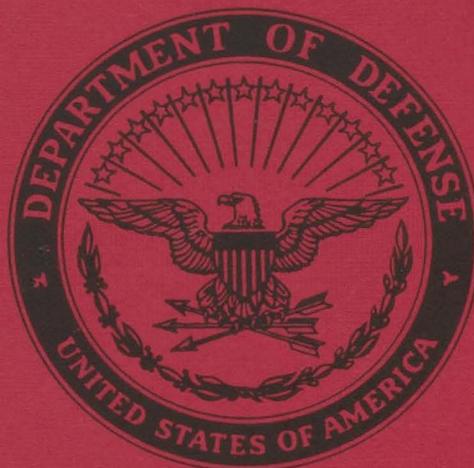


**REPORT OF THE
DEPARTMENT OF DEFENSE
STUDY GROUP
ON THE
UNITED STATES
COURT OF MILITARY APPEALS**



**OFFICE OF THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE**

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

July 25, 1988

MEMORANDUM

SUBJECT: DoD Study Group on the U.S. Court of Military Appeals

On July 17, 1987, the former General Counsel, Department of Defense, formed a Study Group to identify and thoroughly examine all significant issues affecting the size, organization, jurisdiction and operations of the United States Court of Military Appeals, with particular attention to matters which may be, or should be, the subject of proposed legislation. The objective of the Study Group was to facilitate the exchange of information and views among the services and the Office of the Secretary of Defense, provide the best possible information base for evaluation by the Department of Defense and each of the military departments of any legislative proposals, and propose for further consideration within the Department of Defense any legislation deemed appropriate.

As there is pending legislation (S. 1625 & H.R. 3310, 100th Congress) that would reconstitute the court under article III of the U.S. Constitution, the primary focus of the report is whether the court should be an article I or article III court. In addition to assessing the impact that article III status would have on court functions, the report evaluates various proposals for reform of the court which could be implemented in conjunction with or independent of any change in the court's article I status.

Before any decisions or recommendations are made by the Department of Defense regarding changes to the status or organization of the United States Court of Military Appeals, the issues discussed in the report will be subject to careful and thorough review. We believe that wide circulation of the report for comment will be of benefit to the Department of Defense in shaping any legislative proposals and to the Congress in considering these proposals. Accordingly, we are circulating this report to solicit the views of the bench and bar, the committees of Congress with responsibility for military justice and the judiciary, other government agencies and offices that have an interest in justice systems, veterans organizations, legal services organizations and interested members of the public.

Kathleen A. Buck

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Department of Defense
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I. INTRODUCTION

The purpose of an armed force is to maintain a state of readiness during periods of peace so as to deter war and, when the occasion arises, to fight effectively in armed conflict. Well motivated and disciplined servicemembers are essential to the success of an armed force. This requirement for discipline both in peacetime and wartime is what primarily sets military justice apart from civilian justice. Military justice promotes good order and discipline by being fair, efficient and timely. The United States Court of Military Appeals (COMA) is an integral part of the military justice system, and its proper role in the system is of great concern to the Department of Defense (DOD).

COMA is a three-judge court of limited jurisdiction established under Article I of the U.S. Constitution and located for administrative purposes only in DOD. The issue of whether COMA should be reconstituted under Article III of the U.S. Constitution has been the subject of some debate, and legislation has been introduced recently to accomplish that change. On July 17, 1987, the DOD General Counsel, having decided that the time was ripe to resolve long-standing concerns regarding COMA's status, size, organization, jurisdiction and operations, formed an ad hoc Study Group to "identify and thoroughly examine all significant issues affecting the court, with particular attention to matters which may be, or should be, the subject of proposed legislation." The Study Group was composed of a military attorney from each armed service within DOD and, by invitation, a military attorney from the U.S. Coast Guard. On September 15, 1987, the Acting DOD General Counsel formalized the Study Group and designated the U.S. Army as the Executive Agent for all matters related to the Study Group's activities.

II. EVOLUTION OF THE ISSUE

A. Article III Courts and Article I Courts.

Article III, § 1, of the U.S. Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

The Judiciary Article thus provides for the creation of an independent judicial system as one of the separate but coordinate

branches of the national government. The sole business of these courts is to try cases or controversies between litigants who properly invoke its jurisdiction.

Congress almost immediately exercised its power to create Article III inferior courts when it enacted the First Judiciary Act in 1789 (Act of Sept. 24, 1789, 1 Stat. 73). Three circuit courts and at least one district court for each state were created. District court judges were appointed for each district and, together with the Supreme Court justices, also comprised the circuit courts, which had no judges appointed to them. The act also defined the appellate jurisdiction of the Supreme Court. The courts of appeals were created pursuant to the Article III power by the Evarts Act in 1891 (Act of Mar. 3, 1891, 26 Stat. 826) and the circuit courts were abolished in 1911 (Act of Mar. 3, 1911, 36 Stat. 1087). Many other alterations and enlargements to the federal court system have occurred as the United States has expanded and its judicial needs have changed.

The power of Congress to create courts, however, does not flow exclusively from Article III. Congress has the authority to create courts under Article I, § 8 and Article IV, § 3 (territorial courts). These courts are usually referred to as "legislative" or "Article I" courts, as distinguished from the "constitutional" courts created under Article III. Although all federal courts can be characterized as "constitutional" courts since they are established either by the constitution itself (i.e. the Supreme Court) or by Congress acting under some constitutional power, "constitutional courts," as that term is used in court decisions and literature on the subject, refers only to courts created under Article III.

The distinction between "constitutional" and "legislative" courts has not been definitively established, but is characterized by the express terms of Article III, the separation of powers, the nature of the jurisdiction conferred, or the differing nature of the rights litigated by the courts in the exercise of their jurisdiction. The importance of the distinction is (1) the life tenure and protections against salary reduction enjoyed by "constitutional" court justices or judges, and (2) the limitation of "constitutional" court jurisdiction to the exercise of Article III judicial power [See Hodgson v. Bowerbank, 5 Cranch 303, 3 L.Ed. 302 (1809)]. Congress may establish any standard of tenure and salary for the members of "legislative" courts that it deems suitable [See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)]. The jurisdiction of "legislative" courts may be extended to matters other than "cases or controversies" and the judges of such courts may be tasked with administrative duties [See Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Ex parte Bakelite Corp., 279 U.S. 438 (1929)].

Whenever Congress has created a "legislative" court, it has

been extremely careful to balance the needs of the three branches of government so as to further the obligations of the legislature and executive without unnecessarily encroaching upon the Article III power of the judiciary. In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra, the Supreme Court recognized three narrow situations in which this balance can be constitutionally struck in favor of the creation of "legislative" courts. The Court noted that these situations each recognize

a circumstance in which the grant of power to the Legislature and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.

(Id. at 64).

The first situation involves territorial courts [See American Ins. Co. v. Canter, 1 Pet. 511 (1828)]. As to certain geographical areas in which no state operates as sovereign, Congress exercises the general powers of government. These territories are temporary entities that will either gain independence [e.g. Philippines (60 Stat. 1352)] or statehood [e.g. Alaska (72 Stat. 339) or Hawaii (73 Stat. 4)]. Since the territorial courts are also temporary, the judges of such courts should not have life tenure. Many of these courts ceased to exist when there was no longer a need for them [e.g. Choctaw and Chickasaw Citizenship Court (Act of July 1, 1902, 32 Stat. 641), which determined questions of tribal membership relevant to property claims within Indian territory - See Wallace v. Adams, 204 U.S. 415 (1907); Court for China (Act of June 30, 1906, 34 Stat. 814)]. Consular courts operating overseas as Article I courts have also been established by concession from foreign countries [See In Re Ross, 140 U.S. 453 (1891)]. Although not a territory or possession, the District of Columbia has an Article I court system (District of Columbia Court of Appeals and Superior Court of the District of Columbia) created under an analogous rationale, that is, Congress exercising the general powers of government [See Palmore v. U.S., 411 U.S. 389 (1973); Kendall v. U.S., 12 Pet. 524, 619 (1838)]. Territorial courts that still exist include the District Courts in Guam, the Northern Mariana Islands, and the Virgin Islands.

The second situation involves courts or administrative agencies created to adjudicate cases involving "public rights" [See Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856)]. The "public rights" doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently judicial" and thus fall within the purview of the Judiciary Branch (Ex parte Bakelite Corp., supra at 458). Public rights must at a minimum arise between the

government and others. In contrast, the liability of one individual to another under the law is a matter of private rights. Legislative courts created under this rationale, like territorial courts, may be abolished when there is no longer a need for them [e.g. Court of Private Land Claims (Act of March 3, 1891, 26 Stat. 854) to adjudicate claims between private claimants and the U.S. founded on Mexican or Spanish grants to lands within the territory ceded to the U.S. by Mexico; Commerce Court (Act of June 18, 1910, 36 Stat. 539)]. Article I courts created for the adjudication of "public rights" still in existence include the U.S. Tax Court and U.S. Claims Court.

The third and, for the purpose of this report, most important situation involves courts-martial, that are based upon

a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue. Article I, § 8, cls. 13, 14, confer upon Congress the power '[t]o provide and maintain a Navy,' and '[t]o make Rules for the Government of the land and naval Forces.' The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for 'cases arising in the land and naval forces.' And Art. II, § 2, cl. 1, provides that 'The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States.' Noting these constitutional directives, the Court in Dynes v. Hoover, 20 How. 65 (1857), explained:

'These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely separate of each other.' Id., at 79.

(Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra at 66)(footnote omitted). COMA is an integral part of the court-martial system and was established in 1951 as a valid exercise of the Congressional authority to create an Article I appellate court dedicated solely to military justice cases.

B. Establishment of the United States Court of Military Appeals

The public and Congressional debate, which followed World War II, concerning the need to reform the military justice system is too extensive to adequately summarize in this report, and one

should see Amendments to the Articles of War: Hearings on H.R. 2575 Before a Subcomm. of the House Comm. on Armed Services, 80th Cong., 1st Sess. (1947) for a representative sampling of such debates. The abbreviated summary of the creation of COMA which follows focuses only issues relevant to the subject of this report, to wit the appropriate status of COMA. For a more extensive history see Larkin, Professor Edmund M. Morgan and the Drafting of the Uniform Code, 28 Mil. L. Rev. 7 (1965).

Although the notion of a civilian appellate court to review courts-martial had existed since at least 1919, the notion became a reality as a result of the Morgan Committee's drafting of the Uniform Code of Military Justice. The Committee was formed by Secretary of Defense James Forrestal pursuant to a request, dated May 3, 1948, from Senator Gurney, Chairman of the Senate Armed Services Committee. In October 1948, Morgan proposed to the Committee that a Judicial Council be established in the Office of the Secretary of Defense. Members would be nominated by the Secretary and appointed by the President for life, with the pay of a federal circuit court judge. In addition to reviewing questions of law, the Council would be empowered to weigh evidence, judge credibility, and determine issues of fact. Representatives of the Military Departments on the Morgan Committee all registered varying degrees of opposition to the proposal. The Committee (with the Army dissenting) adopted a modified proposal that included vesting the appointment power in the Secretaries of the Military Departments, rendered the members removable at will by the Secretaries, and limited review to questions of legal sufficiency. Secretary Forrestal accepted the Morgan Committee proposal as adopted.

On February 8, 1948, a proposed Uniform Code of Military Justice, that included the Morgan Committee Judicial Council provision, was transmitted to Congress. The House hearings on the bill involved detailed consideration of the role of the Judicial Council, as it was a major innovation of the bill [See Establishment of a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. (1949)]. The Subcommittee changed the name from "Judicial Council" to "Court of Military Appeals" and modified the bill to provide life tenure conditioned on good behavior. The full Committee approved these changes and further amended the bill to set a limit on the number of judges who could be appointed from the same political party and to add the Committee as the recipients of the annual report on military justice to be made by the court and the Judge Advocates General. The Committee reported the bill to the House on April 28, 1949 and described the appellate procedures for the Court of Military Appeals as "the most revolutionary changes which have ever been incorporated in our military law" [H.R. Rep. No. 491, 81st Cong., 1st Sess. 6 (1949)]. The Committee noted that the judges "are to be highly qualified civilians and the compensation has been set to attract such persons" (Id. at 32).

On the House floor, Representative Philbin, a member of the Armed Services Committee, emphasized the importance of the court in providing for civilian review of military justice and stated:

This court 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.

[95 Cong. Rec. 5726 (1949)]. The House version passed easily on May 5, 1949 (Id. at 5744).

The Senate also held extensive hearings on the legislation (See Establishment of a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services, 81st Cong., 1st Sess. (1949)). Although stronger opposition to the proposal for a Court of Military Appeals emerged in the Senate Subcommittee hearings, the Subcommittee rejected suggestions that the judges of the court be all military or mixed military and civilian. Senator Kefauver expressed concern that the initial court appointees may be political "lame ducks" and noted that "we want to see how this [court] is going to operate and what kind of personnel we are going to get, and it may be that experience will show that we should have a man with military experience" (Id. at 312). At his suggestion, the committee removed the House proposal for life tenure and substituted staggered eight year terms [Id. at 314; S. Rep. No. 486, 81st Cong., 1st Sess. 28 (1949)]. On the Senate floor, attempts to weaken or eliminate the court provision, as well as attempts to strengthen the court by restoring the House version making it a "court of the United States," were rejected [95 Cong. Rec. 1293, 1442-43 (1950)]. The Senate Armed Services Committee's version was passed without amendment on February 3, 1950. The Conference Committee increased the term for each judge from 8 to 15 years, provided for staggered terms, and granted civil service benefits to the judges [H.R. Rep. No. 1946, 81st Cong., 2d Sess. 4 (1950)]. The court came into existence when the Uniform Code of Military Justice became effective on May 31, 1951 (Act of May 5, 1950, 64 Stat. 107).

The court held its initial meeting in the Pentagon, and then moved to temporary quarters in the Internal Revenue building, sharing facilities with the United States Court of Customs and Patent Appeals. On June 15, 1951, Secretary of Defense Robert A. Lovett asked Mr. Jess Larson, Director of the General Services Administration, to find permanent space for the court because it was "contrary to the wishes of Congress and the judicial

character of the Court" for it to be located in the Pentagon [W. Generous, Swords and Scales 63 (1973)]. In 1952, when the United States Court of Appeals for the District of Columbia vacated its facility at 5th and E Streets (N.W.), the Court of Military Appeals acquired the building, which it now occupies as its permanent quarters.

In 1968, Congress amended Article 67(a)(1), Uniform Code of Military Justice, to rename the court and clarify its status as follows:

There is a United States Court of Military Appeals established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense.

(Act of June 15, 1968, Pub. L. 90-340, 82 Stat. 178). The House Armed Services Committee noted:

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

[H.R. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968)]. This act made explicit that which was implicit in 1951, to wit, the court is an article I court. The report further noted, in connection with a provision for a retired judge of the court to sit by designation, that

[w]hile the House, upon request of the Armed Services Committee has on three separate occasions, voted to have the judges of the Court of Military Appeals have life tenure, as do judges of regular courts of appeals, the Senate has so far refused to agree.

(Id.). The act also provided that

(1) any judge appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed only for the unexpired term of his predecessor;

(2) each judge is entitled to the same salary and travel

allowances as are judges of the United States Court of Appeals;

(3) the chief judge take precedence over the other judges, and the other judges take precedence based on their seniority;

(4) retired COMA judges may take Senior status, occupy offices in a federal building, and have a GS-9 staff assistant; and

(5) a judge appointed to fill a temporary vacancy due to illness or disability may only be a judge of the Court of Appeals of the District of Columbia.

In 1980, legislation was enacted that gave every judge appointed a full 15 year term rather than the unexpired portion of the term of the judge whose vacancy was being filled (Act of Dec. 23, 1980, Pub. L. 96-579, 94 Stat. 3369). In 1983, Congress provided for direct review by writ of certiorari to the U.S. Supreme Court of cases in which COMA granted review, eliminated from the scope of mandatory review those cases affecting a general or flag officer, added two public members to the Article 67(g) Code Committee, required the Committee to meet "at least annually," and that a judge appointed to fill a temporary vacancy due to illness or disability may only be a judge of the Court of Appeals of the District of Columbia Circuit (emphasis added) (Act of Dec. 6, 1983, Pub. L. 98-209, 97 Stat. 1402).

The full text of Article 67, UCMJ, that sets forth the composition, organization, jurisdiction, and responsibilities of COMA, is attached at TAB R.

C. Early Comment.

An early discussion of Article III status for COMA appeared in Willis, The Constitution, the United States Court of Military Appeals and the Future, 57 Mil. L. Rev. 27, 84 (Fall 1972) (hereinafter Willis). The commentator opined that "[o]nly tradition, not logic or the Constitution, would stand in the way of Congress providing for the review of courts-martial by an Article III court" (Willis at 84). The perceived benefits were greater independence for the court and the attraction of qualified persons to the court. The House of Representatives has three times passed legislation providing for life tenure [e.g. H.R. Rep. No. 1480, 90th Cong., 2d Sess. 2 (1968)], and the COMA judges have themselves asked for life tenure (Annual Report of the United States Court of Military Appeals (1965) at 13); however, the Senate has refused to agree. Willis surmised that the Senatorial concerns over lame duck appointments and uncertainty over the future workload of the court, which were expressed at the time the Uniform Code of Military Justice was enacted, have "proved unwarranted and should no longer detain the Senate from agreeing to fully judicialize [COMA]" (Willis at 85).

In conclusion, Willis noted that the "conferring of Article III status would eliminate any actual or felt inability by the judges to question the Code, reduce the judicial inefficiencies caused by collateral attacks on courts-martial, and pave the way for direct review by the Supreme Court" (*id.*). Stripped of the Supreme Court review benefit (which has been granted to COMA as an Article I court) and the uncertain improvement in efficiency, Willis support for Article III status rests solely upon clarifying COMA's judicial power, which had already been so clarified by the Act of June 15, 1968 (Pub. L. 90-340, 82 Stat. 178) which stated, "There is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense."

D. DoD Draft Staff Paper on Reform of COMA.

On May 7, 1979, Ms. Deanne C. Siemer, General Counsel, Department of Defense, circulated a draft staff paper that had been prepared to assist the Secretary of Defense in deciding whether any legislative proposals for reform of COMA should be submitted to Congress, to solicit the views of the bench and bar, the committees of Congress with responsibility for military justice, other government agencies and offices that have an interest in justice systems, veterans organizations, civil rights-civil liberties organizations, legal services organizations and interested members of the public. The draft paper assessed the need for reform with respect to COMA and the advantages and disadvantages of various proposals for reform. The paper was written for the purpose of shaping the issues and providing the necessary background for decision-making, but did not represent any official DOD point of view. The General Counsel noted that "[b]ecause of its critical role in [the military justice] system and its recognized impact on military discipline and national security, it is essential that the appellate process within the military justice system be of unquestioned excellence."

The paper noted that three broad factors created a need for reform. First, changed circumstances since 1951 have resulted in a very different military justice system than that which existed when COMA was created. The Military Justice Act of 1968 in particular made many significant changes to court-martial practice and procedure. By 1979, civilian judicial review was no longer the experimental idea that it was in 1951, but an accepted mode in the military justice system. It was important to look critically at the present role of COMA in the system to determine if, after these changed circumstances, alterations were necessary. Second, the lack of direct review by the U.S. Supreme Court of courts-martial was a fundamental flaw. To collaterally attack an adverse COMA decision, an accused was required to take "a judicial trek that has been criticized as inefficient, costly,

time-consuming, and redundant" [H. Moyer, Justice and the Military 1182 (1972)]. The government had no recourse from an adverse COMA decision. Third, COMA had suffered from disruptive turnover in judges and abrupt changes in doctrine. While the cause of the turnover was a matter of considerable dispute, the adverse impact of instability and unpredictability in military law was subject to little disagreement. The need for reform generated by these three factors prompted DOD to carefully examine alternatives for improvement of COMA.

In considering the proposals for reform, DOD sought to balance the advantages sought to be achieved against the disadvantages sought to be avoided. Thirteen factors, that would be considered advantages, were identified. These were: stability; predictability; uniformity; avoidance of undue specialization; adequate appellate review for the government; adequate appellate review for the accused; effective utilization of the Supreme Court; efficiency; better judges; increased stature for military justice; economy; separation of executive and judicial powers; and, flexibility. Eight factors, that would be considered disadvantages, were also identified. These were: adverse impact on the unique role of the military justice system in promoting good order and discipline in the Armed Forces; adverse impact on those aspects of the court-martial system that provide the military accused with greater rights than a civilian counterpart; less expert knowledge of military law, procedures and practices; less supervision of the military justice system; slower appellate consideration of military cases; increased workload for federal judges; expansion of the federal judiciary; and, the system must adapt adequately to wartime conditions.

