

## REFORM OF THE COURT OF MILITARY APPEALS

Article 67 of the Uniform Code of Military Justice (UCMJ), which became effective in 1951, established the Court of Military Appeals “as the civilian interpreter of military law and as the overseer of the court-martial system.”<sup>1</sup> This article of the Code stipulates that the three-member court was to be “located for administrative purposes in the Department of Defense.”<sup>2</sup>

In 1967, Congress sought to address the concern that, despite Congressional intent, there were contentions that the Code could be interpreted to mean that “the [Court of Military Appeals] is not a court at all, but is an instrumentality of the executive branch or an administrative agency within the Department of Defense.”<sup>3</sup> The Senate Committee on Armed Services noted in a report that “the phrase ‘for administrative purposes’ was meant merely to authorize the Department of Defense to furnish such things as telephone services, transportation facilities, and to purchase supplies.”<sup>4</sup> S. 2634, which became law in June 1968 (Pub.L.No. 90-340, 82 Stat 178), provides that the Court of Military Appeals be redesignated the U.S. Court of Military Appeals. As stated in the Senate Armed Services Committee report, this redesignation

and the declaration in law that the court is established under Article I of the Constitution are intended to reaffirm the congressional intent that the court be the civilian supervisor of the administration of military justice and the final interpreter of the requirements of military law.<sup>5</sup>

In May 1979, the General Counsel of the Department of Defense issued a staff paper, the purpose of which was to “assess the need for legislative reform with respect to the Court of Military Appeals, set out the advantages to be sought and the disadvantages to be avoided in effecting reform, and evaluate 13 proposals for reform.”<sup>6</sup> This report includes several appendices, which provide historical background of appellate review, by civilian courts as well as in the military justice system; organizational and operational information regarding the court at the time; statutes that would be affected by potential reform proposals; and a draft legislative proposal.

The report discusses at length the need for reform of the Court. It states that the nature of civilian judicial review, which over time had become “the accepted mode in the military justice system,” had changed so substantially since 1951 as to merit a thorough re-evaluation of the initial compromise that produced the Court of Military Appeals.<sup>7</sup> The changes within and outside the Court that had occurred since the Court’s inception were

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<sup>1</sup> S.Rep.No. 90-806, at 2(1967).

<sup>2</sup> Robinson O. Everett, “Justice in Uniform: Where the U.S. Court of Military Appeals is Heading,” *Judges’ Journal*, 26 (Fall 1987): 29.

<sup>3</sup> S.Rep.No. 90-806, at 2 (1967).

<sup>4</sup> S.Rep.No. 90-806, at 2 (1967).

<sup>5</sup> S.Rep.No. 90-806, at 2 (1967).

<sup>6</sup> U.S. Department of Defense, Office of the General Counsel, *Reform of the Court of Military Appeals* (Washington, DC: U.S. Department of Defense, May 7, 1979), 1.

<sup>7</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 7.

grouped into three “broad categories of factors — changed circumstances over the years, the unusual lack of access to the Supreme Court for final review, and the turbulence in court personnel and doctrine;” together they “have created a substantial need for reform.”<sup>8</sup>

The report “isolates 13 factors that would be considered advantages to be sought in any reform of the Court of Military Appeals,” e.g., adequate appellate review for the government and for the accused, separation of executive and judicial powers, and fiscal austerity.<sup>9</sup> Noting that “the Court of Military Appeals serves some aspects of the military justice system well,” the report urges the preservation of those aspects.<sup>10</sup> However, the report cautions that “urgent requirements in a military justice system” that may not be “served well by the Court of Military Appeals, should not be made worse in the process of changing the system.”<sup>11</sup> The report enumerates the “adverse effects to be guarded against” in any reform proposal, e.g., less expert knowledge of military law, procedures and practices.<sup>12</sup>

