	18,660	17,600	16,444	15,227		
	Criminal	5,260	5,134	4,989	4,881	4,790	4,767		
	Administrative	2,723	3,187	3,179	3,045	3,069	3,118		
	Percent Change in Total Filings – Current Year	Over Last Year ▶ 2.6	5.4	11.7	18.7	25.9			
		Over Earlier Years ▶							
O V E R A L L W O R K L O A D S T A T I S T I C S	T E R M I N A T E D	Total	34,444	33,774	31,387	31,185	28,660	27,984	
		Consolidations & Cross Appeals	2,689	2,848	2,669	3,953	4,180	4,204	
		Procedural	13,253	12,727	12,349	12,905	11,263	11,060	
		O N T H E M E R I T S ¹	Total	18,502	18,199	16,369	14,327	13,217	12,720
			Prisoner	3,631	3,345	2,835	2,163	2,052	1,838
			Other Civil	9,996	9,853	9,208	7,916	7,014	6,934
	Criminal		3,308	3,540	3,070	2,927	2,859	2,541	
	Administrative		1,567	1,461	1,256	1,321	1,292	1,407	
	Percent by Active Judges	82.9	81.8	80.8	81.2	78.7	77.7		
	PENDING APPEALS		26,008	25,276	24,758	22,785	22,480	21,510	
	A C T I O N S P E R A C T I V E J U D G E ²	Terminations on the Merits		323	330	308	276	238	237
Procedural Terminations		87	90	103	116	100	NA		
W R I T T E N D E C I S I O N S		Total	114	118	110	NA	NA	NA	
		Signed	42	48	45	NA	NA	NA	
		Unsigned	57	54	52	NA	NA	NA	
		Without Comment	15	16	13	NA	NA	NA	

¹See Page 29.

²Includes only judges active during the entire 12 month period.

U.S. COURTS OF APPEALS SUMMARY — YEAR ENDED JUNE 30, 1987

		D.C.	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	
OVERALL WORKLOAD STATISTICS	Total	1,583	1,110	3,008	2,595	2,886	4,301	3,817	2,173	2,209	5,652	1,967	3,875	
	Prisoner	95	99	584	567	1,090	1,218	1,136	620	681	895	436	1,067	
	All Other Civil	726	752	1,681	1,432	1,304	2,331	1,976	1,104	1,155	3,272	1,173	1,799	
	Criminal	84	220	544	395	348	503	437	297	312	974	261	885	
	Administrative	678	39	199	201	144	249	268	152	61	511	97	124	
	Percent Change in Total Filings - Current Year	-15.4	-6.4	2.6	5.1	3.1	12.1	5.5	-4.6	7.6	7.6	6.8	-3.1	-1.4
	Over Last Yr.	9.4	6.7	6.4	18.4	8.9	58.4	46.9	1.1	38.4	38.4	28.7	10.3	51.6
	Over 1982													
	Total	1,966	1,092	3,008	2,579	2,760	4,174	3,762	2,340	2,150	5,092	1,857	3,664	
	Consolidations & Cross Appeals	442	29	292	153	252	403	219	139	206	355	59	140	
ON THE MERITS	Procedural	576	412	1,498	1,220	823	1,580	1,337	1,066	545	2,131	555	1,510	
	Total	948	651	1,218	1,206	1,685	2,191	2,206	1,135	1,399	2,606	1,243	2,014	
	Prisoner	48	39	187	179	601	380	696	204	441	285	237	334	
	Other Civil	399	454	695	752	700	1,337	1,113	647	715	1,422	746	1,016	
	Criminal	53	136	272	191	243	377	256	198	199	579	201	603	
	Administrative	448	22	64	84	141	97	141	86	86	44	59	61	
	Percent by Active Judges	88.0	85.2	77.2	75.0	83.5	91.2	79.4	85.0	85.0	83.5	82.6	79.2	83.5
	PENDING APPEALS	1,859	716	820	1,308	1,952	2,552	3,025	1,496	1,496	1,273	5,898	2,275	2,834
	Terminations on the Merits	214	311	217	310	404	434	336	317	317	353	268	314	426
	Procedural Terminations	24	51	61	183	97	81	76	193	193	64	82	50	110
*ACTIONS PER ACTIVE JUDGE	Total	86	108	86	115	141	145	135	111	124	85	103	146	
	Signed	25	52	31	60	29	72	30	61	46	30	67	30	
	Unsigned	48	56	54	4	112	69	91	48	40	48	21	71	
	Without Comment	13	-	1	51	-	4	14	2	38	7	15	45	

*See Page 29.

U.S. COURTS OF APPEALS SUMMARY — YEAR ENDED JUNE 30, 1987

	D.C.	1st.	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
Number of Judgeships/ Number of Panels	12/4-0	6/2-0	13/4-3	12/4-0	11/3-7	16/5-3	15/5-0	11/3-7	10/3-3	28/9-3	10/3-3	12/4-0
Number of Sitting Senior Judges	3	1	4	5	2	5	6	4	4	10	2	4
Number of Vacant Judgeship Months	13-3	4-8	0-0	35-6	0-3	24-0	0-0	14-5	0-5	15-7	14-7	0-0
ACTIONS PER PANEL												
Total	396	555	694	649	787	806	763	593	663	606	590	969
Prisoner	24	50	135	142	297	228	227	169	204	96	131	267
All Other Civil	181	375	387	358	356	437	395	302	347	351	352	450
Criminal	21	110	126	99	95	94	87	81	94	104	78	221
Administrative	170	20	46	50	39	47	54	41	1-8	55	29	31
Total	492	546	694	645	753	783	752	638	645	546	557	916
Consolidations & Cross Appeals	111	14	67	38	69	76	44	38	61	39	17	34
OTHER WORKLOAD PER JUDGESHIP												
Procedural	144	206	346	305	224	296	267	291	164	228	167	378
Total	237	326	281	302	460	411	441	310	420	279	373	504
Prisoner	12	20	43	45	164	71	139	56	132	31	71	84
Other Civil	100	227	160	188	192	251	223	176	215	152	224	254
Criminal	13	68	63	48	66	71	51	54	60	62	60	151
Administrative	112	11	15	21	38	18	28	23	13	34	18	15
PENDING APPEALS	465	358	189	327	532	479	605	408	392	632	683	709
Median Time from Filing Notice of Appeal to Disposition	12-7	8-7	6-0	8-2	8-2	8-8	12-0	11-7	8-3	14-1	16-1	10-3
Applications for Interlocutory Appeals	-	1	3	1	2	2	2	2	1	2	1	3
Pro Se Mandamus Petitions	2	2	1	3	3	11	7	5	21	4	7	8
Petitions for Rehearing	39	36	10	28	34	41	34	37	41	27	19	48

*ACTIONS PER PANEL