The paper considered thirteen proposals for reform and evaluated each in light of the advantage/disadvantage factors listed above. Five of the proposal would have abolished COMA and shifted its jurisdiction to another federal court. These proposals were to: transfer to a permanent panel of the U.S. Court of Appeals for the District of Columbia Circuit; review in the then proposed U.S. Court of Appeals for the Federal Circuit; review in the U.S. Court of Appeals for the District of Columbia Circuit (without a permanent panel); review in a specialized federal court (e.g. Court of Claims, Court of Customs and Patent Appeals, or U.S. Tax Court); and, review in a regional Court of Appeals (e.g. 3d or 4th Circuit). Eight proposals would have maintained COMA and focused on changes in its structure or its place in the federal system. These proposals were: increase the size of the court; provide full terms for all appointees; revise the retirement system; establish life tenure for the judges; provide for review in a U.S. Court of Appeals; provide for review in the Supreme Court; provide statutory regulation of collateral attack on courts-martial convictions; and, a combination of alternatives into a broader legislative package [e.g. COMA could be composed of five or more judges with full 15-year term (or life tenure) whose decisions could be reviewed directly by the

Supreme Court (or through a court of appeals) and a revision of retirement system and the collateral attack system could be added].

E. Proposed Court of Military Appeals Act of 1980.

After having received considerable public comment on the draft report, DOD formulated an administration proposal (H.R. 6298, 96th Cong., 2d Sess.) and submitted it to Congress on January 24, 1980 (126 Cong. Rec. 636). The major provisions of the bill would have

- (1) retained COMA as an Article I court, but made it completely independent of DoD by deleting the "located for administrative purposes only in the Department of Defense" language;
- (2) increased the size of the court to five judges;
- (3) given each judge a full 15-year term of office; and,
- (4) authorized Supreme Court review;

Other provisions of the bill would have

- (1) eliminated cases affecting general or flag officers from mandatory review;
- (2) eliminated the political qualifications test (i.e. no more than two from same political party) and substituted a requirement that appointments be made only on basis of fitness to perform duties of office and age (under 65 years old at time of appointment);
- (3) stated that a majority of the judges constituted a quorum;
- (4) clarified when senior judges may be called to active duty to fill temporary vacancy;
- (5) provided for only "opportunity for hearing" in place of "hearing" prior to removal;
- (6) extended period of time for accused to file petition from 30 days to 60 days;
- (7) provided statutory authority for court expenditures, including the hiring of excepted service civil service employees and publishing court reports; and
- (8) authorized the court to sit at locations other than its principle office in D.C., if necessary for the

expeditious disposition of cases.

The administration proposal had included a provision to revise the retirement system for COMA judges, but such provision was eliminated by the Office of Management and Budget. On February 5, 1980, Mr. White introduced H.R. 6406, which was very similar to H.R. 6298 and added retirement provisions similar to those that were in the original administrative proposal. On February 7, March 6, and September 23, 1980 hearings were held on both bills [Court of Military Appeals Act of 1980: Hearings on H.R. 6406 and H.R. 6298 Before the Subcomm. on Military Personnel of the House Comm. on Armed Services, 96th Cong., 2d Sess. (1980)]. On September 26, 1980, the Committee favorably reported out H.R. 8188, which was a clean bill that included the provisions of H.R. 6298 with technical and conforming amendments (i.e. to retain the political qualification test for judges) and eliminated H.R. 6406 and its retirement provisions [H.R. Rep. No. 96-1412, 96th Cong., 2d Sess. (1980)]. The Committee stated that it

considered recommending establishment of a new retirement system for judges of the Court of Military Appeals. The current retirement system for the judges is the civil service employees' retirement system. That system is inconsistent with Article I and Article III Federal judicial retirement systems. Due to the late date in the Congress and the fact that Article I judicial retirement systems should be established on a uniform basis, a decision on this matter was deferred.

(Id. at 5). H.R. 8188 was passed by the House on October 2, 1980 (126 Cong. Rec. 29011-29013) and referred to the Senate on October 8, 1980, but no further action was taken on this bill. Some of the provisions of H.R. 8188 were enacted in later legislation [e.g. every judge appointed to a full 15 year term rather than the unexpired portion of the term of the judge whose vacancy was being filled (Act of Dec. 23, 1980, Pub. L. 96-579, 94 Stat. 3369), and direct review by writ of certiorari to the U.S. Supreme Court of cases in which COMA granted review and elimination from the scope of mandatory review those cases affecting a general or flag officer (Act of Dec. 6, 1983, Pub. L. 98-209, 97 Stat. 1402)].

F. Military Justice Act of 1983 Advisory Commission.

Although there had been these occasional entreaties for Article III status for COMA, the issue was not formally examined until the Secretary of Defense responded to a Congressional request [H.R. Rep. No. 549, 90th Cong., 1st Sess. 17 (1983)] and mandated that the Advisory Commission do so. The Advisory Commission solicited public comment on this issue, and the public response was mixed. Those favoring Article III status for COMA included associations, academicians, a member of the judiciary,

private practitioners, and one active duty servicemember. Those opposing Article III status included academicians, one member of the judiciary, and military personnel. Other responses failed to address the Article III issue or specifically declined to do so, as in the case of the Standing Committee on Military Law of the American Bar Association, which noted the ABA 1979 policy supporting full 15-year terms for COMA judges and a retirement system equal to that of other Article I courts.

At the Advisory Commission hearings, very little time was spent discussing the Article III status issue. An extensive discussion did occur, however, during the testimony of Colonel (now Brigadier General) D. M. Brahms, USMC, who had also provided the most penetrating public comment on the issue [I Military Justice Act of 1983 Advisory Commission Report 1187-1200 (hereinafter Commission Report)].

The Advisory Commission identified three principal reasons for reconstituting COMA as an Article III court:

- (1) to assure that the court is truly independent;
- (2) to grant the court the same status as other federal courts so that its contributions to criminal jurisprudence will be accorded respect and precedential value in civilian cases; and,
- (3) to be an essential inducement in attracting candidates for the court with the highest standards of professionalism and judicial temperament.

While noting that in the Congressional debates the concern was with tenure more so than the Article I versus Article III issue, the Advisory Commission nevertheless concluded that a "fair reading of the legislative history does not reveal any fundamental judgment that the court should not be an Article III court" (Commission Report at 10). The Advisory Commission was also confident that Congress could constitutionally change the court from Article I to Article III and limit the court's jurisdiction. The Congress would have to address certain Presidential functions, such as whether the required Presidential approval of death sentences rendered COMA opinions "advisory". The Advisory Commission concluded that although Congress could probably place age and duration limits on the Chief Judge's term, the President could not replace the Chief Judge of an Article III COMA whenever he so chose or even at designated intervals, such as five or ten years.

Countervailing considerations which were noted by the Advisory Commission included:

- (1) the court's jurisdiction may be expanded by legislative enactment to encompass matters much broader than review

of courts-martial;

- (2) the court could become a court of general jurisdiction with matters presently within the jurisdiction of the federal district courts being transferred to COMA; and,
- (3) the change to Article III should not occur simply to satisfy the need for a fair and equitable retirement system.

Six of the nine Advisory Commission members recommended that the court be reconstituted as an Article III court

with the caveat that the enacting legislation expressly limit the jurisdiction of the court to that which it currently exercises, and that specific language be included in the legislation to preclude the court's exercise of jurisdiction over administrative discharge matters, and non-judicial punishment actions under Article 15, UCMJ.

(Commission Report at 11). Three Advisory Commission members dissented from the recommendation. Two of the dissenters, in a joint Minority Report, expressed concern over some of the technical aspects that would result from the Article III change. These aspects included: the requirement to sit on the Code Committee, TJAG certifications, substitution of judges, life tenure, removal processes, designation of the Chief Judge, and salary reduction protections. The authors of the Minority Report were fearful of COMA's propensity to confer expanded power upon itself by the All Writs Act and the extent to which COMA would, as an Article III court, intervene in matters outside its prescribed jurisdiction when perceived constitutional issues were involved. Since Article I, § 8 carved out military law from the judicial power of Article III, the Minority Report reasoned, the constitutionality of any Congressional attempt to make COMA an Article III court may be questioned.

According to the Minority Report, even if Congress could constitutionally make COMA an Article III court, there are compelling reasons why Congress should not. Such reasons include:

- (1) COMA would accelerate its assertions of jurisdiction beyond the limitations in any statute;
- (2) the appellate process would not be improved;
- (3) COMA judges must be removable upon more grounds and under a more reliable process than impeachment; and,
- (4) COMA judges must continue to be appointed for a term of years -- not for life.

The Minority Report concluded that "COMA must remain a legislative court, deciding strictly legal issues, and participating in a unique balance of power between the President and Congress" (Commission Report at 65).

The third dissenter, in a separate report, stated the following concerns:

- (1) It can not be ensured, even by careful legislative drafting, that COMA will not expand the current scope of its jurisdiction if it obtains Article III status.
- (2) The Advisory Commission had not had time to study exhaustively the impact of such a jurisdictional expansion, or to examine the effect such an expansion would have on the Courts of Military Review.
- (3) There is no guarantee that the federal judiciary would allocate to COMA adequate staff and budget to accomplish its important judicial review functions.
- (4) COMA judges could be assigned to perform certain other judicial duties within the Article III court system that could interfere with their judicial role in the military justice system.

G. Code Committee.

The Advisory Commission report was submitted to Congress on December 14, 1984 and was sent to the Article 67(g) Code Committee for comment. The Code Committee discussed the Advisory Commission report at a January 24, 1985 meeting and the Army, Air Force and Marine Corps members clearly opposed granting Article III status to COMA. In a letter, dated January 18, 1985, one of the two public members supported Article III status. One of the two judges present abstained from taking any position. In a letter, dated January 25, 1985, the Coast Guard member supported benefits for COMA judges equivalent to those of Article III judges "so that COMA judges are not lost to that system." The Coast Guard vote on the Code Committee appears to be against Article III status. The Navy member submitted comments after the Code Committee meeting stating Navy opposition to Article III status. Chief Judge Everett supported Article III status in comments prepared on January 28, 1985 to the other Code Committee members. When submitting the Code Committee's comments to the House Committee on Armed Services on February 28, 1985, Chief Judge Everett stated that "a clear majority of the Code Committee members... is opposed to Article III status for the Court."

H. Views of Chief Judge Everett.

In December 1984, Chief Judge Everett authored an article entitled Some Observations on Appellate Review of Courts-Martial Convictions - Past, Present and Future, 31 Fed. B. News & J. 421 (1984). Section III of the article (Possible Future Changes) included subsections on: Article III Status, Expansion of Jurisdiction, Additional Judges, and Problems in Changing the Status Quo. Chief Judge Everett cited the following reasons for granting Article III status to COMA: the removal of some present confusion about the power of the court and issues which it may consider, enhanced prestige for the court in order to attract and retain quality judges, and the opportunity for COMA judges to sit on other Article III courts and to have other Article III judges sit on COMA. In the area of expanded jurisdiction, the author listed the following potential areas: nonjudicial punishment, administrative discharges, and veterans claims. Chief Judge Everett suggested a redesignation of COMA as the United States Court of Appeals for the Military Circuit with jurisdiction over "all the legal issues that fit within the military related categories established by Congress...." (*id.* at 422). Chief Judge Everett advocated adding judgeships to the court if jurisdiction were expanded, but did not believe that additional judges (without expanded jurisdiction) would increase productivity enough to justify the added expense to the taxpayers. The article noted that the future administrative support for COMA would be a problem that would have to be overcome. The DOD-COMA relationship was described as

satisfactory on both sides and any transfer of the court's administrative support to the Administrative Office of the United States Courts might reduce the level of funding and support that the court has heretofore received. Traditionally, the Department of Defense has given some priority to the court's needs; and it is uncertain that the Administrative Office would have the same concern for a relatively new Article III court.

(*Id.* at 423). Chief Judge Everett also noted the turf battle which could result between the Congressional Committees on the Armed Services and Committees on the Judiciary over matters related to COMA, such as confirmation hearings on judicial nominees. The article concluded with the recommendation that "Congress should also consider whether to reconstitute the Court of Military Appeals under Article III of the Constitution and to expand its jurisdiction" (*id.*).

I. Federal Bar Association and American Bar Association Action.

In October 1985, the Judiciary Section of the Federal Bar Association prepared resolution 86-2 and an accompanying report, which supported Article III status for the court. The report

stated that

[t]here have been proposals that, incident to Article III status or otherwise, the court's membership be increased or its jurisdiction expanded. Whether or not these proposals have merit, they are completely separable from the question of life tenure and Article III status; and the Resolution and this Report concern only the latter

(Report at 8). The report also noted that

we recognize the legitimate concerns of those who fear that military justice will be "civilianized" and will no longer be responsive to the needs of the military society. However, the present proposal will not lead to that result.

(Id.). On November 2, 1985, the National Council of the Federal Bar Association passed Resolution 86-2.

In August 1986, a proposal before the American Bar Association's House of Delegates to support the reestablishment of COMA under Article III was withdrawn before being brought to a vote. On January 28, 1987, draft legislation and an accompanying draft speaker letter was prepared for ABA committee consideration (Note: a speaker letter is the cover document that transmits the proposed legislation to the Speaker of the House and explains the purpose of the legislation). The draft legislation would:

- (a) grant Article III status for COMA;
- (b) grant COMA judges life tenure during good behavior and the same salary, travel allowances, retirement pay, entitlements, rights, privileges and other appurtenances of office as circuit courts of appeals judges;
- (c) eliminate the prohibition against more than two COMA judges being from the same political party;
- (d) transfer the authority to designate substitute judges from the President to the Chief Justice;
- (e) allow COMA judges to take Senior Judge status in the same manner as Circuit judges;
- (f) authorize COMA judges to sit by designation as Circuit judges;
- (g) automatically convert the sitting judges into the new Article III judges (presumably without Presidential nomination or Senate confirmation); and,
- (h) permit present COMA Senior Judges to perform judicial

duties on the new Article III COMA (note: it is unclear if this converted Senior Judges to Article III judges or allowed Article I Senior Judges to sit on an Article III court).

The draft speaker letter listed full independence and the appearance of full independence as the most important reasons for enactment of the proposed legislation. The principal assurance of independence would be life tenure, which would remove

even a suspicion that a judge nearing the end of his term might be seeking support for reappointment from the Department of Defense, which traditionally has played a major role in the appointment process for judges of this court.

(Speaker Letter at 4). Other reasons stated to support the legislation were to encourage the retention of judges and to eliminate the disability and temporary vacancy problems. A benefit that was noted, albeit downplayed by reference to the court's heavy workload, was the possibility of COMA judges being available for assignment in other appellate courts.

J. Views of COMA Counsel.

In 34 Federal Bar News and Journal 132 (March-April 1987), Mr. Robert C. Mueller and Mr. Christopher J. Sterritt, Counsel to the COMA judges, coauthored an article entitled, "Article III Status for the U.S. Court of Military Appeals - the Evolution Continues." Mr. Sterritt had been a member of the Military Justice Act of 1983 Advisory Commission, and Mr. Mueller was a member of the Working Group of the same Advisory Commission. The authors consider Article III status to be the next logical step in the evolution of COMA. The article lists these impacts on the internal operation of the court: (1) attracting and retaining the best quality judges; (2) allowing COMA judges to sit by designation on other federal courts and allowing temporary assignments of federal judges to COMA; and (3) removing any doubts as to COMA's authority to hear constitutional issues. Impacts on the military justice system would include: (1) enhanced prestige for COMA; (2) higher visibility through inclusion of COMA opinions in the Federal Reporter; and (3) improved independence and the appearance of independence for COMA. The authors conclude that the national defense would be improved by the public's perception that the military justice system is fair and that COMA is independent.

K. DOD Draft Proposal for a Congressional Commission.

In May 1987, Mr. Chester Paul Beach, Jr, Office of the Assistant General Counsel (Personnel and Health Policy),

Department of Defense, prepared a draft legislative proposal to form a commission to consider whether COMA should be reconstituted under Article III and whether any changes regarding the court's size, organization, jurisdiction, or operation are necessary or desirable. The nine members of the commission would be private citizens recognized as authorities in criminal justice, military law, or judicial administration. Two members each would be appointed by the President, the Speaker of the House, the President pro tempore of the Senate, and the Chief Justice; and, one member would be appointed by the Chief Judge of COMA. A copy of the draft proposal was sent to Chief Judge Everett on May 13, 1987.

Chief Judge Everett's response to Mr. Beach on May 19, 1987, indicated a concern that a congressionally mandated commission would unduly delay further legislative consideration of any Article III proposal. Chief Judge Everett believed "that the merits of those proposals had already been thoroughly studied. Indeed, the desirability of Article III status seems to have received rather general acceptance," and he cited the Advisory Commission Report, the Federal Bar Association Resolution, and the ABA Standing Committee on Military Law resolution [Note: the latter was later withdrawn from the House of Delegates]. The Chief Judge believed that by supporting certiorari jurisdiction in 1982-83 DOD had "indirectly committed itself to back Article III status." While not supporting a congressional commission, Chief Judge Everett indicated that he would support a COMA appointed committee to consider any desirable changes in the court's organization, structure or operations.

In a letter dated June 3, 1987, the Honorable H. Lawrence Garrett III, DOD General Counsel, advised Chief Judge Everett that DOD would not seek establishment of a congressional commission against the court's wishes, and that DOD would consider any concrete proposal that the court may wish to make concerning a DOD-COMA sponsored study group to address the Article III status issue, as well as important questions regarding the size, jurisdiction and organization of the court. Mr. Garrett respectfully differed with Chief Judge Everett's views that DOD had "indirectly committed itself to back Article III status" and that Article III status had "received rather general acceptance."

L. DOD Ad Hoc Study Group.

On July 17, 1987, Mr. Garrett formed an ad hoc study group, which included representatives from his office and each of the uniformed services, to "identify and thoroughly examine all significant issues affecting the court, with particular attention to matters which may be, or should be, the subject of proposed legislation." The Chief Counsel of the U.S. Coast Guard was invited to appoint a representative to the ad hoc study group, and such invitation was accepted.

M. ABA 1987 Annual Meeting.

At its annual meeting in August 1987, the ABA House of Delegates was presented with Resolution 126, a joint proposal of the Federal Bar Association (FBA) and the Bar Association of the District of Columbia. The resolution, which sought ABA support for Article III status for COMA, was identical to FBA Resolution 86-2, that was passed by the FBA National Council on November 2, 1985. The ABA House of Delegates did not accept Resolution 126, but instead adopted a resolution from the Section on General Practice which supported the creation of a study group to address the issue. The adopted resolution also requested that the appropriate ABA committees be an integral part of the study group.

N. Legislation and Court Committee.

On August 7, 1987, Senator Terry Sanford (D-NC) introduced legislation into the U.S. Senate, and the bill was referred to the Judiciary Committee [S.1625, 100th Cong., 1st Sess., 133 Cong. Rec. S11652 (1987)]. On August 28, 1987, Chief Judge Everett formed an eleven member court committee, chaired by Associate Dean James Taylor, Jr., Wake Forest University School of Law. The committee held its first meeting in December, 1987 and has indicated in a letter to The Judge Advocate General, U.S. Army, that Article III status for the court will probably be an issue for future consideration by the Committee. On September 21, 1987, Congressman Derrick (D-SC) introduced into the House of Representatives legislation identical to Senator Sanford's bill, and the bill was referred to the Committee on Armed Services [H.R. 3310, 100th Cong., 1st Sess., 133 Cong. Rec. H7735 (1987)].

O. Formal DOD Study Group.

On September 15, 1987, the Acting DOD General Counsel formalized the ad hoc study group, restricted the study group's deliberations to those outlined in the General Counsel's Memorandum of July 17, 1987, required the study group's report to be filed with the General Counsel, and designated the U.S. Army as the Executive Agent for all matters related to the study group's activities.

III. ISSUES CONSIDERED BY THE DOD STUDY GROUP

The DOD Study Group compiled a list of seventeen issues, which were separately analyzed. The issues overlap in certain areas. Position Papers have been prepared on each issue and are attached as appendices to this report. The following summarizes the issues and states the DOD positions on each issue:

A. ARTICLE I COURTS (TAB A)

COMA is a limited court serving a limited need. Albeit different, COMA is not unique among Article I courts. Like other Article I courts, COMA is not a separate 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.

DOD Position

Given the constitutional, historical and logical bases for COMA as an Article I court, it should not be reconstituted under Article III.

B. BUDGET (TAB B)

As an Article III court, COMA, like the Federal Circuit, may be granted control over its budget. If so, COMA's staff would have to be augmented to accomplish the task. Alternatively, an Article III COMA's budget may be subjected to the supervision and control of the Administrative Office. The Administrative Office would: fix the compensation of employees whose compensation is not otherwise fixed by law; regulate and pay annuities; control necessary official travel and subsistence expenses; purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the operation and maintenance of COMA; and, audit COMA's vouchers and accounts. The COMA budget would be subject to greater control by the Administrative Office than is currently exercised by DOD.