According to the report, there are two basic types of proposals for reform of the Court — “abolish the Court and shift its jurisdiction to another federal court,” or “maintain the existing Court of Military Appeals and focus on changes in its structure or its place in the federal system.”<sup>13</sup> For the first of these alternatives, the report notes that there are “four federal courts to which jurisdiction over military appeals might be transferred, and several variations in how the transfer might be structured.”<sup>14</sup> The report evaluates the efficacy of each of these options, based on the 13 factors cited above. For the second alternative, the report evaluates seven proposals to compensate for “perceived deficiencies in the current system.”<sup>15</sup> It concludes with an assessment of the merits of combining these seven alternatives “to provide for a Court of Military Appeals composed of five or more members with full 15-year term (or life tenure) whose decisions could be reviewed directly by the Supreme Court (or through a court of appeals). Revision of the retirement system and the collateral attack [on court-martial convictions] system could be added.”<sup>16</sup>

In February, March, and September, 1980 the House Armed Services Committee held hearings to consider proposed legislation (H.R. 6298 and H.R. 6406) to revise the laws governing the U.S. Court of Military Appeals and the appeals process itself.<sup>17</sup> The hearing record includes a January 2, 1980 letter from the General Counsel of the

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<sup>8</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 18.

<sup>9</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 19-31.

<sup>10</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 31.

<sup>11</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 31.

<sup>12</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 31-37.

<sup>13</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 38.

<sup>14</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 38.

<sup>15</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 54.

<sup>16</sup> U.S. Department of Defense, *Reform of the Court of Military Appeals*, 60.

<sup>17</sup> U.S. Congress, House of Representatives, Committee on Armed Services, Subcommittee on Military Personnel, *Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process*, 96th Cong., 2<sup>nd</sup> Sess., February 7, March 6, and September 23, 1980.

Department of Defense (DOD) to House Speaker O'Neill proposing legislation "to improve the appellate process in the court-martial system by enhancing the stature of the Court of Military Appeals."<sup>18</sup> The legislation proposes reforms addressed in the May 1979 DOD report, details of which were enumerated in testimony presented by DOD Assistant General Counsel Robert Gilliat to the House Armed Services Committee. He urged that the Court of Military Appeals be a five-member, independent court, each member being granted a full 15-year term. He also testified in support of granting the Supreme Court discretionary authority to review decisions of the Court of Military Appeals.<sup>19</sup> Support for the legislation under consideration by the committee, which incorporated DOD's proposals, was expressed by witnesses A.B. Fletcher, Jr., Chief Judge of the U.S. Court of Military Appeals, and William H. Cook, Judge of the U.S. Court of Military Appeals. Major General Alton H. Harvey, Judge Advocate General of the Army, testified that the legislation was "essential to the stability of the military justice system, and the predictability which subordinate military courts, legal officers, and commanders have a right to expect as they perform their responsibilities under the Uniform Code of Military Justice."<sup>20</sup>

In September 1980, the House Armed Services reported a clean bill, H.R. 8188, the "Court of Military Appeals Act of 1980," which "incorporated changes the committee made in H.R. 6298, the original Administration proposal, and eliminated the provision in H.R. 6406 which would have created a new retirement system for judges of the Court of Military Appeals."<sup>21</sup> The committee viewed the bill as an "effort to stabilize and thereby enhance the military appellate structure."<sup>22</sup> H.R. 8188 passed the House of Representatives on October 2, 1980 but was not enacted into law.

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<sup>18</sup> U.S. House Armed Services Committee, *Revision of the Laws Governing the U.S. Court of Military Appeals*, 41.

<sup>19</sup> U.S. House Armed Services Committee, *Revision of the Laws Governing the U.S. Court of Military Appeals*, Testimony of Robert L. Gilliat, Assistant General Counsel (Manpower, Health and Public Affairs), Department of Defense, 50-57.

<sup>20</sup> U.S. House Armed Services Committee, *Revision of the Laws Governing the U.S. Court of Military Appeals*, Testimony of Major General Alton H. Harvey, Judge Advocate General of the Army, 64.

<sup>21</sup> H.R. Rep. No. 96-1412, at 1 (1980).

<sup>22</sup> H.R. Rep. No. 96-1412, at 2 (1980).