DOD Position

The COMA budget process would not be improved and could be harmed by reconstituting COMA as an Article III court.

C. SUPERVISORY POWERS (TAB C)

COMA has not hesitated to review courts-martial which ordinarily might never have been reviewable on direct appeal under Article 67(b), UCMJ. The court has not reviewed these cases on the theory that these were cases to which its jurisdiction might extend when a sentence is finally adjudged and approved. Rather, they have opined that they have a supervisory obligation under Article 67 to review: any court-martial in which an accused has been denied his constitutional rights; any action of any courts or person purporting to act under the authority of the UCMJ; and, any actions which would deprive persons in the Armed Forces of their constitutional rights. If COMA is given

Article III status, it would be likely to move into areas heretofore traditionally associated with Article III courts. Such areas could include prison law, review of Article 138, UCMJ, complaints and rulemaking.

DOD Position

Reconstituting COMA as an Article III court could result in COMA extending its supervisory power over military justice to unacceptable limits.

D. CHIEF JUDGE DESIGNATION (TAB D)

The Chief Judge is responsible for the efficient administration of the court. The President must be able to redesignate the Chief Judge in order to rectify tardiness in the operation of the court. Delays in the processing of appeals, that may be acceptable in peacetime, become intolerable in wartime. Any modification to the procedure for designating the Chief Judge must retain Presidential wartime authority to quickly replace a Chief Judge who is unable or unwilling to expeditiously dispose of cases. Since the designation would only affect administrative duties and not the judge's seat on the court (unless the dereliction is sufficient to warrant removal), the President's authority would not reasonably affect the independence of the Chief Judge in deciding individual cases.

DOD Position

Modifications to the system by which the Chief Judge is designated, if deemed desirable, can be accomplished without reconstituting COMA as an Article III court.

E. CODE COMMITTEE (TAB E)

As an Article III court, COMA could still be a member of the Code Committee, and that committee could still be required to submit its report to Congress. It is uncertain if COMA's participation in the Code Committee would be unencumbered or if its opinions and recommendations would have to be cleared through the Judiciary. If the Judicial branch chooses to get involved in the approval of COMA's positions before they are submitted to the Code Committee or requires an opportunity to review and comment on the finished report prior to COMA's endorsement, then such involvement would bestow upon the Judicial branch an opportunity to direct the other branches in the management of their affairs. The Code Committee is a very important participant in the military justice system, and COMA is a very needed and active member of that Committee. If for any reason COMA was no longer a participating member of the Code Committee, the contribution of the committee would be diminished.

DOD Position

Conversion of COMA to an Article III court has the potential for judicial branch entanglement in Code Committee matters, which would interfere with an existing beneficial executive-legislative relationship.

F. INDEPENDENCE (TAB F)

The Judiciary must be able to exercise its functions free from governmental influence or threat of interference. Military judges, including civilian judges sitting atop an exclusively military system, simply do not require the same accoutrements of independence as do Article III judges who are tasked with preserving our tripartite system and the doctrine of federalism. Military courts are justified on the basis of executive and congressional supremacy in military affairs and the special need for swift and flexible military discipline. COMA judges presently have substantive independence (i.e. in deciding cases, a judge is influenced only by the law and the commands of his or her own conscience), personal independence (i.e. the terms and conditions of their livelihood and continuance in office are adequately protected), and systemic independence (i.e. the court is provided with the financial and material resources to effectively carry out its judicial functions).

DOD Position

All of the essential and desirable elements of substantive, personal and systemic independence are attainable or are already assured to COMA under an Article I status.

G. JURISDICTION (TAB G)

While authority exists to support Congressional power to establish COMA as an Article III court, that status may by its own force expand COMA's scope of review in certain cases despite the limitations in Article 67(d), UCMJ, that COMA may act only on matters of law. The current bills to establish COMA as an Article III court do not express any view regarding the reach of COMA's extraordinary writ power to nonjudicial and administrative disciplinary matters, despite strong recommendations in the past that any such legislation should expressly limit COMA in those areas. Congressional silence on those issues provides no clear guidance to the armed services regarding future expansions of an Article III COMA's supervisory and writ powers and may be viewed by COMA as tacit Congressional approval of the most expansive writ power.

DOD Position

DOD strongly opposes any expansion of COMA's jurisdiction beyond its present scope. Any legislation concerning COMA's jurisdiction should explicitly preclude COMA from reviewing administrative discharges, nonjudicial punishment and other actions not involving direct appeal of courts-martial under Article 67.

H. NUMBER OF JUDGESHIPS (TAB H)

During the past 15 years, COMA has experienced several vacancies. To lessen the potential for turbulence on COMA, future vacancies should be expeditiously filled, and the judicial philosophy of nominees should be thoroughly explored to ensure their willingness to adhere to the court's precedents. Additionally, the use of senior judges to fill temporary vacancies on the court could be explored.

DOD Position

An increase in the number of judgeships on an Article I COMA to five is supported.

I. NOMINATIONS-APPOINTMENTS (TAB I)

Both the formal and informal processes which lead to the appointment of a COMA judge currently provide for an apparently subjective assessment of the nomination against the needs of the armed forces: any COMA nomination is referred to the Senate Armed Services Committee, and the White House permits DOD to "take the lead" in recommending nominees. If COMA were established as an Article III court, COMA nominations would be referred to the Senate Judiciary Committee. In addition, the White House's normal internal procedures for Article III judges rely heavily on the Department of Justice, rather than DOD. Article III status poses the risk that appointments to COMA could be made with little or no required assessment of the impact an appointment to COMA would have on the needs of the armed services, unless DOD were allowed to maintain its role in the selection of judges to an Article III COMA.

DOD Position

Article III status for COMA would remove COMA nominations from consideration by the Senate Armed Services Committee and DOD's role in the informal process may be reduced or eliminated.

J. IMPACT ON TJAG AUTHORITY (TAB J)

TJAG must retain the authority to select and assign both trial and appellate military judges. The needs of the military for job rotation and personnel flexibility are desirable and in some instances essential to the overall mission. An Article III COMA would be much more likely to attempt to eliminate or encroach upon TJAG authority over trial and appellate military judges than an Article I COMA. TJAG prescribes rules to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the UCMJ and Manual for Courts-Martial (MCM). COMA has promulgated rules for the admission of attorneys to the COMA bar and the disciplining of these attorneys. In light of COMA's continued reliance on its supervisory authority, when coupled with the perceived increase in power by becoming an Article III court, a real possibility exists that an Article III COMA will attempt to preempt TJAG authority over attorney certification/discipline. If COMA were to become an Article III court, it would be precluded from giving advisory opinions, just as it avoids doing so now. COMA does not consider TJAG certified questions to be advisory in nature. COMA decisions are binding because they resolve the issues and inform the party litigants of the upper limits of what they will be permitted to do or approve. While the decisions of the court cannot be disregarded, the ultimate decision that will complete a legal action in the military justice system rests with those charged with the overall responsibility for good order and discipline in the armed forces. Whether in times of peace or war, the military must have the ability to have certified questions answered expeditiously.

DOD Position

TJAG's authority over the Courts of Review, military judges and attorney certification/discipline, and authority to certify questions could be adversely affected if COMA is restructured as an Article III court.

K. PRESTIGE (TAB K)

If COMA became an Article III court and retained its limited jurisdiction of review of courts-martial, its prestige would not be greatly enhanced by merely changing its status. An examination of the quality of COMA judges in relation to judges on the Federal Courts of Appeals fails to reveal any remarkable differences. There is no evidence that COMA is composed of inferior judges or that quality lawyers will not serve on the court. COMA can, however, enhance its prestige by continuing to write well-reasoned and scholarly opinions on constitutional law issues, which have applicability to Federal criminal law practice. Efforts to increase the court's prestige should be directed more to increasing the public's knowledge about the

court by producing scholarly and well-reasoned opinions and developing a reputation as an efficient court system, rather than by changing its status.

DOD Position

A mere change in status to an Article III court will not significantly enhance COMA's prestige.

L. REMOVAL (TAB L)

Article 67, UCMJ, provides for removal of COMA judges by the President following notice and hearing, but only for conduct directly related to performance of judicial duties (i.e. neglect of duty or malfeasance in office, or mental or physical disability). Article III judges may be removed only by impeachment. Grounds for impeachment include criminal conduct not directly related to the performance of judicial duties. Although Article III status would broaden the grounds for removal of a COMA judge, the impeachment process is far more cumbersome than the removal process. Moreover, the duration of the impeachment process alone could cripple the functioning of COMA and severely threaten the administration of military justice.

DOD Position

COMA should remain subject to the Article 67, U.C.M.J., removal process, which should be amended to permit removal of a COMA judge for conviction of a felony and for conduct involving moral turpitude, in addition to the existing grounds for removal.

M. RETIREMENT (TAB M)

If COMA becomes an Article III court, any necessary upgrading of the retirement system would automatically be resolved since, by definition, the judges would come under the retirement plan for Article III judges and justices contained in 28 U.S.C. § 371. Although COMA presently has a retirement system which gives the court special treatment in comparison to other civil service employees and provides a retirement system equally as beneficial as that available to Congress, COMA's retirement system is not as lucrative as that for Article III courts or most other Article I courts (i.e. Tax Court (trial judges), district courts in the territories and possessions, and the District of Columbia Court of Appeals). Yet, in comparison to U.S. Claims Court judges and bankruptcy court judges, COMA judges have a more favorable retirement system. COMA's retirement system was upgraded in 1983 largely to dissuade qualified candidates from declining an appointments to COMA, or for judges, once appointed, from prematurely leaving office to seek more lucrative job opportunities.

DOD Position

While COMA judges should be entitled to a retirement system that closely parallels that of the most favorable retirement system existing for an Article I court, any desired changes to COMA's retirement system can be accomplished without reconstituting COMA as an Article III court.

N. SALARIES (TAB N)

Each judge on COMA is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Courts of Appeals. They do not have the salary protection guaranteed Article III judges. Conceivably, Congress could change the pay of a COMA judge or exclude COMA from a periodic increase granted to federal judges. It is significant that such a change would have to come from the Legislative branch, not the Executive branch and DOD.

DOD Position

Although the salaries of COMA judges are not absolutely protected against reduction, the present system, whereby the COMA judges' salaries are identical to those of U.S. Courts of Appeals judges, and increase as those salaries increase, is acceptable.

O. SENIOR JUDGES (TAB O)

Senior judge status is a practical and beneficial way to relieve older judges of the burdens of full time active service while still retaining their expertise and limited service. The federal courts use senior judges quite extensively. COMA has not been able to take full advantage of its senior judge provisions because so few judges have attained that status. Judges who do take senior status should be provided with government office space and an administrative assistant only when the Chief Judge certifies that the senior judge is performing services substantial enough to justify facilities and that the administrative assistant is gainfully employed. Judges who have retired from COMA could provide valuable service; however, if the general pool of federal senior judges was available, their large number would not offset their lack of experience in military justice matters. To tap the potential reservoir of talent that senior judges can offer, a modest easing of the requirements for taking senior status (to induce judges to take senior status while they are young enough to provide productive service as senior judges) may be appropriate.

DOD Position

Senior judges who have retired from COMA should be more fully utilized in times of vacancies to reduce backlogs; however, the availability to COMA of Article III senior judges is not necessarily in the best interest of the military justice system.

P. STAFFING (TAB P)

A significant impact of Article III status for COMA would be the conversion of court personnel to "excepted employees"; that is, their service would be at the pleasure of the court. The protections of tenure and grievance would be lost. The employees of the court would no longer be civil service employees, but would switch to the Judicial Salary Plan. Comparable positions in the judiciary are paid less, and it is unlikely that the central legal office, presently with eight attorneys, will be as generously staffed. These personnel changes may cause COMA personnel to seek to remain in the civil service and switch jobs to other executive branch positions.

DOD Position

Reconstituting COMA as an Article III court might result in personnel turbulence harmful to the military justice system.

Q. SUBSTITUTION (TAB Q)

COMA judges gain valuable insight into the particularized needs of the military by service on a bench dealing exclusively with military criminal law cases, participation on the Code Committee, and worldwide travel on judicial field trips to military installations. COMA judges develop a skill in recognizing the critical role that military justice plays in protecting our nation's ability to field an effective fighting force in time of war. As a result of the specialized experience required of COMA judges, the Supreme Court accords deference to the opinions of COMA. As the establishment of COMA under Article III will result in the capability of COMA judges to sit on other federal courts, as well as enabling other federal judges to sit on COMA, the special expertise of the court, as well as the deference accorded to it, will be jeopardized. Non-COMA judges would lack the necessary expertise to strike the balance between the rights of the servicemembers and the demands of discipline and duty. Military justice could suffer further detriment if COMA judges are permitted to sit on other federal courts, as such a practice could result in delays in military cases.

DOD Position

Article III status for COMA would adversely impact on military justice if Presidential authority to designate substitute judges is eliminated, and the possibility of COMA judges being absent from COMA and inexperienced judges sitting on COMA is increased.

IV. UNITED STATES COURT OF MILITARY APPEALS IMPROVEMENTS ACT OF 1987 (Proposed) (TAB S)

A. In General

On August 7, 1987, Senator Terry Sanford (D-NC) introduced S. 1625, 100th Cong., 1st Sess. (1987), "A bill to enhance the effectiveness and independence of the United States Court of Military Appeals", which was referred to the Committee on the Judiciary (133 Cong. Rec. S11652). Senator Sanford's bill has been co-sponsored by three other Senators [Senator John H. Chafee (R-R.I.)(133 Cong. Rec. S12402-01), Senator John Melcher (D-Mont.)(133 Cong. Rec. S00000-55) and Senator Thad Cochran (R-Miss.)(133 Cong. Rec. S16702-01)]. On September 21, 1987, Congressman Butler Derrick (D-SC) introduced identical legislation [H.R. 3310, 100th Cong., 1st Sess. (1987)], which was referred to the Committee on Armed Services (133 Cong. Rec. H7735).

B. Senator Sanford's Floor Statement

Senator Sanford stated that the "legislation would reconstitute the court under Article III of the U.S. Constitution and would make provision for judicial disability or temporary vacancy in the membership of the court." The court, according to Senator Sanford, "has been the victim in recent years of a number of difficulties that have plagued its ability to function effectively." Such difficulties included:

- (1) Rapid turnover of judges;
- (2) Long periods of time during which, because of disability or vacancy, only two judges have been available to deal with a burgeoning caseload;
- (3) Confrontation with the Department of Defense;
- (4) Uncertainty as to the court's authority; and,
- (5) Public confusion about what the court is and does.

These issues will be addressed seriatim.

The "rapid turnover" is not solely the result of lack of Article III status. Although two Judges (Duncan and Perry) left COMA to accept federal district court judgeships, their reasons could certainly have been mixed. While it is obviously attractive to have life tenure, there are other incentives for one to accept federal district court judgeships (which resulted in a pay cut for the former COMA judges). A federal district court judge has the opportunity to engage in trial work, which for some judges is more stimulating than appellate work. Even an Article III COMA, if it was restricted to the narrow field of military criminal appellate work, would not necessarily dissuade judges from seeking the challenge of dealing with a diversity of issues as a federal district court judge. The "rapid turnover" justification also overlooks the fact that other COMA judges have been quite content to serve lengthy terms [e.g. Chief Judge Quinn (24 years) and Judge Ferguson (15 years plus full-time senior judges service)].

The "temporary vacancy" problem would not be improved by Article III status. All appellate courts, including the present U.S. Supreme Court, have had periods where they must operate at less than full strength. There is an inevitable delay in having presidential nominees confirmed by the U.S. Senate. The UCMJ has a provision for providing substitute judges from the U.S. Court of Appeals for the District of Columbia when COMA judges are temporarily disabled or ill [Article 67(a)(4)], but it has never been invoked. The "disability" problem would be exacerbated by Article III status as, unlike the present UCMJ, the President could not remove disabled judges. The longest "vacancy" on COMA was a "disability" vacancy which was ultimately resolved only by Presidential action.

The "DOD confrontation" issue is an apparent reference to Mundy v. Weinberger, 554 F.Supp. 811 (D.D.C. 1982), which involved a disagreement on a staffing decision, which arose out of the implementation of statutory requirements regarding the new civil service act. The DOD-COMA relationship has been an apparently amicable one for 36 years. Chief Judge Everett has described the relationship as "satisfactory on both sides" (31 Fed. B. News & J. at 423). Indeed, the legislation seeks to retain all of the benefits of such a relationship by permitting COMA to accept DOD support and requiring DOD to furnish such support as the Chief Judge requests.

The "uncertainty over the court's authority" issue appears to be a reference to United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), wherein the government counsel questioned the court's authority to decide the constitutionality of the death penalty. The court explicitly settled that issue by declaring its authority. Litigants always have and always will pursue the tactic of questioning a court's authority to do whatever it is that the litigants do not want done. An Article III COMA would face challenges to its authority. The "solution" to the issue is

precisely crafted legislation and clear judicial declarations, not Article III status.

The "public confusion" issue will not be measurably affected by a change in the court's status. Public ignorance about the court and its functions needs to be addressed by a public information program. The court has had numerous opportunities to educate the public about the court. DOD has provided COMA with foreign and domestic travel to meet with the troops and concerned groups. Military publications (from legal journals, such as the Military Law Review, to popular periodicals, such as Soldiers magazine) have had informative articles on the court. Newspapers (from the Army Times to the Legal Times) have done likewise. The ABA and FBA have several committees which provide a regular forum for the court to inform the legal community of its functions. Public awareness of the court and its functions is beneficial to the system.

Senator Sanford cites the court's significant increase in responsibility in recent years due to a greater number of cases and more complex questions involving "constitutional issues that were not even contemplated at the time the court was created." Although the caseload has increased, a significant percentage involve petitions with no assignment of error. The complexity of the issues results from evolving constitutional law that is unrelated to the court's status. Indeed, "constitutional" rights that were granted in the 1951 UCMJ, such as the right against self-incrimination [Article 31(b)] and right to counsel [Article 27(b)], were more expansive than rights existing in civilian practice. Thus, COMA has been dealing with some complex constitutional issues in advance of Article III courts. Senator Sanford's reference to COMA as the "gatekeeper" for Supreme Court review of court-martial convictions is not a weighty reason for changing the court's status. Congress included such a provision, that not all courts-martial be entitled to direct review by the Supreme Court, to alleviate a Department of Justice concern that the workload of the Court would be overburdened by writs of certiorari if all courts-martial convictions were eligible for review. The Floor Statement also notes the increase in COMA jurisdiction resulting from the reserve component legislation (Military Justice Amendment of 1986) and Solorio v. United States, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987) overruling O'Callahan v. Parker, 395 U.S. 258 (1969). The impact of the reserve component legislation and Solorio are speculative. Senator Sanford's reference to military tribunals as currently being "the only Federal courts in which imposition of the death sentence is a realistic possibility" lends no support to the argument for Article III status. Indeed, COMA in United States v. Matthews, supra, the only death penalty case to reach the court in a number of years, declared its authority to pass judgment on the constitutionality of the death penalty.

The Floor Statement noted the Military Justice Act of 1983

Advisory Commission's support for Article III status for COMA. The military departments dissented and, more importantly, the Commission added a caveat that any change in the court's status must be accompanied by a Congressional mandate that the court's jurisdiction remain the same and that the court be explicitly prohibited from reviewing nonjudicial punishments or administrative discharge matters. The support of the Federal Bar Association, the Bar Association of the District of Columbia and the ABA Standing Committee on Military Law, is weakened by the lack of any indication that these groups conducted any detailed analysis of the issue and the impact that it would have on the military justice system. The ABA House of Delegates in its most recent action recommended further study of the issue.

C. The Legislation (TAB S)

The proposed legislation raises many legitimate concerns both by what it contains and by what it does not address. A listing of some of DOD's concerns is as follows:

a. §(a)(1) provides for the reconstituting of COMA as a three-judge Article III court. For the reasons stated in the Position Paper on Membership of the Court, DOD supports a five-judge Article I court to improve the efficiency of the court and give more stability to the law.

b. §(a)(7) provides that the judges shall hold office during good behavior. DOD supports a term of 15 years and a removal process that is fair, efficient, and capable of being invoked in a timely manner in order to insure that military justice will enhance military discipline, especially in wartime.

c. §(a)(8) provides for substitute judges from U.S. Courts of Appeals to fill temporary vacancies caused by illness, disability or recusal. For the reasons stated in the Position Paper on Substitution, DOD believes that judges from other courts may not fully appreciate the unique needs of the military, and their participation may be counterproductive to military justice and discipline.

d. §(a)(9) provides for COMA judges to take senior status under the same conditions as U.S. Courts of Appeals judges. Presumably, the two present senior judges of COMA, as Article I judges, would be precluded from rendering any further service to COMA.

e. §(a)(10) authorizes COMA judges to sit by designation on U.S. Courts of Appeals. Given the "increased responsibilities," "burgeoning caseload," and "expanded jurisdiction" of COMA cited by Senator Sanford, if COMA judges spend any time away from COMA, military justice may be neglected.

f. §(a)(11) authorizes COMA to accept facilities and administrative support from DOD and requires DOD to furnish such support as the Chief Judge requests in order for the court to carry out its responsibility. This provision is a clear recognition that COMA has fared quite well by its administrative relationship with DOD. Indeed, in spite of the purported COMA-DOD confrontation, it appears that COMA desires to retain the relationship. This section recognizes that COMA is probably more favorably situated receiving its support from DOD rather than from the Judiciary. The provision requiring DOD support (giving the Chief Judges the authority to demand whatever support is desired) is a direct interference with the executive department's authority to control its own budget. If COMA truly believes that DOD has been confrontational and desires to be free of the yoke of DOD control, then this provision does little to solve the "problem."

g. SEC. 4 Transitional Provision. (a) Continued Service "urges and requests" the President to nominate the present COMA judges to the Article III judge positions created by the legislation. If one of the avowed purposes of the legislation is to increase the pool of applicants and attract nominees of the highest professional competence and judicial temperament, it is inconsistent to deprive the system of this advantage by limiting the initial appointments in any manner. The President should take all factors into account, including the life tenure of the positions, in deciding who are the best nominees.

h. The jurisdiction of the court is not addressed and at least initially would remain unchanged. Any expansion of COMA jurisdiction is of great concern to DOD, and by failing to even adopt the caveat of the 1983 Advisory Commission, this legislation does nothing to assuage that fear.

(i) The legislation would deprive the President of the power to replace a Chief Judge, and for the reasons stated in the Position Paper on Designation of Chief Judge, DOD considers this power essential to an effective wartime military justice system.

V. MILITARY JUSTICE: A SPECIALIZED JURISPRUDENCE

The Supreme Court of the United States has long recognized the special deference that should be given to the military justice system. Recently, the Court reiterated "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The framers expressly entrusted that task to Congress." [Solorio v. United States, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987) quoting Burns v. Wilson, 346

U.S. 137, 140 (1953). Within this statement, the Court mentions two concepts that merit discussion when considering the granting of Article III status to COMA. These are: (a) the unique role of discipline and duty in relation to justice within the military, and (b) the role of the legislative, as opposed to the judicial, branch regarding military justice.

Discipline, Duty and Justice

In Chappell v. Wallace, 449 U.S. 966, 1068 (1983), the Court stated:

The need for special regulations in relationship to military discipline and the consequent need and justification for a special and exclusive system of justice... [are obvious]; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting [citation omitted]. In the civilian life of a democracy many command few; in the military necessity makes demands on its personnel, "without counterpart in civilian life" [citation omitted] . . . The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

The purpose of an armed force is to maintain a state of readiness during periods of peace so as to deter war, and when the occasion arises, to fight effectively in an armed conflict. To accomplish this mission, the military must have the will of the nation behind it and sufficient resources, that is, equipment and personnel. The mere existence of sufficient numbers of personnel, however, will not guarantee success unless those personnel are sufficiently motivated and disciplined.

To many civilians discipline is synonymous with punishment. To the military man discipline connotes something vastly different. It means an attitude of respect for authority developed by precept and by training. Discipline - a state of mind which leads to a willingness to obey an order no matter how unpleasant the task to be performed - is not characteristic of a civilian community.

The Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, Report to Honorable Wilber M. Brucker, Secretary of the Army, at 11 (Jan. 18, 1960).

This requirement for discipline in both peacetime and wartime is what primarily sets military justice apart from civilian justice. "The accomplishment of a military mission demands from the soldier his absolute loyalty and commitment found probably nowhere else in our society. Military law, in contrast to civilian law, therefore, must have a motivating as well as a preventive function." [Westmoreland, Military Justice -

A Commander's Viewpoint, 10 Am. Crim. L. Rev. 5 (1971)]. Discipline, in the military context, is not grounded on fear, but upon the respect that exists between leaders and followers based upon the training, experience, and customs of service within the armed forces. Any change to the military justice system must not detract from the discipline that military justice serves to foster. To promote the requisite discipline, military justice must be efficient, speedy and fair; and, as the Supreme Court has stated, "[t]he military is a specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history [citation omitted]." [Brown v. Glines, 444 U.S. 348, 354 (1980)]. General William T. Sherman expressed a thought in 1879 that appears as appropriate today as it did when first announced.

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation. These objects are as wide as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its value, and defeats the very object of its existence.

Reprinted in Establishment of a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 606, 780 (1949).

Even in the face of changing circumstances, the specialized nature of military justice with its emphasis on duty and discipline remains viable. For example, the adoption of an all volunteer force has made the armed services more dependent upon the fostering of morale and discipline within the ranks. Unless service members are motivated and feel comfortable within the military, the armed forces cannot maintain necessary manning levels or ensure that their members will attempt or complete oftentimes disagreeable, undesirable, and dangerous tasks. To talk in terms of morale and discipline in connection with civilian justice is almost meaningless, but the contrary is true when discussing military justice. The military's mission with all its attendant risks, burdens, and obligations distinguishes military legal practice from civilian practice. Participants within the military justice system need to be keenly aware of, if not continually trained in, these important distinctions. The potential consequences of the failure of counsel and judges, on both the trial and appellate levels, to appreciate the role of duty and discipline within the court-martial setting far outweigh any alleged lack of independence and prestige experienced by individual participants within the military justice system.

Because of the special deference given to military justice, stemming from its uniqueness, "it is very important for [COMA] judges to be intimately familiar not only with criminal law generally but also with the military way of life and with the practical concerns of accomplishing the military mission." [Mueller and Sterritt, Article III Status for the U.S. Court of Military Appeals - The Evolution Continues, 34 Fed. B. News & J. 132, 133 (1987)]. One practical result of such needed familiarity is the ability of the judges to take judicial notice of military procedures, operations and way of life. Article III status for COMA with its attendant possibility of the designation of other Federal judges to sit on COMA could upset the necessary understanding of COMA's role in helping to accomplish the military mission.

Although "[m]ilitary law ... is a jurisprudence which exists separate and apart from the law which governs in [the] federal judicial establishment", servicemembers are protected by constitutional guarantees of due process. [Burns v. Wilson, 346 U.S. 137, 140 (1953)]. Early in its existence, COMA asserted that military members have the same constitutional rights as civilians except to the extent those rights are implicitly or expressly excepted. [United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960)]. The only right specifically excepted in the Constitution for members of the armed forces is the requirement for grand jury indictment [U.S. Const., Amend. V]. Although the military does not utilize grand juries, Article 32, UCMJ, requires an adversarial, pretrial investigative proceeding prior to any case being tried by general court-martial. The Article 32 investigation, in essence, gives the military accused more rights than a civilian defendant obtains at a grand jury proceeding. Unlike the grand jury proceeding, a military accused has the right to be present at the proceeding, the right to have a defense attorney present at no cost to the accused, the right to present evidence and cross-examine witnesses, and the right to a free transcript of the proceedings.

The military member also enjoys enhanced constitutional rights in other areas. Unlike civilian practice where the availability of appointed counsel is based upon indigency, all military accused are entitled to appointed military counsel free of charge. Moreover, the military accused, if convicted, has a right to appeal the conviction, to have a free transcript of the trial, and to be represented by appellate counsel at no personal expense. The military also provides far more liberal discovery rights than those existing in civilian practice. Congress in Article 46, UCMJ, has mandated that the military accused have opportunity equal that of the prosecution to obtain witnesses and other evidence. The military's double jeopardy provisions exceed those in civilian practice [Compare Articles 44 and 63, UCMJ with North Carolina v. Pearce, 395 U.S. 711 (1969) (a heavier sentence may be imposed at a civilian retrial in some circumstances while such is not permitted by the UCMJ in military retrials)]. The

military's right against self-incrimination found in Article 31, UCMJ, predated the Miranda requirements, and the military continues to provide for a warning to remain silent without the requirement of Miranda's custodial interrogation. While Federal courts historically have required twelve-member juries in criminal trials and require unanimous verdicts, the Supreme Court has dispensed with the twelve-member and unanimity requirements for state courts [See e.g. Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970)]. Thus, the military courts-martial panels (normally composed of less than twelve members and requiring a two-thirds vote to convict) are not as violative of trial by jury provisions as oftentimes assumed.

The above discussion of rights enjoyed by military accused reflects that military justice is as concerned as civilian justice with the fairness and rights of an accused. Fairness, after all, fosters respect and contributes to the maintenance of good order and discipline within the armed forces. Military justice is indeed a specialized jurisprudence, which requires its participants to understand the intricacies of military life and the role of military justice in the overall national defense structure.

Roles of Legislative and Judicial Branches Regarding Military Justice

In Solorio v. United States, 107 S.Ct 2924, 2929, 97 L.Ed.2d 364, 370 (1987), the Court stated:

Decisions of this court . . . have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military [J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged. [citation omitted] . . . [W]e have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated The notion that civil courts are "ill-equipped" to establish policies regarding matters of military concern is substantiated by experience.

The Court has held that Article III courts should not hear collateral attacks regarding courts-martial unless they are based on constitutional grounds [United States v. Augenblick, 393 U.S. 348 (1968)]. Moreover, Article III courts should not entertain constitutional claims until direct appellate review has been completed under the UCMJ [Schlesinger v. Councilman, 420 U.S. 238 (1975)]. Such pronouncements by the Supreme Court merely

recognize the "very significant differences [that exist] between military law and civilian law and between the military community and the civilian community." [Parker v. Levy, 417 U.S 733, 752 (1974)].

The recognition of the peculiarities of military judicial practice is also made evident by Congress having elected to place all matters concerning COMA under the province of the Armed Services Committee of the Senate and House of Representatives. "[I]n view of the importance which the Armed Services Committees attach to [COMA's] role in balancing the needs of military discipline with those of justice, it is doubtful that they would willingly relinquish their jurisdiction." [Everett, Some Observations on Appellate Review of Courts-Martial Convictions - Past, Present and Future, 31 Fed. B. News & J. 420, 423 (1984)]. Moreover, if Congress, through the Armed Services Committees, is to continue its oversight over the relationship between discipline and justice within the military, it seems incongruous that COMA could become an Article III court and still remain under the auspices of the Armed Services Committees. In view of the historical precedence for Congress exercising exclusive oversight over COMA and the entire military justice system, Congress should proceed cautiously before relinquishing its role, or any part thereof, to the Judicial Branch.

While the conversion of COMA to Article III status would enhance its independence, COMA has already achieved the level of judicial independence necessary to fulfill its judicial mission. To emphasize COMA's independence, Congress clarified COMA's relationship with DOD in 1968 by amending Article 67, UCMJ, to read "There is a United States Court of Military Appeals . . . located for administrative purposes only in the Department of Defense." [Pub. L. No. 90-362, 82 Stat 1335 (emphasis added)]. The mere administrative convenience of locating COMA within DOD and the judicial independence of COMA was reinforced by an Article III court, which held that when DOD overruled or ignored the personnel decision of COMA's Chief Judge, DOD violated the congressional mandate that COMA be an independent judicial tribunal. [Mundy v. Weinberger, 554 F. Supp. 811 (D.D.C. 1982)]. Because of other peripheral questions emanating from a change to Article III status, the obtaining of a more definitive statement of COMA's independence by converting it to Article III status appears unwarranted.

One such peripheral question is that of COMA's jurisdiction under Article III. COMA was organized under the UCMJ to review certain courts-martial. Article III status, without further limitation, could allow an expansion of COMA's jurisdiction into areas outside of its Congressional mandate for review. Such areas could encompass administrative discharge proceedings, nonjudicial punishment, military tort actions, prisoner disciplinary hearings, efficiency report appeals, reports of survey on military property, line of duty determinations,

attorney professional responsibility matters, and other military-related issues. COMA's caseload would not only be increased, but it would create a "trickle-down" effect of increasing the caseload of the services appellate divisions since, due to the peculiarities of military practice, it would be unfair not to have an aggrieved party represented by military counsel before the court. The increased caseload would adversely affect processing times for reviewing courts-martial. As once was stated, "the relative success of military justice in avoiding court congestion and trial delays constitutes an additional impressive argument against further precipitous changes. Certainly proposals to change military justice should carry a burden of proof that they will not materially delay military criminal law administration." [Everett. The New Look in Military Justice, 1973 Duke L.J. 649, 701 (1973)].

There is a need for a specialized understanding when decisions are made concerning military justice. Article III courts have candidly admitted that they are ill-equipped to handle military concerns. In view of the uniqueness of military justice, Congress should resist the cosmetic attractiveness of converting COMA to an Article III court. Instead, Congress should look to COMA to assist in providing the necessary expertise on military justice matters so that the system remains an arm of military discipline capable of operating effectively in times of peace and war. An Article I COMA is capable of ensuring a proper balance of duty, discipline, justice and the needs of national defense. Recent COMA history reveals that turnover on the court was a problem because judges failed to fulfill their full terms. An increase in the size of the court from three to five members would help stabilize the court.

Retaining COMA as an Article I court will allow continued, special deference to be given to the military and will allow Congress to fully exercise its Article I powers over the military as the Supreme Court has interpreted them and as the framers of the Constitution envisioned them.

VI. DOD POSITION

COMA should remain as a limited jurisdiction, Article I court.



ART I/ART III

U.S. CONST. Art. III § 2 provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges of the Supreme Court and the inferior courts hold their offices during good behavior and, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

The theoretical basis of Art. III is the separation of powers and the protection of an independent judiciary. The Framers of the Constitution "thought it imperative to assure that the newly created federal judiciary, unlike the colonial judiciary it supplanted, would not bow with obsequious deference to, nor yield to manipulation by, those exercising legislative or executive powers. This independence could be assured, however, only if the salary and tenure of federal judges were insulated from the majoritarian control of Congress and the executive branch." Note, Federal Magistrates and the Principles of Article III, 97 Harv. L. Rev. 1947, 1949 (1984).

The literal mandate of Art. III, granting the judicial power of the United States to courts insulated from legislative or executive interference, must be interpreted in light of both the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

In some circumstances Congress has established federal tribunals (legislative courts) which do not comply with the requirements of Art III. Legislative courts are now primarily referred to as Art. I courts because these tribunals were established as "necessary and proper" exercises of the Art. I, § 8 legislative power.

The term "legislative" court and much of its doctrinal analysis derive from Chief Justice Marshall's opinion in American Ins. Co. v Canter, 26 U.S. (1 Pet.) 511, 546 (1828). The Court's decision in Canter centered on the constitutionality of territorial courts. In Canter, the Chief Justice contrasted "constitutional" courts established by Congress in accordance with Art. III, with "legislative" courts. The Supreme Court upheld the validity of territorial courts in Canter on the premise that Art. IV granted Congress the combined powers of a local and general government over the territories. This plenary sovereign power included the right to establish courts, which although not conforming to Art. III requirements, could nonetheless exercise some subject-matter jurisdiction described in Art.

III. The Supreme Court has applied similar reasoning to sustain Art. I courts in other geographical areas subject to exclusive congressional control, such as the District of Columbia. In Palmore v. U.S., 411 U.S. 389 (1973), the Court upheld the constitutionality of the Art. I court system of the District of Columbia as a valid exercise of Congress' plenary sovereign power to legislate for that geographical area.

Finally, "the doctrine of legislative, or Art. I, courts recognizes that rigid adherence to the Art. III tenure and salary provisions may impair important practical interests of government flexibility." Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 571 (1980). Congress may also establish Art. I tribunals for particular types of cases and may change tribunal personnel from time to time in order to preserve or enhance the tribunal's expertise.

Thus, Congress can create courts without Art. III powers and protections to aid in execution of congressional power cited elsewhere in the Constitution.

Article I courts

Most Art. I courts derive their authority from the "necessary and proper" clause of the Constitution. Certain grants of power to the legislative and executive branches are historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts is consistent with, rather than threatening to, the constitutional mandate of separation of powers. The Congressional power to "make Rules for the Government and Regulation of the land and naval forces" (Art. I, § 8) is just such an exceptional area. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

Territorial courts

These courts are created by Congress pursuant to its rule-making power over the territorial possessions of the United States. The Framers intended for Congress to exercise the general powers of government in geographical areas in which no State operated as sovereign. Inasmuch as the territory may ultimately secure its independence or acquire statehood, the establishment of courts whose judges have life tenure is inappropriate.

Courts of the District of Columbia

Congress organized the court system in the District of Columbia with one set of courts having Art. III characteristics (U.S. District Court of the District of Columbia and the U.S. Court of Appeals for the District of Columbia) which is devoted to matters of national concern and also created a wholly separate court system under Art. I (Superior Court of the District of Columbia and the District of Columbia Court of Appeals) to serve as a local court system for a large metropolitan area .

Members of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia are appointed by the President of the United States, have terms of office of fifteen years, and their salaries are not guaranteed against diminution. These Art. I courts have jurisdiction over felonies irrespective of the limitations of Art III.

In Palmore, the Supreme Court stated that the "decision with respect to inferior federal courts [i.e. District of Columbia courts], as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art. III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art. III." Palmore , 411 U.S. at 401.

United States Court of Military Appeals

The United States Court of Military Appeals (COMA) was created by Congress pursuant to its power to "make Rules for the Government and Regulation of the land and naval forces." Art. I, §8. The court is an independent legislative court "located in the Department of Defense (DOD) for administrative purposes only." (Article 67(a), Uniform Code of Military Justice [hereinafter UCMJ]). This administrative arrangement involves such matters as conducting security checks on the court's personnel and providing logistical support. Further, the court's budget is funded separate from DOD by Congress, but is disbursed by DOD. This arrangement was intended to provide necessary administrative support efficiently and economically without infringing upon the court's independence.

COMA consists of three members, appointed from civil life for fifteen year terms by the President with the advice and consent of the Senate. The judges are compensated at the same rate as the judges of the federal circuit courts of

appeals. COMA judges' retirement, however, is governed by the civil service laws. The Supreme Court has recognized the creation of courts-martial and COMA as valid exercises of congressional Art I powers. Several reasons are presented:

Inherently judicial test. Throughout the development of the doctrine of subject-matter legislative courts, the Supreme Court's analysis has concentrated on the nature of claims adjudicated by such tribunals. This test is primarily historical. "If a particular type of controversy has traditionally been resolved by courts at common law or equity rather than by the legislative or executive departments, then it is 'inherently judicial' and must be heard in an Art. III court if heard in a federal court at all." Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, *supra*, at 575.

Under this test, Art. I status for courts-martial and COMA is a valid exercise of congressional power. Matters concerning the military have traditionally fallen in the province of the legislature or the executive, not the judiciary. As to military affairs generally, the Supreme Court has noted:

It is difficult to conceive of an area of government activity in which the [civilian] courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civil control of the legislative and executive branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Thus, by creating COMA pursuant to Art. I, Congress did not relegate inherently judicial matters to a legislative court.

Particularized need test. In Palmore, the Supreme Court upheld the creation of Art. I courts in the District of Columbia, as there was a "particularized need" for these courts to exist. The "particularized need" test requires that the need for an Art. I court must be so pervasive as to outweigh the potential for abuse which exists when limited tenured and financially unprotected judges preside over a court. If it is necessary for the proper execution of a power committed to the legislative or executive branches that a matter be resolved outside the channels of the Art. III judiciary, Congress may constitutionally delegate the matter to an Art. I tribunal.

This test is applicable to the Art. I courts of the military.

There is another context in which criminal cases arising under federal statutes are tried, and defendants convicted, in non-Art III courts. Under its Art I § 8, cl. 14 power '(t)o make rules for the government and regulation of the land and naval forces,' Congress has declared certain behavior by members of the armed forces to be criminal and provided for the trial of such cases by court-martial proceedings in the military mode, not by courts ordained and established under Art III. Within their proper sphere, courts-martial are constitutional instruments to carry out the congressional and executive will.

Palmore, 411 U.S. at 404. The "military [trial] courts have been justified on the basis of executive and congressional supremacy in military affairs and the special need for swift and flexible military discipline." Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, *supra*, at 577. Extensive judicial intervention in military affairs might itself endanger the legitimate prerogatives of the other branches. The exigencies of military discipline require the existence of a special system of military courts in which not all of the special procedural protections deemed essential in Art. III trials need apply. Thus, a "particularized need" justifies Congress' creation of COMA pursuant to its Art. I power.

Discussion

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.

The Supreme Court has found "nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Art. III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property." U.S. ex rel Toth v. Quarles, 350 U.S. 11, 17 (1955).

The laws which govern trials by court-martial are specialized and tailored to meet the needs of discipline in the military. The Supreme Court has noted that the Uniform Code of Military Justice "cannot be equated to a civilian criminal code. ...While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community." Parker v. Levy, 417 U.S. 733, 743 (1974).

COMA is at the head of a system of justice which "remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved." O'Callahan v. Parker, 395 U.S. 258, 265 (1969). 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 court's usefulness to the military judicial system.

POSITION

Given the constitutional, historical and logical bases for COMA as an Article I court, it should not be reconstituted under Article III.

POSITION PAPER

SUBJECT: Budget

Federal Court Practice

The Administrative Office of the United States Courts is tasked with the administration of Art. III courts. Prior to 1939, the Judiciary was provided administrative support by the Department of Justice. That system was abolished, however, because of conflicts in maintaining the separation of powers. Thus, the Administrative Office was established.

The Director of the Administrative Office is required to submit to the Office of Management and Budget annual estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts. Such budgets must be approved, before presentation to the Office of Management and Budget, by the Judicial Conference of the United States (two exceptions: the Court of International Trade and the Court of Appeals for the Federal Circuit approve their own budgets).

Within the Administrative Office, the Office of Audit and Review performs internal and functional audits to evaluate the effectiveness and efficiency of administrative services provided to the courts. In 1987, the Office of Audit and Review completed an audit of the biweekly salary payment delivery process, initiated audits of the procurement, space and property management process, the drug aftercare program administration and financial management and oversight of community defender guarantees.

The US Court of Appeals for the Federal Circuit.

As mentioned above, The United States Court of Appeals for the Federal Circuit (Federal Circuit) presents its own budget to Congress without input or endorsement from the Administrative Office. This is probably because of the way the budgeting process was handled by the Court of Customs and Patent Appeals, the predecessor to the Federal Court.

The budget is managed internally by the Administrative Services Officer of the Federal Circuit. He receives some technical assistance from the Administrative Office, much like that provided COMA by the Washington Headquarters Service (WHS). The Administrative Office, however, does not have the authority to screen or reject Federal Circuit budget proposals. The Administrative Office's function is only to help put the budget together.

Execution of the budget is the responsibility of the court. The Federal Circuit is its own treasury. The Administrative Services Officer of the Federal Circuit and a small staff handle the court's contracting and procurement. The Clerk of Court has

authority to write checks and disburse funds. The Clerk is responsible for keeping the books and justifying the expenses. Travel funds are also administered by the Federal Circuits, subject only to budget constraints.

Court of Military Appeals Practice

As provided by statute, the United States Court of Military Appeals is located in the Department of Defense (DOD) for administrative purposes only. Accordingly, DOD through the Washington Headquarters Service (WHS) and other divisions provide the court support in matters concerning personnel, procurement and preparation and submission of the budget.

COMA operates on an annual budget of approximately \$3.2 million. Of that figure, approximately \$2.2 million goes to salaries and benefits. Some expenses incurred by the court are covered by GSA as part of the rent and general maintenance of the facility.

The typical budget cycle involves both COMA and the WHS. First, the Office of the Secretary of Defense presents the court an estimated budget. The court receives a proportionate share of any budget increases which are available to DOD-supported organizations.

After the Chief Judge of the court has reviewed the proposed budget, he can make requests for more fund. OSD then prepares a rough draft for review by the Comptroller, Office of the Secretary of Defense, for fine-tuning before it is forwarded to Congress. Because the court is "in its own budget envelope" from Congress, DOD can not reallocate the court's budget.

Management of the budget is within the court's discretion. For example, the court is its own approval authority for travel costs. DOD does not impose any limitations on travel by the judges. Indeed, the judges are authorized to use military transportation at no cost to the court. There is no authority for the court to reimburse the military branches for the costs of government transportation.

Unexpected expenses have been covered by budget lapses, such as the retirement of a senior judge. Also, the court is seldom at full staff. Thus, there has never been a problem with the court running out of money.

The WHS considers the COMA budget to be very stable and workable. This can be attributed to the court's size, stability and predictability. It has been a gradually increasing account: 12 years ago there were 40 employees, now 43. The WHS sees its role in the COMA budget as a matter of bookkeeping, not influence.

Discussion

If COMA were granted article III status, more than likely it will retain its own budget and operate autonomously from the administrative office of the US Courts. Other courts that evolved into federal courts (Court of Appeals for the Federal Circuit and the Court of International Trade) were permitted to keep their own budgets. The administrative office is presently experimenting with independent budgets for the Courts of Appeals.

If COMA is granted control over its budget like the Federal Circuit, its staff would have to be augmented to accomplish the task. COMA would become more involved in the budget process. Presently, the WHS provides the staff support in preparing and submitting the budget to Congress. COMA would also contract and procure its goods and services, tasks not presently administered by the court staff.

If COMA were to be reorganized as an Art. III court its budget could be subject to the supervision and control of the Administrative Office. The Administrative Office would fix the compensation of the Clerk of Court and other employees whose compensation is not otherwise fixed by law. The Administrative Office would regulate and pay annuities to widows and surviving dependent children of judges. It would control necessary travel and subsistence expenses incurred by judges, court officers and employees while absent from their official stations on official business. The Administrative Office would purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies need for the operation and maintenance of the courts. Vouchers and accounts of COMA would be audited by the Administrative Office. The COMA budget would be subject to greater control by the Administrative Office than is currently exercised by DOD.

POSITION

The COMA budget process would not be improved and could be harmed by reconstituting COMA as an Article III court.



POSITION PAPER

SUBJECT: Supervisory Powers.

The primary grant of jurisdiction of the United States Court of Military Appeals (COMA) is set forth in Article 67, U.C.M.J., 10 U.S.C. § 867. Additional jurisdiction is granted in cases of government appeals by Article 62, U.C.M.J. and COMA has expanded its own jurisdiction by use of the All Writs Act, 28 U.S.C. § 1651(a). The Court early on proclaimed that within the statutory limits, it had a duty to see that courts-martial were conducted fairly. United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951). Pursuant to this duty, the court ruled that it had the authority to supervise and regulate the law officers and the court members. United States v. O'Neal, 1 U.S.C.M.A. 138, 144, 2 C.M.R. 44, 50 (1952). In addition, the Court declared that it would intervene whenever necessary to preserve the integrity of court-martial proceedings. United States v. Drexler, 9 U.S.C.M.A. 405, 408, 26 C.M.R. 185, 188 (1958); United States v. Bouie, 9 U.S.C.M.A. 228, 236, 26 C.M.R. 8, 12 (1958). Perhaps the most expansive supervisory power assumed by COMA was the capacity to issue writs in aid of its jurisdiction. United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). These "inherent" supervisory powers exercised by COMA over the military justice system were extensively discussed by Brigadier General (then Colonel) D. M. Brahms, USMC, in a paper submitted to the Military Justice Act of 1983 Advisory Commission [Military Justice Act of 1983 Advisory Commission Report 1187-1200 (hereinafter Commission Report)]. Excerpts from that paper form the remainder of this position report.

It is a well settled rule of law that "courts created by statute can have no jurisdiction but such as the statute confers." Sheldon v. Sill, 50 U.S.(8 How.) 441, 12 L.Ed. 1147 (1850). Hence COMA has that jurisdiction which is granted to it in its enacting statute, 10 U.S.C. 867. . . .

If Congress were to make COMA an Article III court it does not necessarily follow that COMA's jurisdictional grant would change. . . .it is therefore, difficult to imagine that COMA's jurisdictional grant and hence statutory reach and power, would, ipso facto, be increased.

The Court of Military Appeals also draws its power from another statute, the All Writs Act, found at 28 U.S.C. § 1651(a). It provides that: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (emphasis added). It is beyond dispute that the All Writs Act applies to the Court of Military Appeals. Noyd v. Bond, 395 U.S. 683, 685 n. 7 (1969). The act applies equally to Article III courts. Hence, once again COMA's power would not necessarily increase if it were to become an

Article III court. There may, however, be differences in the manner in which COMA and Article III courts apply the All Writs Act. It is appropriate to briefly review some of the leading cases in this area.

The Court of Military Appeals first announced its belief that it was a court within the meaning of the All Writs Act in United States v. Frischholz, 36 C.M.R. 36 (1966). In Frischholz, the accused filed a Petition for Writ in the Nature of Error Coram Nobis seeking to have his general court-martial conviction reviewed by COMA. The accused had unsuccessfully petitioned the Court for a review of his case some six years earlier. COMA found that rather than seeking coram nobis, the accused was really asking for reconsideration of its 1960 decision denying his petition for review. The court did not find good cause for waiving the five day time limit for filing reconsideration motions. Nevertheless, in the interests of justice, the court reviewed the record, found no error, and denied the requested relief. In Frischholz, then, it was a situation where COMA had an arguable jurisdictional basis, Article 67(b)(3), UCMJ, from which to proceed in aid of its jurisdiction under the All Writs Act. In determining that the Court did have power under the All Writs Act, the Court noted that "[p]art of our responsibility includes the protection and preservation of the Constitutional rights of persons in the armed forces" Id. at 152.

The Court of Military Appeals extended their concept of jurisdiction under the All Writs Act one step further in Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967). In Gale, the accused was pending trial before a general court-martial. Prior to petitioning COMA, the accused's counsel moved to dismiss the charges on the basis that his client had been denied a speedy trial. The law officer granted the motion and dismissed the charges. The convening authority ordered the law officer to reconsider his ruling. Upon reconsideration, the law officer viewed this order as an appellate reversal of his dismissal and ordered the trial to proceed. Id. at 305-306. The accused then petitioned the court for extraordinary relief and asked that the law officer's original ruling be upheld. The government argued that COMA lacked jurisdiction to act since this case fell outside the grant of jurisdiction under Article 67(b). Clearly, the government's literal reading and argument were correct. The Court of Military Appeals, however, chose to interpret Article 67 as indicating Congress' intent to "confer upon this court a general supervisory power over the administration of military justice." Id. (emphasis added). The court concluded that "in an appropriate case, this court clearly possesses the power to grant relief to an accused prior to the completion of court-martial proceedings against him." Having reached this conclusion, the Court then found that the accused's facts were not sufficiently extraordinary so as to warrant relief by way of an extraordinary writ. The court then refused to consider the merits of the accused's petition. Id. at 308.

The rule of Gale was further strengthened by the court's holding in United States v. Bevilacqua, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968). In Bevilacqua the accused was sentenced by a special court-martial to a reduction in grade and partial forfeiture of pay. The sentence was approved and ordered executed. The accused then petitioned the court for a review of his conviction. Once again, the government argued that the Court was powerless to act in this case, or any case where as here, the sentence as approved is not within those cases set out in Article 67(b). Once again, the Court rejected this argument. It cited Frischholz and Gale and then stated:

These comments and decisions certainly tend to indicate that this court is not powerless to accord relief to an accused who has palpably been denied constitutional rights in any court martial; and that an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary.

Id. at 11-12. The court then reviewed the record before it, found no grounds for relief, and denied the petition. Id.

The court seemed to retreat from the Frischholz, Gale, and Bevilacqua trilogy, in United States v. Snyder, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969). In Snyder, the accused was convicted at a special court-martial and sentenced to a detention of pay and reduction in grade. The convening authority approved the sentence and ordered it executed. The accused petitioned the Judge Advocate General, United States Air Force, for review of his case under Article 69, UCMJ. The accused's claim for relief was denied. The accused then filed a Petition for Review and Writ of Coram Nobis with the court. The accused relied upon the decision in Bevilacqua in petitioning the Court. Id. at 193-94. The Court correctly noted that this case was not reviewable in the ordinary course of appellate review. The Court characterized its holdings in Frischholz, Gale, and Bevilacqua, as recognizing a "responsibility to correct deprivations of constitutional rights within the military system . . ." in those cases "in which we have jurisdiction to hear appeals or to those to which our jurisdiction may extend when a sentence is finally adjudged and approved." Id. at 195 (emphasis added). The court then denied the petition.

Snyder remained a viable precedent under our system of stare decisis for seven years before the Court characterized it as "too narrowly focused." McPhail v. United States, 1 M.J. 457 (C.M.A. 1976). In McPhail, the accused was convicted at a special court-martial and sentenced to restriction and hard labor without confinement. The sentence was approved and ordered executed. The accused was denied relief when he petitioned the Judge Advocate General of the Air Force. The accused then petitioned

the court for review of his conviction. This case was, in all significant procedural aspects, on all fours, with Snyder. The Court, however, chose to disregard Snyder and instead seized the opportunity to reexamine the extent of its powers under the All Writs Act. After referring to the Frischholz, Gale, and Bevilacqua trilogy, the Court postulated that "an accused who has been deprived of any fundamental right under the Uniform Code need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary." McPhail at 460 (citations omitted). The court reiterated its belief that it acts as a supervisory authority since it is the highest court in the military judicial system. The court then reviewed congressional statements and Supreme Court cases to support its conclusions. Finally, the Court recognized that "there are limits" to its authority, but did not define them. Id. at 463. The court concluded by stating that:

Whatever those limits are, as to matters reasonably comprehended within the provisions of the Uniform Code of Military Justice, we have jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority.

Id. The court then granted the relief sought by the petitioner.

In sum, these cases establish that the court has not hesitated to review courts-martial which ordinarily might never have been reviewable on direct appeal under Article 67(b), UCMJ. The court has not, as suggested in Snyder, reviewed these cases on the theory that these were cases to which its jurisdiction might extend when a sentence is finally adjudged and approved. Rather, they have theorized that they have a supervisory obligation under Article 67 to review any court-martial in which an accused has been denied his constitutional rights (Bevilacqua); any action of any courts or person purporting to act under the authority of the Uniform Code of Military Justice (McPhail); and any actions which would deprive persons in the Armed Forces of their constitutional rights (Frischholz). The relevant question now becomes, do Article III courts operate under similar concepts?

It is clear that Article III courts do not view their grant of authority under the All Writs Act as broadly as COMA does. Professor E. H. Cooper, University of Michigan, School of Law, a noted authority on Federal Practice and Procedure, presented an address entitled "Extraordinary Writ Practice in Criminal cases: Analogies for the Military Courts" on 18 May 1983 at the Eighth Annual Homer Ferguson Conference on Appellate Advocacy. (Reprinted at 98 F.R.D. 593). In discussing a court's power under the All Writs Act he noted that "the first and most important limit on writ power is that it can be exercised only in aid of the court's jurisdiction." Id. at 603. He suggested that this limit does not mean much. He opined that to the federal

courts of appeals "it means essentially that a writ cannot issue to an inferior tribunal if it is clear that the court of appeals could not ever acquire jurisdiction of an appeal in that particular case Potential appellate jurisdiction, however, clearly is enough." Id. (emphasis added). Hence, Article III courts seek to determine whether a potential of direct appellate review exists before finding jurisdiction under the All Writs Act. This is the position adopted by the Court of Military Appeals in Snyder, but later repudiated in McPhail.

Professor Cooper recognized that "a much more difficult question is presented by the prospect of cases that never can come before a Court of Military Review or the Court of Military Appeals." Id. at 604. For instance, a case "may progress from an ambiguous posture to one in which it has become clear that these courts will not ever have appellate jurisdiction." Id. . . . Professor Cooper suggested that even in such circumstances the courts should consider exercising extraordinary writ power as a means of "ensuring individual justice." He opined that the "diffuse notions of 'inherent power' drawn from the particular needs of the military justice system may be enough" to warrant invocation of the power. Id. The Court of Military Appeals could justifiably draw support for its actions in McPhail from Professor Cooper's comments.

. . . A little over two months after Professor Cooper presented his remarks to the Court of Military Appeals, the Court issued its opinion in Dobzynski v. Green, 16 M.J. 84 (1983). In Dobzynski, the accused had successfully urged the suppression of certain evidence at his special court-martial. The charges were then withdrawn by the convening authority and referred to Captain's Mast. The accused, being attached to a vessel, was not allowed to refuse the nonjudicial punishment imposed. The accused then sought review of his nonjudicial punishment by filing a petition for extraordinary relief with the Court of Military Appeals. In an opinion by Judge Fletcher, the Court concluded that "under the facts as herein presented, . . . there is no legal error calling for invocation of our power to grant a petition for extraordinary relief." Id. at 84. Judge Cook concurred with Judge Fletcher. The significance of Judge Fletcher's opinion is that he appeared to assume that had the court found some legal error in the nonjudicial punishment proceeding it could have ordered extraordinary relief. Perhaps even more significant, is the fact that Judge Fletcher did not find it necessary to discuss the legal basis of his assumption.

On the other hand, Chief Judge Everett, in a dissenting opinion, did elaborate upon the court's authority. . . . Chief Judge Everett found that the court had authority to order extraordinary relief under the Court's general supervisory power over the administration of justice as set forth in such cases as Frischholz, Bevilacqua, Gale, and McPhail. Id. at 89-90. Furthermore, as an alternative ground, he found that the review

could be accomplished as a matter falling within the "court's potential jurisdiction." Id. He cited Professor Cooper's remarks at the Annual Homer Ferguson Conference as support for his position. Id. at 91. Chief Judge Everett concluded that "the present case in no way involves the issue of whether our court should become engaged in the routine review of nonjudicial punishments" Id. at 92. [See also, Jones v Commander, Naval Air Force, U.S. Atlantic Fleet, 18 M.J.198 (1984)].

... In Jones, the accused had been acquitted at a general court-martial of various charges. These charges were then referred to Captain's Mast where the accused received nonjudicial punishment. The accused was then processed for and received an administrative discharge under less than honorable conditions. Mr. Jones then petitioned the Court for extraordinary relief seeking a reversal of his nonjudicial punishment and an annulment of his administrative discharge. Id. at 198-99. Judge Fletcher authored the opinion of the court. Once again, he assumed that the court had the power to grant the requested relief, but concluded that the legal error did not rise "to the level requiring extraordinary relief by this court." Id. at 199. He noted, however, that the "petitioner may well seek relief in the Article III courts." Id. Judge Cook, in a concurring opinion, concluded exactly the opposite. He was willing to take action under the circumstances, but concluded that the court lacked jurisdiction to intervene in nonjudicial punishments. Id. at 199-200. He noted that this limited review was unfortunate. Id.

On the other hand, Chief Judge Everett concluded that the petitioner's nonjudicial punishment was indeed illegal. He therefore dissented from the majority's dismissal of the petition. After reviewing with approval such cases as Frischholz, Gale, and McPhail, Chief Judge Everett concluded that:

In light of these pronouncements, I have no doubt about this court's power to grant extraordinary relief when Article 15 is used in a manner that clearly violates a servicemember's statutory and constitutional rights.

Id. at 201. Chief Judge Everett also stated that he would agree with Judge Fletcher's opinion that the "petitioner may well seek relief in the Article III courts." Id. at 202. He believed, however, that the petitioner should not have to incur the cost of a collateral attack in an Article III court. Id. He would therefore grant Jones extraordinary relief by directing that the nonjudicial punishment be set aside. Id. at 203. Chief Judge Everett was careful to point out that he did not consider whether administrative discharges may be the subject of extraordinary relief from the court. Id. at n.4.

. . . [I]n light of COMA's current position that it has a supervisory obligation under Article 67 to review any action of

any courts or persons purporting to act under the authority of the Uniform Code of Military Justice, (McPhail) or any action that would deprive persons in the armed forces of their constitutional rights (Frischholz), that if it were given Article III status it would be likely to move into areas heretofore traditionally associated with Article III courts. Such areas can easily be found in a plethora of cases set forth in 28 U.S.C.A. § 1651(a). A brief exploration of several areas will suffice for this discussion.

Prison law. Every accused sentenced to confinement is confined pursuant to the authority of the Uniform Code of Military Justice. In recent years a body of law recognizing the constitutional rights of prisoners has emerged: freedom of expression under the First Amendment, Procunier v. Martinez, 416 U.S. 396 (1974); freedom of religion under the First Amendment, Cruz v. Beto, 405 U.S. 319 (1972); freedom from unreasonable searches and seizures under the Fourth Amendment, Bell v. Wolfish, 441 U.S. 520 (1979), United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982); and freedom from cruel and unusual punishments under the Eighth Amendment, Holt v. Sarver, 309 F.Supp. 362 (E. D. Ark. 1970). Traditionally, the writ of habeus corpus under 28 U.S.C. § 2241 has been utilized as a means to vindicate prisoners' rights. The Court of Military Appeals has asserted that it has the right to issue a writ of habeus corpus in a proper case. Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399, 401 (1967). Hence, under the reasoning of McPhail, Frischholz, and Levy, it is entirely conceivable that COMA would extend its supervisory role to reviewing the conditions of confinement in military correctional facilities.

Review of Article 138, UCMJ, Complaints. Article III courts have not hesitated to compel military officials to vacate administrative discharges when such discharges are a result of the officials' failure to follow the applicable service regulations. Colson v. Bradley, 477 F.2d 639 (8th Cir. 1973). In Colson, the petitioner had filed an Article 138, UCMJ, complaint with his superiors. It was denied and he was discharged. He then filed a petition with the federal courts seeking a review of his Article 138 complaint. The Eighth Circuit found that the Army had not followed its own regulations in reviewing the petitioner's 138 complaint. The court issued a writ of mandamus ordering reinstatement of the petitioner into the service. Under the reasoning of McPhail and Jones, it is conceivable that COMA would extend its supervisory role to reviewing alleged denials of Article 138 complaints and subsequent administrative discharges if it were made an Article III court.

In considering CMA's expansive reading of its powers under the All Writs Act in supervising military justice, ... [it is interesting to speculate on what COMA might do] with regard to areas traditionally associated as inherent powers of a court:

rulemaking and supervision of judge advocates' ethics.

Rulemaking. Although there was a substantial basis for inherent rulemaking power in the common law, legislative control over judicial rulemaking was established early on in the federal system. See the Judiciary Act and Process Act of 1789. Presently, in accordance with statutory mandates, the Supreme Court prescribes the federal rules of civil procedure (28 U.S.C. § 2072), criminal procedure (18 U.S.C. §§ 3771 and 3772), evidence (28 U.S.C. § 2076), and appellate procedure (18 U.S.C. §§ 3771 and 3772 and 28 U.S.C. §§ 2072 and 2075). In every instance in which the Supreme Court prescribes rules under these statutes it forwards them to Congress as a condition precedent to the rules taking effect. If, upon receipt, Congress disagrees with the rules it has not hesitated to disapprove them. Hence, Congressional control over Article III courts' judicial rulemaking power is well established in the federal system.

The Military Rules of Evidence and procedure are prescribed by the President of the United States pursuant to the authority vested in him by Article 36, UCMJ (10 U.S.C. § 836). Article 67(a), UCMJ (10 U.S.C. § 867) provides that COMA "may prescribe its own rules of procedure" In light of the well established principle of Congressional control over judicial rulemaking, . . . change in the military judicial system rulemaking authority if COMA becomes an Article III court [is not foreseen]. The choice of whom, if anyone, to delegate the power lies with Congress. Thus far, Congress has chose to delegate this authority for the military judicial system to the President. There is nothing to suggest that this might change if COMA becomes an Article III court.

I The Military Justice Act of 1983 Advisory Commission Report 1187-1200 (1983).

POSITION

Reconstituting COMA as an Article III court could result in COMA extending its supervisory power, over military justice to unacceptable limits.

POSITION PAPER

SUBJECT: Designation of Chief Judge

COMA PRACTICE

Article 67(a)(1), U.C.M.J., provides in part that "[t]he President shall designate from time to time one of the judges to act as chief judge". Such a provision did not appear in the earlier drafts of the Code [See H.R. 4080, 91st Cong., 1st Sess. (1949), reprinted in 2 Index and Legislative History of the Uniform Code of Military Justice, (1950) at 1613 (1985)]. When H.R. 4080 was reported by Congressman Kefauver on June 10, 1949 [H.R. Rep. 486, 81st Cong., 1st Sess. 159 (1949), reprinted in 3 Index and Legislative History of the Uniform Code of Military Justice, (1950) at 2736 (1985)], the language was included as part of an amendment that substantially redrafted the entire bill, was in the bill as enacted, and remains in the Code unchanged.

The only specific reference to a "chief judge" appears in connection with a discussion concerning the possible use of temporary judges in addition to permanent judges when the workload of the court was particularly heavy. Congressman Brooks, while having no objection to such an arrangement noted that, "Of course, if you do that, then you are going to have to provide here that one judge shall be nominated presiding judge, with authority to make those assignments." [Establishment of a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1282 (1949)]. Given the relatively recent use of the term "chief judge" even in the federal courts (see infra Federal Practice), it is not surprising that the position of a chief judge for COMA did not generate any discussion.

In the history of COMA there have been five chief judges. Chief Judge Quinn served from his initial appointment on 20 June 1951 until he was replaced during his second term on 23 June 1971. Chief Judge Quinn continued to serve on the court until his retirement on 25 April 1975. Chief Judge Darden, who had been initially appointed to COMA on 13 November 1968, was elevated to chief judge on 23 June 1971 and served as such until his resignation from COMA on 29 December 1973. Chief Judge Duncan, who had initially been appointed to COMA on 29 November 1971, was elevated to chief judge on 15 January 1974 and served as such until his resignation from COMA on 11 July 1974. Chief Judge Fletcher was appointed to serve on COMA with designation as chief judge on 30 April 1975. Chief Judge Fletcher was replaced as chief judge on 16 April 1980 and continued to serve on COMA until he was removed by the President for physical disability on 11 September 1985. Chief Judge Everett was appointed to COMA with designation as chief judge on 16 April 1980 and continues to

serve in that position. Thus, three chief judges have been designated as such upon their initial appointment and two chief judges have been elevated from associate judge positions. Two chief judges have resigned, two have been replaced while in office, and one continues to serve.

FEDERAL PRACTICE

The position of chief judge in the U.S. Courts of Appeal was formally created in 1948 (see Act of June 25, 1948, ch. 646 § 45(a), 62 Stat. 869, 871: "The circuit judge senior in commission shall be the chief judge of the circuit."). As the term "chief judge" was adopted to replace the term "senior circuit judge" in recognition of the increased administrative duties of such judge, it was viewed more as a change in nomenclature than the creation of a new substantive position. By custom and tradition, the privileges and precedence of the chief judge, as with the former senior circuit judge, accrued from seniority. In 1948, the administrative duties of the position were few and the caseloads of the courts were low. As the administrative duties of the chief judge expanded in scale and scope and as caseloads burgeoned, Congress set an age limit of 70 in order to relieve older judges of the "burdens" associated with the position (see Act of August 6, 1958, Pub. L. No. 85-593, 72 Stat. 497). An attempt to remove this age restriction in 1979 was unsuccessful [see 125 Cong. Rec. 6949 (1979)]. In 1975, a Congressional commission headed by Senator Roman L. Hruska concluded that a proposal by which the Chief Justice of the United States with the consent of the Associate Justices would select the circuit court chief judges and that the Circuit Chief Judges with the consent of the other active circuit judges would select the district court chief judges would politicize the selection process and rejected such a proposal [Compare, Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: A Recommendation for Change, A Preliminary Report 108-109 (1975) with Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: A Recommendation for Change, 68 (1975)].

By the Act of August 6, 1982 (Pub. L. 97-164, Title II, §§ 201-203, 96 Stat. 51), the mechanism by which the chief judge was determined was changed from "the senior judge under 70 years of age" to the following basic criteria: the circuit judge in regular service who is senior in commission, is sixty-four years old or younger, has served for one year or more as a circuit judge, and has not served previously as chief judge [28 U.S.C. § 45(a)(1)]. If no judge is sixty-four years old or younger, then the youngest of the judges who have served for one year or more shall be the chief judge [28 U.S.C. § 45(a)(2)(A)]. If no judge is sixty-four years or younger and no judge has served for more than one year, then the judge senior in commission, who has not previously served as chief judge, shall be chief judge [28 U.S.C.

§ 45(a)(2)(B)]. A judge acting as chief judge who does not meet the basic criteria shall serve only until some judge does meet the basic criteria [28 U.S.C. § 45(a)(3)(B)].

The chief judge shall serve a term of seven years. If, after seven years, no judge qualifies under the basic criteria, then the chief judge continues to serve until a another judge does meet such criteria [28 U.S.C. § 45(a)(3)(A)]. The chief judge cannot serve after attaining 70 years of age. When the chief judge reaches 70 years of age, if no other judge meets the basic criteria and none of the judges over sixty-four years of age has served for one year or more, then the chief judge serves until another judge meets the basic criteria or one over sixty-four years of age has served for more than one year [28 U.S.C. § 45(a)(3)(C)].

The provisions concerning the appointment of chief judges did not affect then-sitting chief judges, but the provisions concerning the seven year term and age seventy limit did (Pub. L. 97-164, § 203). The retention of a sitting chief judge upon the redesignation of the position is similar to what occurred when the Chief Justice of the Court of Appeals for the District of Columbia was redesignated the Chief Judge of the Court of Appeals for the District of Columbia (Act of June 25, 1948, § 2(a), 62 Stat. 869). The U.S. Court of Appeals for the Federal Circuit, which was created by the 1982 legislation, required a unique solution since two sitting chief judges (U.S. Court of Claims and U.S. Court of Customs and Patents Appeals) would be appointed to the new court. The senior of the two sitting chief judges was designated chief judge of the Federal Circuit and the other was next in precedence (Pub. L. 97-164, § 166).

If a chief judge desires to be relieved of the duties of chief judge while retaining an active status, the chief judge so certifies to the Chief Justice of the United States [28 U.S.C. § 45(c)]. The new chief judge is then determined by application of the basic criteria. Prior to 1982, there was an additional requirement that the circuit judge next in precedence be willing to assume that position.

The 1982 legislation sought to balance the need for continuity and the desirability of rotation in the position of chief judge (S. Rep. No. 275, 97th Cong., 1st Sess. 8, 25-26). The prior system, which was based on seniority with an age seventy limitation, had produced two difficulties. It required the long-term retention of a chief judge who may or may not have had lacked the interest or ability to be an enthusiastic administrator. At the other extreme, it required rapid turnover among chief judges when consecutive judges of similar advanced age took office. These problems were illustrated by one chief judge who served for 17 years (Chief Judge Richard Chambers, 9th Circuit, August 1959-June 1976) while in another circuit three chief judges served within one year (Chief Judges Florence Allen,

John Martin and Thomas McAllister, 6th Circuit, September 1958-August 1959) . By precluding the appointment of a chief judge who is over 64 at the time of appointment and fixing the maximum term of service at seven years, the new system avoids the extremes of too lengthy or too short a term of service. A constant seven year term for the chief judge unless death, resignation or retirement shortens the term ensures continuity and can enhance administrative efficiency, while periodically breathing fresh air into the office and relieving older judges of administrative burdens.

ROLE OF THE CHIEF JUDGE

a. Federal Practice.

Most of the responsibilities and prerequisites of the office of chief judge come from custom and tradition and very little has been written on the subject. Two notable exceptions are Feinberg, The Office of Chief Judge of a Federal Court of Appeals, 53 Fordham L. Rev. 369 (1984) and R. Wheeler & C. Nihan, Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures (Federal Judicial Center, 1982). Feinberg notes that, although chief judges have a multitude of internal, systemic and external duties as head of a court of appeals and chief administrator of a circuit, seniority and administrative skill do not necessarily accompany each other.

The "internal" duties include those which affect the operation of the court. The most important is the selection and organization of the three-judge panels. A circuit of five judges has 10 possible panel combinations. The chief judge must consciously avoid any manipulation in the selection. The chief judge's goal is to balance the workload and ensure that all judges have an opportunity to preside over a panel (even the junior judge could preside if combined with a senior judge and a designated district court judge). In so doing, the chief judge must carefully select senior judges (who essentially work for free since they would get their full pay regardless) and guesstimate and schedule for visiting judges (this is often done based upon suggestions from colleagues and, if from outside the circuit, with the approval of the Chief Justice). These tasks are further complicated by recusals, illnesses and unforeseen contingencies. Although the presiding judge gets the power of assigning opinions, he or she also gets additional burdens, such as preparing the bulk of written summary orders.

Other "internal" duties include monitoring the flow of cases through the appellate process. Although this responsibility lies in the first instance with the Clerk of Court, it ultimately rests with the chief judge. The chief judge must supervise the filling of the most important staff positions, plan for and preside over meetings of the active judges, supervise voting on

en banc hearings, and allocate chamber space. The chief judge must resolve problems associated with the appointment of counsel for indigent appellants in criminal cases including personally approving vouchers for payment [18 U.S.C. § 3006A(a) (1982)].

The chief judge has a number of systemic duties such as attending the Judicial Conference of the United States at least twice a year [28 U.S.C. § 331 (1982)]. This conference sets policy on a wide variety of subjects affecting the operation of the federal judiciary and its relationship with other branches of government. It is a valuable means of exchanging information, but also requires a considerable amount of time reading bulky committee reports. The chief judge must also plan for and preside over at least two Circuit Council meetings a year [28 U.S.C. § 332 (1982)], which includes the district court judges and is a microcosm of the Judicial Conference. The chief judge must supervise the correspondence involving essential business between these meetings. Other systemic duties include the approval of substitute district court judges within the circuit [28 U.S.C. § 292(b) (1982)] or seeking the approval of the Chief Justice for inter-circuit switching [28 U.S.C. § 292(d) (1982)]. The chief judge also monitors the caseload statistics of district court judges and approves/disapproves recommendations for the appointment of bankruptcy judges (Pub. L. No. 95-598 § 404, 92 Stat. 2549, 2683-84). The chief judge must act on any complaints filed against any judicial officer (circuit judge, district court judge, bankruptcy judge, or magistrate) anywhere in the circuit. The chief judge can dismiss the complaint if it is frivolous or outside the scope of the Act [28 U.S.C. § 372 (1982)] or convene a statutory committee composed of equal numbers of circuit and district court judges and the chief judge.

The chief judge also has external duties such as testifying before Congressional committees, making speeches, disseminating public information (e.g. annual reports), greeting distinguished visitors and answering letters from frustrated pro se litigants. The chief judge is often the focal point in the court's relationship with the local bar and the news media. A chief judge often spends considerable time fostering legal education (e.g. moot court competitions) or improving community relations.

The chief judge must handle all of the administrative burdens which come with the position and yet must continue to function as a judge. The key to success is to keep the administrative duties from consuming an inordinate amount of the chief judge's time. A chief judge must foster collegiality, build consensus, smooth ruffled feathers, and head off potential crises or problems. In spite of the honor of being chief judge, the administrative headaches can be a real disincentive to serve as such.

b. COMA Practice.

The internal duties of the Chief Judge of COMA are as varied as his circuit court counterpart; however, such duties are very different in nature and in the degree to which the Chief Judge of COMA can attend to small details. As COMA is only a three judge court, the Chief Judge obviously does not have to expend any time determining the composition of panels. Senior judges have served actively only three times and no visiting judge has ever sat with COMA; thus, the Chief Judge has not been burdened with planning for their service. Since COMA has only one facility, there is no need for conducting the business of the court through the mail, as there is in the federal circuits where district and bankruptcy courts are spread all over the circuit. As COMA has a small staff (43 persons including the three judges) with low turnover, the Chief Judge does not face an overwhelming number of personnel actions. He has, however, the time to attend personally to personnel matters, such as hiring and firing of lower level personnel, promotions, and approval of time cards, that his circuit court counterpart does not have. Likewise, since COMA has only one facility to operate, the Chief Judge can attend to details of budget, such as acquisition of equipment and supplies, travel, training, subscriptions, mail and communication costs, and printing.

A systemic duty of the Chief Judge is to participate in the Code Committee, which is required to meet at least annually (1) to make a comprehensive survey of the U.C.M.J., (2) to report to Congress and the Executive the number and status of pending cases, and (3) make recommendations relating to uniformity of sentencing policies, U.C.M.J. amendments, and any other matter considered appropriate (Article 67(g), U.C.M.J.). The committee usually meets two or three times per year and issues an annual report. Each meeting is approximately 2-4 hours in duration and the agenda is generally suggested by the committee members. No travel is required and preparation time is not as extensive as for the Judicial Conference, since no lengthy committee reports need be read before attending the meeting. Another systemic duty is the Homer Ferguson Conference, which COMA annually co-sponsors with the Military Law Institute. The Chief Judge is very active in soliciting speakers to attend and gives final approval to the program.

Since the military justice system is worldwide, the external duties of the Chief Judge include a lot of travel and are thus more time consuming than those of a circuit chief judge, who may have only several states to cover. The Chief Judge and the associate judges of COMA make judicial visitations to military installations throughout the world. These visits are very beneficial for the system as the servicemembers are better informed about the workings of the court and its civilian nature. The visits are also very helpful to the judges by keeping them aware of the conditions of military life in which military

justice must operate. The Chief Judge also speaks at military schools, conferences and seminars, is actively involved in professional legal associations (e.g. ABA and FBA), and occasionally testifies before Congressional committees.

DISCUSSION

When the position of chief judge was created for COMA, it was probably considered more of an honor than a burden. As with the federal courts, the administrative workload which went with the position was not viewed as onerous. The federal courts, however, came to recognize the strain that the administrative chores placed on older judges and set limits on service in the position, first by age and later also by a term of service. Indeed, prior to 1958, a chief judge had to accept voluntarily this position of "honor." Since COMA is limited to one three judge panel, the Chief Judge does not have the time-consuming burden of structuring of panels which the circuit chief judges have. Likewise, the power of assigning opinions is less significant on COMA, where decisions will depend more on collegiality than fortuitous combinations.

If COMA were to become an Article III court, the administrative burdens placed on its Chief Judge would probably be increased. The Chief Judge would have to expend considerable time preparing for and participating in the Judicial Conference, even though the Conference's subject matters would be only marginally relevant to military justice. As an Article III court, visiting judges or senior circuit or district court judges may sit more frequently and additional time would be spent on planning for their service. The administrative burdens of the Chief Judge now consume approximately 40 percent of his time. Any significant increase in such duties would give the Chief Judge less time to attend personally to details. As all of the present duties serve a valuable purpose, it would not be beneficial to eliminate any of them. The Chief Judge could not afford to take a caseload reduction since COMA is only a three judge court. An increase in the administrative duties of the Chief Judge would not benefit the military justice system.

The present COMA system, which gives the President discretion to replace the chief judge, has worked in spite of the potential for abuse. Chief Judge Quinn served for 20 years. His replacement by Chief Judge Darden was probably to relieve Chief Judge Quinn of the administrative burdens after many years of excellent service. Two chief judges resigned the position simultaneous with their departure from the court. The appointment of Chief Judge Everett and "demotion" of Chief Judge Fletcher, although accomplished for the best of motives (i.e. the exceptional qualifications of the incoming judge), could leave the erroneous impression that Chief Judge Fletcher was being "punished" for unpopular opinions. In spite of the additional

burdens, the position of chief judge is prestigious and coveted and its loss could be mortifying. If COMA were to gain Article III status, the selection of chief judge would probably be controlled by a formula similar (if not identical) to that which the circuit courts of appeals use. If COMA does not receive Article III status, it may be desirable, nevertheless, to develop a formula which will retain some necessary flexibility for the President but make the appointment more systematic, so as to remove any perception that the honor is being manipulated. For example, the President could appoint the chief judge for a set term (such as seven years) and, at the expiration of such term, either reappoint the chief judge to another term or appoint a new chief judge. An age limit could be added if deemed desirable.

The Chief Judge is responsible for the efficient administration of the court. The President must be able to redesignate the Chief Judge in order to rectify tardiness in the operation of the court. Delays in the processing of appeals, that may be acceptable in peacetime, become intolerable in wartime. Any modification to the Chief Judge designation procedure must retain Presidential wartime authority to quickly replace a Chief Judge who is unable or unwilling to expeditiously dispose of cases. Since the designation would only affect administrative duties and not the judge's seat on the court (unless the dereliction is sufficient to warrant removal), the President's authority would not reasonably affect the independence of the Chief Judge in deciding individual cases.

POSITION

Modifications to the system by which the chief judge is designated, if deemed desirable, can be accomplished without reconstituting COMA as an Article III court.



POSITION PAPER

SUBJECT: Representation on the Code Committee

Article 67(g)(1), UCMJ, provides:

A committee consisting of the judges of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense shall meet at least annually. The committee shall make an annual comprehensive survey of the operation of this chapter. After each such survey, the committee shall report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate.

The question to be addressed by this position paper is whether the Court of Military Appeals would be permitted to remain a member of the Code Committee if it were chartered under Article III of the Constitution.

The legislative history concerning the Code Committee is minimal. The primary focus of Congress was on the creation of COMA itself and not on the court's subsidiary code committee duty. The work of the committee was believed to be self-evident. A specific task assigned to COMA was participation on the Code Committee, which committee was directed to provide annual "status" reports to Congress through the Senate and House Armed Services Committees.

As an Article I court accountable to the legislature and the executive, COMA can be required to participate in the recommendation process to those respective branches. However, if COMA was transferred to the control of the judiciary branch, as it would be if its charter were shifted to Article III, its primary accountability would likewise be shifted.

28 U.S.C. § 331 provides for the Judicial Conference of the United States, the purpose of which is to "advise as to the needs of [each] circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved." Section 331 further provides that "[a]ll judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section." Therefore, any corrections ordered by the Conference must be made. If the military justice system was subject to the mandates

of the Judicial Conference, then the Conference could direct binding orders to the military in the name of "shortcomings" in the field of military justice. These orders could have significant impact on the mission of the military and could interfere with the constitutional power of the President as Commander in Chief and the Congress as the regulator of the armed forces.

It is further provided in 28 U.S.C. § 331 that "[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation." Although both the Judicial Conference and the Code Committee have reporting requirements, the purposes of their respective reports are very different. The Judicial Conference is composed of judges from the various circuits, who are intent on rectifying perceived shortcomings in the federal judicial system. The Code Committee represents various interest groups, who are concerned with the fair and efficient administration of military justice.

Although Article III status does not create a bar to submission of congressionally mandated reports, it is uncertain whether such reports could go from an "inferior" federal court directly to Congress, as the current Code Committee reports do, or if such reports must pass through the Supreme Court as the head of the judicial branch. Obviously, if the latter was required, the reports would be subject to alteration and manipulation so as to reflect judicial branch interpretation and evaluation. Also, if the report contained evaluations concerning the Courts of Military Review (Article I tribunals) would/could such courts be subject to review and direction by the judicial branch?

The purpose of the Code Committee is to make recommendations to the President and Congress, including proposed changes to the UCMJ. COMA's views and input now go straight to the Code Committee and then, through the Committee report, to Congress without the concern of or censorship from the judicial branch. If COMA was reconstituted under Article III, its allegiance would be shifted from the legislative branch to the judicial and its input would most likely be subject to approval of the judicial branch hierarchy. Further, COMA would be faced with a dilemma of which avenue to follow to pursue changes that it perceived were needed: the Judicial Conference or the Code Committee. COMA could possibly pursue both avenues. This however, would open the door for possible conflict if the Judicial Conference would order one course of action in order to correct a perceived shortcoming in the "system" and the Code Committee recommended a diametrically opposed course.

In conclusion, as an Article III court, COMA could still be a member of the Code Committee and that committee could still be required to submit its report to Congress. COMA's participation

in the Code Committee, and its opinions and recommendations, need not be encumbered Judiciary supervision. If the judicial branch chooses to get involved in the approval of COMA's positions before they are submitted to the Code Committee or requires an opportunity to review and comment on the finished report prior to COMA's endorsement, then such involvement would bestow upon the judicial branch an opportunity to direct the other branches in the management of their affairs. The Code Committee is a very important participant in the military justice system and COMA is a very needed and active member of that Committee. If for any reason, COMA was no longer a participating member of the Code Committee, the contribution of the committee would be diminished.

POSITION

Conversion of COMA to an Article III court has the potential for judicial branch entanglement in Code Committee matters, which would interfere with an existing beneficial executive-legislative relationship.



POSITION PAPER

SUBJECT: Independence of COMA

INTRODUCTION

The United States Court of Military Appeals ought to be endowed with all of the independence necessary to carry out its judicial functions. The military justice system needs for its highest appellate court, its intermediate appellate courts and its trial courts-martial, to be and be perceived to be independent of any injurious interference from any outside source, including the executive and legislative branches. Military discipline will be fostered only if the participants in and observers of the system believe that military justice is being administered by independent tribunals. The absolute independence of courts is, however, neither attainable nor desirable under our tripartite system of government. So long as the legislature is responsible for raising and appropriating public funds and the executive is responsible for the expenditure of those funds, the courts, which need financial and material support to perform its functions, and the other branches of government are going to be interdependent. The issue this position paper will address is the essential or desirable attributes of independence which COMA needs to fulfill its mandate and whether those needs can be better met under its existing Article I status or by reconstituting the court under Article III.

COMA'S ARTICLE I STATUS

When COMA was created in 1951, the congressional intent was that COMA be a court in every significant aspect. The House changed the originally proposed title of "Judicial Council" (which to at least one Congressman suggested one of the usual basement operations here in Washington) to the more judicial title "Court of Military Appeals." Professor Morgan, Chairman of the Code Committee, supported having the judges "appointed in the same way that the circuit court of appeals judges are appointed" [Establishment of a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 610 (1949) (Testimony of Professor Edmund M. Morgan)]. In spite of some opposition that a civilian appellate tribunal would cause delay in the administration of military justice and thereby endanger the security of the nation [id. at 772-73 (Testimony of Major General Raymond H. Fleming on behalf of National Guard Bureau)], the House passed a bill that would have given COMA the most significant aspect of Article III status (life tenure). The Senate, although it was also concerned with improving military justice, was hesitant to create life appointment judgeships which might be filled during the lame duck

Truman administration. In the Senate hearings, the opposition to COMA was stronger than in the House hearings. Colonel Weiner reiterated the concern of delays and interference with the maintenance of discipline. The Senate approved a bill which differed from the House bill by: setting the term of office at eight years; providing for removal by the President for cause; fixing compensation at the same level as circuit court judges; and, granting retirement benefits equal to those of territorial court judges. The conference committee compromised the term to fifteen years, staggered the initial terms and provided for civil service retirement.

Although the terms "Article I" and "Article III" were not used in either the House or Senate hearings, the essence of the distinction (life tenure) was clearly considered by Congress and a definitive decision was made not to grant life tenure. This is not to be confused with the congressional intent that the court be independent. The congressional expectation that the court be independent was articulated by Representative Philbin as follows:

This court 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 any outside influences.

[95 Cong. Rec. 5726 (1949)]. In spite of such sweeping language, the Code as enacted created "a Court of Military Appeals, located for administrative purposes in the Department of Defense."

In 1968, Congress clarified the status of COMA as a legislative court and its administrative relationship with DOD. In hearings on S.2634, 90th Cong., 1st Sess., Chief Judge Quinn stated that the

really important provision contained in this bill is that it establishes the U.S. Court of Military Appeals as a judicial tribunal in every sense of the word. In the past there have been intimations at least that it really was only an administrative agency. This bill removes any doubt about its full stature as a U.S. court. It increases its standing and prestige in the judicial hierarchy and, by implication, gives it the full power of a U.S. court.

[H.R. Rep. No. 1480, 90th Cong., 1st Sess. 3 (1968) (Statement of Chief Judge Robert E. Quinn)].

Judge Ferguson noted, "I think it is very important that Congress go on record making this a legislative court in words. I believe that they have always intended it to be so." [*Id.* at 4 (Statement of Judge Homer Ferguson)]. Finally, Judge Kilday held a similar view when stating that

In some quarters the status of this court has been called

into question. There are some who contend that the court is an administrative agency in the Department of Defense and not a court in the true sense. This provision establishes the status of the court as a court in the true sense and under the Constitution. This is of the greatest importance.

[Id. at 5 (Statement of Judge Paul J. Kilday)].

Public Law 90-340, which enacted S. 2634, was certainly intended to put to rest the status of COMA and its relationship with DOD by containing the language that "[t]here is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense." S. Rep. No. 806, 90th Cong., 1st Sess. (1967) which accompanied S. 2634, stated that the original congressional intent

was that the Court of Military Appeals be a court in every significant respect. Despite this clear intent, there have been contentions that the court is not a court at all but is an instrumentality of the executive branch or an administrative agency within the Department of Defense. Such a contention may have been inadvertently supported by a provision in the law that the Court of Military Appeals is 'located for administrative purposes in the Department of Defense.' This provision was adopted only to reduce expenditures for the administration of the relatively small staff of the court. The phrase 'for administrative purposes' was meant merely to authorize the Department of Defense to furnish such things as telephone services, transportation facilities [sic], and to purchase supplies. The court justifies its own budget and funds are appropriated for its operations with no control exercised by the Department of Defense.

[Id. at 2; Reprinted at 114 Cong. Rec. 33911].

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 during 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.

ARTICLE III COURTS

The founding fathers intended that judicial power be kept separate and distinct from legislative or executive power. Their

British ancestors had by the Act of Settlement 12 & 13 Will. 3, c. 2 (1701) required judicial commissions issued by the Crown to be made quam diu se bene gesserint (during good behavior), that judicial salaries be ascertained and that judges be removed only upon address of both Houses of Parliament. The founding fathers granted Article III judges life tenure during good behavior, with protections against salary reduction, and removal only by impeachment in the House and trial in the Senate, as the guaranties of an independent and impartial judiciary. They went a step further than their ancestors, however, and elevated the judiciary to a third co-equal branch of government whose authority flowed directly from the same constitutional wellspring as its sister branches. This rendered federal judges independent of the political departments not only with respect to their tenure and salary, but more importantly, in their source of judicial authority.

The separation of powers principle is designed to maintain the proper balance of power among the branches of the national government. The Constitution does not, however, mandate the complete and absolute separation of power. Congress can permissibly interfere with judicial power (other than salary reduction and tenure), such as when Congress creates or abolishes lower federal courts (Article III, § 1) or regulates the appellate jurisdiction of the Supreme Court (Article II, § 2). Any encroachment upon the judiciary's sphere is an acutely sensitive endeavor. Congressional or executive action cannot, however, be allowed to interfere with the judiciary's core function of impartial decisionmaking. So long as this core function is not infringed upon, Congress and the executive have weighty and legitimate interests, such as approving a budget or controlling the armed forces, which may require some intrusion upon the independence of the judiciary. The separation of powers also helps to preserve the balance of power between the federal and state authorities. An independent federal judiciary is necessary to check any encroachment by its sister branches upon the states' domain. The federal courts by maintaining the supremacy of federal law and safeguarding federal interests help advance the vital constitutional principle of federalism.

Article III judges, because of the critical role that they play in the checks and balances system of the federal government and in the federal-state relationship, need a greater degree of independence than that required by other judicial officials. Article III salary and tenure protections, although they obviously enhance judicial independence, are not essential ingredients of independence. Only three percent of all federal, state and local judges have these constitutional protections, yet the other 97% of the judges can still independently and impartially fulfill their judicial duties without Article III status.

In the federal sphere, the doctrine of legislative (Article

I) courts recognizes that rigid adherence to the Article III tenure and salary provisions may impair important practical interests in governmental flexibility. Specialized areas have particularized needs and warrant distinctive treatment [Palmore v. United States, 411 U.S. 389, 408-9 (1973)]. Not all cases arising under federal law must be heard by an Article III judge and there is nothing inherently unfair about criminal cases being heard by non-Article III judges. To hold otherwise would disparage the impartiality and independence of the District of Columbia judges or military trial and appellate judges.

Military courts are justified on the basis of executive and congressional supremacy in military affairs and the special need for swift and flexible military discipline. In Dynes v. Hoover, 61 U.S. (20 How.) 65, 79, 15 L.Ed. 838, 843 (1857), the Court noted that the constitutional "provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now protected by civilized nations; and that the power to do so is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." Military courts do not threaten the separation of powers doctrine because they are sharply restricted to matters over which the political branches have primary control. Indeed, extensive judicial intervention in military affairs might itself endanger the legitimate prerogatives of the other branches. Also, as the states do not play any role in military matters, military courts do not offend the policy of federalism. Thus military judges, including civilian judges sitting atop an exclusively military system, simply do not require the same accoutrements of independence as do Article III judges who are tasked with preserving our tripartite system and the doctrine of federalism.

DISCUSSION

Judicial independence is a fundamental principle of our constitutional arrangement. The judiciary must be able to exercise its functions free from governmental influence or threat of interference and to administer justice without fear or favor. This independence is rightly regarded as an indispensable condition of free constitutional government and the ultimate safeguard of the rights and liberties of our citizens. Since COMA cannot be hermetically sealed off from the other components of the military justice system and it cannot be absolutely independent of the other branches of government, the most appropriate parameters of COMA's independence must be determined. This can be accomplished by examining the following three intertwined components: substantive independence; personal independence; and, systemic independence.

A. Substantive independence.

Substantive independence means that in the discharge of his or her judicial decision-making functions, a judge is influenced only by the law and the commands of his or her own conscience. The constitutional power to decide cases fairly in accordance with the law can be effectively exercised only if the deliberative process of the courts is free from undue interference by the legislative or executive branches of government. The government is a party to all of the litigation which comes before COMA and in its role as an advocate attempts to lawfully influence the nature of the decision. The government has not attempted and obviously should not attempt to infringe impermissibly upon any function which is essential to the effective exercise of COMA's deliberative independence. Any impairment of public confidence in the impartiality of COMA judges would result in a diminution of public acceptance of military courts as a dispute-resolving mechanisms, and, in the end, would threaten the stability and eventually the existence of our military justice system.

Courts-martial members have from time to time been subjected to command influence and military appellate judges are especially sensitive to the deleterious effect that such interference with the independence of courts-martial in their deliberative process has had on the system. Military appellate courts have been spared from any similar encroachment on their independence. This is due in large part to the high moral character of military practitioners and their sincere desire to have an independent court system. Also, such encroachments are futile, as they would be abruptly rebuffed by our appellate judges. Given that COMA has total substantive independence, the granting of Article III status would not enhance their substantive independence.

B. Personal independence.

Personal independence means that the judge will have the terms and conditions of his or her judicial service protected to ensure that the executive or legislative branches will not be able to dominate the judiciary through the coercive manipulation of judicial livelihood and continuance in office. It encompasses salary, pensions, retirement, tenure, and removal. As noted above, the Article III guarantees of personal independence are life tenure during good behavior with removal only through the impeachment process and protections against salary reduction. These protections significantly enhance personal independence and would presumably have this salutary effect on COMA judges should they become Article III judges.

Under the present system, COMA judges are paid at the same rate as judges of the U.S. Courts of Appeals, so COMA judges would not receive a higher salary by becoming Article III judges. They do not, however, have any guarantee that Congress could not

change their rate of pay to, for example, that of judges of the District of Columbia Court of Appeals, who are paid at the rate of 90% of that of a judge of the U.S. Courts of Appeals. Control over judicial salary fixation is always at least an incipient threat to personal judicial independence. COMA salaries are now fixed at an appropriate rate and the only protection against salary reduction is that any attempt to do so would provoke a firestorm of controversy. Congress could enact legislation that would protect COMA judges against salary reduction during their term in office; however, the protection afforded by such legislation is illusory since Congress could repeal such legislation. The pension and retirement system are important components of the total financial security and also need to be adequate (although they are probably more important as an inducement to acceptance of the appointment than they are as a guarantor of judicial independence). So long as the financial remuneration is adequate, protected and regularly adjusted to keep it appropriate, COMA's personal independence can be enhanced without granting Article III status.

Security of tenure is also a fundamental guarantee of personal independence. Life tenure is, however, not essential to personal independence as is demonstrated by the overwhelming percentage of federal, state and local judges who exhibit their independence while lacking life tenure. Indeed, some judges must be periodically reelected directly by the citizenry. COMA judges are appointed for fifteen year terms; and, while this lends a certain amount of job security, it is obviously not as secure as a lifetime appointment. The fifteen year decision was a conscious compromise by Congress which was concerned about appointments by the lame duck Truman administration. (Recall that the House had approved life appointments while the Senate had approved eight year terms.) Unless a judge has previous government service, fifteen years may not be enough to qualify for retirement. A fear, albeit with no empirical support, has been expressed that a judge nearing the end of the fifteen year term will feel some pressure to modify or alter his or her opinions in order to curry favor with the executive branch in order to be reappointed. The quality and integrity of COMA appointees is such that this type of reappointment conversion should not be a temptation. A possible solution is to grant a pension to judges who, after having served a full term, are willing to undertake a reappointment but are not so reappointed.

The reality of security of tenure depends largely upon the rules for removal. Article III judges may be removed only by "Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors" U.S. Const., Art. II § 4. COMA judges "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, or for mental or physical disability, but for no other cause." Substantively, Article III judges may arguably be removed for more reasons than COMA judges since "high crimes and misdemeanors" include private

criminal conduct, while "neglect of duty or malfeasance in office" may be limited to official misconduct. This distinction is, however, probably overwhelmed by the procedural differences in the removal process. The impeachment process is arduous and cumbersome and thus affords a great deal of insulation, while the notice and hearing requirements can be streamlined and straightforward. Personal independence does not require de facto life appointments, but only that judges be removed from office only for a breach of some clearly enunciated and promulgated rule of conduct. When the critical needs of national security are balanced against the incremental gain in personal independence that life tenure would provide, it is clear that the military justice system must be able to remove judges by a process that is eminently fair but not cumbersome and that the standard of judicial misconduct which would justify such removal be clearly defined and promulgated by law. The language of Article 67 can certainly be clarified to accomplish this objective.

C. Systemic independence.

Systemic independence requires that the court be provided with the financial and material resources to effectively carry out its judicial functions. Short of devising a system under which COMA could sustain itself on fees, fines, or forfeitures extracted from litigants, the court will always be financially dependent upon Congress. Such a dependence problem is perhaps insoluble and will always pose some threat to the independent and impartial administration of justice. Those who control the purse strings will always have some capacity to influence the actions of those who are dependent upon the contents of the purse. The executive and legislative branches must resist the temptation to use the power of the purse to influence judicial decisions or judicial policy. Judges must be resolute in resisting any temptation to endeavor to please the executive or legislature in the hope of obtaining more favorable financial treatment.

If there exists in the public mind a tendency to identify the administration of law with its outward manifestations, then it would follow that public confidence in the judiciary could be significantly affected by the nature and suitability of its budget and physical plant (i.e., courtroom) and by whether that budget and those facilities are seen to be controlled by the judiciary or by the executive or legislature. The judiciary must have the right to exclusive possession of its building, the power of control over ingress to and egress from the building (i.e., security), and the power to allocate the purpose to which the building is put. The judiciary needs sufficient funds to ensure an adequate quantity of consumable supplies, to acquire necessary equipment and services, and to travel in furtherance of their official duties to necessary conferences, educational seminars and, in the case of COMA, worldwide military installations. The judiciary needs a support workforce that is in sufficient numbers and at appropriate grades to ensure a stable, professionally

competent staff. More important, however, is the need for the staff to be and to be seen to be under the control of the court.

Since COMA does not have its own source of funds, it depends upon Congress to allocate necessary financial resources. COMA presents its budget to Congress and, once the budget is approved, COMA controls its own expenditures. As COMA lacks budgetary and personnel expertise, it must rely upon services provided by Headquarters Washington Services (an agency of the executive branch). A close, amicable relationship has existed between COMA and its administrative support agency. A notable exception resulted in the case of Mundy v. Weinberger, 554 F. Supp. 811 (D.D.C. 1982) which resulted from a disagreement over providing an SES position to a member of the COMA staff. One isolated disagreement however does not evidence any attempt to influence the independence of the court by the executive. The executive has always supported and Congress has always provided funding which was sufficient for COMA to fulfill its constitutional functions and responsibilities.

The benign supervision by DOD of the COMA budget has worked primarily because COMA has been very conservative in its growth and spending habits. Such supervision has also led to an institutional dependency by COMA upon DOD. If COMA wishes to increase its fiscal independence, it would have to develop budgetary competence and budgetary responsibility. The court could assert its administrative independence and establish the means for internalizing fiscal responsibility within its own institution by adding a specialized staff with planning and budgeting skills. In so doing, however, the judiciary should not be allowed to set itself up as an elite which would be granted immunity from the formal and informal mechanisms of accountability, scrutiny, and control to which other institutions and organs of government are subject. The judiciary would be entitled to use techniques of justification and persuasion to influence legislative decisionmaking, but ultimately it would be subject to the budget levels and constraints imposed by Congress. If COMA were granted Article III status and thus had its financial needs looked after by the Administrative Office of the U.S. Courts, its budget would go to OMB for inclusion in the executive budget document without executive revision but subject to recommendation by the executive. This would actually result in less direct access by COMA to the legislature than it now enjoys. The independence of COMA is better protected by such direct access because it can seek the promotion of legislation or governmental action which will facilitate the performance of its functions and can effectively oppose measures which might hinder it and can do so in a manner that better insures that its views will in fact reach the intended recipients (Congress) uncensored and undistorted.

POSITION

All of the essential and desirable elements of substantive, personal and systemic independence are attainable or are already assured to COMA under an Article I status.

JURISDICTION

Article 67(b), UCMJ, confers jurisdiction on the United States Court of Military Appeals (COMA) to review cases, following Court of Military Review (CMR) review, when the sentence includes death, punitive discharge, or confinement for one year or more. COMA must review death cases and those referred to it by a Judge Advocate General (TJAG) and may review others upon petition of the accused. The pending legislation does not expressly change these jurisdictional grants. COMA judges have asserted authority to issue extraordinary writs in all court-martial cases regardless of the limits in Article 67(b), UCMJ, and have also intimated that this authority reaches nonjudicial and administrative disciplinary actions. The current bills (S. 1625 and H.R. 3310, 100th Congress) do not address COMA's extraordinary writ power, despite strong recommendations in the past that any such legislation do so. Art. III status may, by its own force, increase COMA's scope of review of Constitutional issues and its supervisory powers generally. Any legislation concerning COMA's jurisdiction should address COMA's supervisory powers explicitly.

DISCUSSION

A. CASES REVIEWED BY COMA

1. Direct Review

The court-martial cases which reach COMA for review fall into three statutorily defined categories. For ease of discussion, they are referred to as, "capital cases", "TJAG certified issues", and "petitions", respectively. The statutory basis for each of these three avenues for COMA review is found in Art. 67(b), Uniform Code of Military Justice (UCMJ); 10 U.S.C. 867(b) as follows:

- (a) Capital Cases - Art. 67(b)(1), UCMJ "all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;" [NOTE: In 1983, Congress eliminated COMA's review of all cases "involving general or flag officers." D. Schleuter, Military Criminal Justice: Practice and Procedure, § 16-16(B) at 514 n.6 (2d ed. 1987) (hereinafter Schleuter)].
- (b) TJAG Certified Issues - Art. 67(b)(2), UCMJ "all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review;" and,
- (c) Petitions - Art. 67(b)(3), UCMJ "all cases reviewed by a Court of Military Review in which, upon petition of

the accused and on good cause shown, the Court of Military Appeals has granted a review."

Since, as noted, all three categories of cases reaching COMA for review must first have been affirmed or reversed by a CMR, a brief explanation of the jurisdiction of those appellate courts is in order.

Article 66, UCMJ, establishes the four CMRs and describes their jurisdiction to review court-martial cases in which the sentence as approved by the convening authority includes:

- (a) death;
- (b) punitive discharge (dismissal of an officer, cadet, or midshipman and dishonorable or bad conduct discharge imposed on enlisted members); or,
- (c) confinement for one year or more.

(Art. 66(b)(1), UCMJ). Except for cases in which the sentence extends to death, the accused may waive or withdraw an appeal following sentence approval by the convening authority, thus preventing review by a CMR and, in turn, review by COMA (Art. 66(b)(2), UCMJ). The CMRs review both the facts and the law, while COMA may only "take action with respect to matters of law" (Arts. 66(c) and 67(d), UCMJ).

In summary, when a court-martial adjudges and a convening authority thereafter approves any sentence including death, punitive discharge, or confinement for one year or more, a CMR must review the case for errors of fact or law (Art. 66(b)(1), UCMJ). Thereafter, COMA must review the case for legal error if the sentence as affirmed includes death ("capital cases"). Secondly, COMA must review cases when ordered by a TJAG following CMR review, but need only review those issues identified in the order ("TJAG certified issues") (Art. 67(d), UCMJ). Finally, COMA may review cases in which, following CMR review, an accused has petitioned COMA for review ("petitions"). COMA's discretionary grant of petitions for review submitted to COMA by accused military members following CMR review represents the most common method by which COMA reviews court-martial cases (See Schleuter at 514).

Cases which do not qualify for review by a CMR and, therefore, may not reach COMA for its direct review are examined for legal sufficiency by TJAG or may reach TJAG on application of the accused (Art. 69, UCMJ). Hence, any case in which the approved sentence does not include a sentence of death, punitive discharge, or confinement for one year or more is not within COMA's appellate jurisdiction described in Art. 67(b), UCMJ.

2. Extraordinary Writs

Over and above its authority to directly review court-martial cases previously reviewed by a CMR, COMA has jurisdiction to hear petitions for and to issue extraordinary writs pursuant to the All Writs Act, 28 U.S.C. 1651(a)(1982) [U.S. v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966)]. In Frischholz, the court held that as "a court established by act of Congress" under the act, it possesses authority granted by the act to "issue all writs necessary or appropriate in aid of [its] jurisdiction" (id. at 309). The court denied the accused's petition for writ of error and held that inasmuch as COMA itself had denied the accused's petition for direct review filed five years previously, a writ for extraordinary relief was unavailable to seek "reevaluation of the evidence or reconsideration of alleged errors" (id.).

Having established its power under the All Writs Act, the court made clear that despite Art. 67, UCMJ's limitation stating COMA may act "only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law" by a CMR, its power permitted it to hear petitions for extraordinary relief even prior to completion of trial by court-martial. The court stated:

To hold otherwise would mean that, in every instance, despite the appearance of prejudicial and oppressive measures, [an accused] would have to pursue the lengthy trail of appellate review -- perhaps even serving a long term of confinement -- before securing ultimate relief.

[Gale v. U.S., 17 U.S.C.M.A. 40, 43, 37 C.M.R. 304, 307 (1967)]. Again, the court denied the petition in Gale, holding that since the accused was not in confinement and jurisdiction was not at issue, the normal appellate avenues of relief were available. Thus, the exercise of the court's extraordinary writ powers was unnecessary in this particular case (id. at 43-44, 307-308).

The court's extraordinary writ powers have been called upon, for example, to challenge the legality of pretrial confinement, apparently prior to any CMR review of the case [Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976)]; to seek habeas corpus and mandamus relief from an adjudged sentence to confinement [Levy v. Resor, 17 U.S.C.M.A. 37 C.M.R. 399 (1967)]; to assert constitutional rights allegedly violated at a court-martial in a petition for extraordinary writ submitted to the court after the Air Force Board for Correction of Military Records had denied applications for correction [U.S. v. Bevilacqua, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968)]; to determine, before trial was completed, the legality of a convening authority's withdrawal from a pretrial agreement [Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983)]; and, to decide whether or not to order a military trial judge to reverse a pretrial ruling concerning the qualifications of

civilian defense counsel [Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980)].

Relief by way of petition for extraordinary writ from COMA is also available to the government [Dettinger v. U.S., 7 M.J. 216 (C.M.A. 1979)]. Moreover, though not directly relevant to COMA's jurisdiction, COMA has interpreted the All Writs Act to also afford the CMRs extraordinary writ power under the act (id.). COMA holds jurisdiction under the All Writs Act to afford extraordinary relief whether or not the particular case is within COMA's appellate jurisdiction as granted by Art. 67(b), UCMJ [McPhail v. U.S., 1 M.J. 457 (C.M.A. 1976)]. Stated another way, whether or not a court-martial case is within the categories of cases which could bring COMA review pursuant to the jurisdictional grant of Art. 67(b), COMA has held it possesses extraordinary writ power over virtually all court-martial cases (id.). This broad holding concerning COMA's extraordinary writ power, divorced as it is from Congress' jurisdictional grant to COMA in Art. 67(b), UCMJ, has caused concern both on and off the court. Any discussion of COMA's jurisdiction would be incomplete without a brief explanation of this historical concern.

B. CONCERN REGARDING COMA'S EXTRAORDINARY WRIT POWER

As noted earlier, in McPhail, supra, the court asserted its authority to issue extraordinary writs even in cases which, because of the sentences adjudged and approved, were not eligible for either CMR or COMA review within the Congressional grants of jurisdiction to those courts found in Arts. 66 & 67, UCMJ. Judge Cook's opinion, with the concurrence of Chief Judge Fletcher and Judge Perry, grounded the court's authority upon its role as the supreme court of the military judicial system, with inherent supervisory power "to require compliance with applicable law from all courts and persons purporting to act" under UCMJ authority (McPhail at 463). The court thus issued its writ directing TJAG to vacate the accused's conviction and restore all rights "affected" by the conviction (id.). Judge Cook's certainty regarding the court's authority, however, was short-lived.

Two years later Judge Cook declared, "I was wrong in McPhail as to the scope of this court's extraordinary relief jurisdiction" [Stewart v. Stevens, 5 M.J. 220 (C.M.A. 1978)(pet. dismissed)(J. Cook, concurring)]. Thus, McPhail's author revisited the legislative history behind Congress' division of court-martial review authority between military appellate courts and TJAG and declared, "[I] hold now that the Court has no jurisdiction to entertain a petition [for extraordinary relief] to inquire into the legality of Article 15 [nonjudicial punishment] and Article 69 [TJAG review] proceedings" (Stewart at 222). Given Judge Cook's repudiation of his McPhail opinion and the subsequent resignation and removal, respectively, of Judge Perry and Chief Judge Fletcher, COMA's view of its writ authority is unpredictable.

Soon before his 1984 retirement, Judge Cook reiterated his repudiation of McPhail in Jones v. Commander, 18 M.J. 198 (C.M.A. 1984)(pet. dismissed)(J. Cook, concurring). Judge Cook's concurring opinion in Jones repeated his view, expressed in Stewart that, regarding nonjudicial punishment imposed on a military member, the court's "charter to review only courts-martial -- and not even all of those -- remains unchanged, and we, as a court, are powerless to effect a remedy" (Jones at 200). However, by the time of Jones in 1984, Chief Judge Everett had joined the court and strongly expressed his view in dissent (id. at 200) (C.J. Everett, dissenting). Not only did the Chief Judge embrace the McPhail view that COMA may issue writs in cases outside the court's Art. 67(b) jurisdiction, he went on to assert the court's writ power reaches a commander's imposition of nonjudicial punishment, which is not a court-martial at all, at least when nonjudicial punishment is "used in a manner that clearly violates a servicemember's statutory and constitutional rights" (Jones at 201). Since the accused in Jones had received nonjudicial punishment which formed the basis of a subsequent administrative discharge, the Chief Judge's dissent next spoke to whether the court's extraordinary writ power might reach administrative discharges:

Since the majority is unwilling to grant relief even as to the nonjudicial punishment, I have not attempted to consider whether administrative discharges -- which generally fall outside the purview of the Uniform Code [UCMJ] -- may be the subject of extraordinary relief from this court, if based solely on illegal nonjudicial punishments.

(Id. at 203 n.4). Though stated in dissent, the Chief Judge's assertion that COMA's extraordinary writ power might reach not only outside Art. 67(b), even outside the court-martial arena, but also beyond the UCMJ and into the administrative discharge arena, has led some court observers to conclude the court is now not at all "bashful" about the sweeping reach of its extraordinary writ power.

In December 1984, six months after the Chief Judge's dissent in Jones was published, the Military Justice Act of 1983 Advisory Commission submitted its report to the Senate Committee on Armed Services, having spent nearly a year studying several military justice issues, including whether COMA should be reconstituted as an Article III court under the Constitution. This nine-member commission's majority of six (including a COMA representative) recommended Article III status for COMA, but:

with the caveat that the enacting legislation expressly limit the jurisdiction of the Court to that which it currently exercises, and that specific language be included in the legislation to preclude the Court's exercise of jurisdiction over administrative discharge matters and nonjudicial punishment actions under Article 15, UCMJ . . .

[I Military Justice Act of 1983 Advisory Commission Report 11 (1984)(hereinafter Commission Report)].

Three of the commission's five military members dissented from the Art. III status recommendation entirely and expressed their views in separate reports which focused on, among other things, COMA's tendency to expand its jurisdiction through its extraordinary writ powers (*id.* at 53 and 62). Both the majority and separate reports can fairly be viewed as expressing significant disagreement with an expansive view of the court's writ power.

Any legislation affecting COMA's status or jurisdiction must consider COMA's track record concerning its writ power. Those who favor an expansive reading of the court's power would likely argue that COMA has only exercised authority sufficient to fulfill its role as the ultimate protector of servicemembers under the UCMJ, as Congress intended. Those opposed might say the court has demonstrated an unsettling willingness to exercise its writ power over matters outside its statutory purview, to the detriment of the review power granted to TJAG, the Boards for Correction of Military Records, and military commanders. In any event, the following brief discussion of COMA's jurisdiction under Art. III of the Constitution would be incomplete if it ignored the context of what has gone before.

C. COMA'S JURISDICTION AS AN ART. III COURT

Neither of the identical bills pending in Congress to grant Art. III status to COMA contains any express provision with regard to COMA's jurisdiction to review courts-martial [S. 1625 and H.R. 3310, 100th Cong., 1st Sess. (1987) (hereinafter cited as bill)]. In addition, neither bill follows the recommendation of The Military Justice Act of 1983 Advisory Commission's majority that legislation granting Art. III status to COMA expressly limit the court to its current jurisdiction and "that specific language be included . . . to preclude the Court's exercise of jurisdiction over administrative discharge matters and nonjudicial punishment actions under Article 15, UCMJ" (Commission Report at 11). Therefore, if passed by Congress as written, the bill would not specifically express the intent of Congress regarding whether the court's jurisdiction reaches nonjudicial punishment or administrative discharge matters, which would be contrary to the commission's majority recommendation. Those issues would thus be left to the court's decisions, as they have been in the past. The only remaining provision of the bill which may affect the court's jurisdiction states, "There is a United States Court of Military Appeals established under Article III of the Constitution of the United States" (bill at § 2).

There is authority for the view that Congress may relegate any justiciable issue within its Art. I powers to an Art. III Federal court for decision [National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 600 (1949)]. One authority has

termed this Congressional power, alternatively, the creation of a "hybrid" Art. III court and "protective jurisdiction" in a substantive area Congress has regulated pursuant to its Art. I power [See Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 3528 at 134 and § 3565 at 430 (1975)]. Consistent with either theory, the bill creates an Art. III COMA with precisely the jurisdiction it possessed as an Art. I court.

One major concern regarding an Art. III COMA was addressed in a separate report of the Commission Report. Citing Crowell v. Benson, 285 U.S. 22, 60 (1932), the separate report noted that when Constitutional issues are raised, Art. III courts can reach their own determination of the law and the facts (Commission Report at 63). Pursuant to Crowell, an Art. III COMA could ignore the limitation of Art. 67(d), UCMJ, that it take action solely with respect to "matters of law" when Constitutional issues were raised. To date, COMA has followed the dictates of Art. 67(d) even when acting on petitions for an extraordinary writ [See Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982)]. However, research has disclosed no line of authority to suggest that COMA's jurisdiction, as opposed to its scope of review, would change solely by virtue of its establishment as an Art. III court.

POSITION

DOD strongly opposes any expansion of COMA's jurisdiction beyond its present scope. Any legislation concerning COMA's jurisdiction should explicitly preclude COMA from reviewing administrative discharges, nonjudicial punishment and other actions not involving direct appeal of courts-martial under Article 67.



POSITION PAPER

NUMBER OF JUDGESHIPS ON THE COURT OF MILITARY APPEALS

The issue of the number of judgeships for the Court of Military Appeals has been frequently debated during the last four decades. When the bill on the proposed Uniform Code of Military Justice was introduced on 7 March 1949 in the U.S. House of Representatives, Committee on Armed Services, article 67(a), UCMJ, provided in part "that a Judicial Counsel be established in the National Military Establishment, and that it be composed of not less than three members." Nonetheless, after the Congressional hearings and debates had ended, article 67(a)(1), UCMJ, as passed provided that "the court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years."

Chief Judge Everett touched upon some of the major points of the debate when he stated:

To add two judges and the related staff at a time when our court has been able to struggle along and dispense justice adequately is a little difficult to justify from the cost standpoint. If we are expanded, there should be some provision that we can sit in panels, at least for the purposes of disposing of petitions for review. For example, each petition might be reviewed by three judges with the opportunity for any of the three to bring the matter to the entire court for disposition. I have made some suggestions that if the court is expanded, then in order to make the expansion more cost-effective, the jurisdiction of the court should at the same time be expanded, perhaps to include administrative discharge matters. Under that approach, we would in effect have a certiorari jurisdiction with respect to the correction boards that exist in each of the military departments, and the discharge review boards. That increase of jurisdiction might make more palatable the expansion in numbers. Short of that I'm very dubious that in the present climate of budget-cutting any expansion in the membership of our court, however desirable in the abstract and in the light of the ABA standards, would have any chance of acceptance. I am very proud of the fact that our court is able to handle its very substantial workload with only three judges.

Fidell, A Look at Chief Judge Robinson O. Everett, District Lawyer, Jul.-Aug. 1981 31, 37.

Chief Judge Everett's statement suggested that a larger court is better able to handle a heavy or increasing caseload, but that due to political realities the additional cost of more judges could only be defended by an expanded jurisdiction of the Court.

The debate on the size of the membership for the Court of Military Appeals continued in 1983 and 1984. Though not required to make a proposal pertaining to the membership of the Court of Military Appeals, the Military Justice Act of 1983 Advisory Commission (Advisory Commission) unanimously recommended that the size of the Court of Military of Appeals be increased from three to five judges. The Advisory Commission perceived that continuity of precedents could be jeopardized when major judicial issues are decided by a two-to-one majority and one judge subsequently departs the Court or changes his opinion on the issue. Additionally, the Advisory Commission believed that the Court could often be deadlocked when, in the absence of one of the three judges, the remaining two could not agree on the holding of a case.

The Minority Report of the Advisory Commission extended the recommendation for increased membership on the Court of Military Appeals by advocating that at least two of the proposed five judges be active duty military lawyers. Adoption of this proposal would minimize the cost of increasing the Court's size and provide an incentive for military lawyers to remain in the military justice career path. Additionally, the Minority Report argued that military attorneys would better appreciate the practical effect of court rulings that affect the balance between individual rights and military necessity. However, since active duty attorneys are from the executive branch, any such appointment could conflict with Article III status for the Court of Military Appeals.

Chief Judge Everett responded indirectly when he noted:

Of course, if the jurisdiction of the Court were expanded, additional members would be necessary. Heretofore, the members of the Court - confronting what may be the highest caseload per judge among Federal appellate judges - have been able to perform their tasks in a timely and reasonably effective manner. Thus, while there have been suggestions that the number of members should be expanded in order to provide greater continuity and avoid abrupt changes in military jurisprudence, it has appeared that adding judges to the Court would increase costs to the taxpayers without a corresponding benefit in productivity. On the other hand, the Court would simply be unable to function effectively if any major addition were made to its jurisdiction without increasing its membership.

Everett, Some Observations on Appellate Review of Courts-Martial Convictions - Past, Present and Future, 31 Fed. Bar News & J. 421, 423 (1984).

In responding directly to the Advisory Commission's report, Chief Judge Everett, in his capacity as Chairman of the Code Committee, submitted a written statement pertaining to the membership of the

Court of Military Appeals to Congressman Les Aspin, Chairman, Committee on Armed Services, U.S. House of Representatives. Chief Judge Everett's statement of February 28, 1985 provided:

Although the question was not specifically included in its charter, the Commission unanimously recommended that the number of judges on the Court of Military Appeals be increased from three to five, irrespective of a change in status. The members of the Code Committee have a diversity of views. Some favor increasing court membership and consider that it would promote continuity of precedents and make the Court more effective. Others believe that, absent an expansion of the Court's jurisdiction, the cost of adding judges exceeds any benefit in judicial administration. They believe that problems of stability and continuity of decisions and temporary vacancy in judgeships on the Court should be handled in other ways.

Proponents of an increase in the size of the Court of Military Appeals thus argued that an increase in size would (1) facilitate the processing of cases, (2) result in greater stability of decisional precedent, (3) prevent a decisional deadlock in some cases when, due to a vacancy, the Court as now constituted, is reduced to two members, and (4) if active duty military members were included on an enlarged Court, the practical effect of court rulings would be made clearer to non-military court members. Additionally, because an increased court size necessarily entails increased expenditures, Chief Judge Everett repeatedly has tied increased size to an expanded jurisdiction for the Court since in his view expanded jurisdiction would be seen as an additional justification for higher court costs.

In fact, increasing an appellate court's size does not facilitate that court's ability to expeditiously dispose of cases, rather it generally increases delays in case processing. Duplication of work in reading briefs, hearing cases, and holding conferences will result from an increase in judges. Also, routing drafts of opinions to five rather than three judges is more time consuming. Use of panels could facilitate case processing in the Court of Military Appeals; yet, panels should not be utilized in what is, in spite of potential U.S. Supreme Court review, the highest military appellate court. In a five-judge court, ten panels are capable of being established; however, inconsistencies in opinions by the different panels could easily dilute an appellate court's function of developing the law. Since the Court of Military Appeals may be considered a supreme court of the military judicial system, the following statement of the American Bar Association is noteworthy:

In hearing and determining the merits of cases before it, the supreme court should sit en banc. Except for those who may be disqualified for cause or unavoidably absent, all

members of the court should participate in the decision of each case. The court should not sit in panels or divisions, whether fixed or rotating, . . .

[American Bar Association Standard Relating to Appellate Courts §3.01 (1974)].

In rendering opinions, the entire membership of a supreme court should participate in order to have the benefit of its collective judicial experience. Furthermore, full participation will promote continuity of the court's precedents.

The American Bar Association has not advanced an opinion on the appropriate size of the Court of Military Appeals; however, it has recommended that the highest appellate court should have not fewer than five or more than nine members [American Bar Association, Standards Relating to Court Organization § 1.13 (1974)]. The Commentary to Section 1.13 states that adding judges to a court may hinder its operation rather than expediting it; however, the Commentary further states:

A supreme court should be constituted of an odd number of judges, so that decisions can be reached by majority vote. This number facilitates the working relationships required to establish concurrence of opinion on difficult legal questions, while at the same time being large enough to provide breadth of viewpoint and the manpower to prepare the opinions that are the principal work product of appellate courts.

During the past 15 years, the Court of Military Appeals has experienced several vacancies. To lessen the potential for turbulence on the Court of Military Appeals, future vacancies should be expeditiously filled, and the judicial philosophy of nominees thoroughly explored to ensure their willingness to adhere to the Court's precedents. Additionally, the use of senior judges to temporarily fill vacancies on the Court could be explored.

POSITION

An increase in the number of judgeships on an Article I COMA Court to five is supported.

NOMINATION/APPOINTMENT

Nominations to COMA are currently referred to the Senate's Armed Services Committee, but would be referred instead to the Senate's Judiciary Committee, if COMA is established under Art. III, U.S. Const. Since the Senate's rules reflect its judgment that all military matters are best referred to its Armed Services Committee, establishing COMA as an Art. III court would thus contradict the Senate's judgment and, moreover, remove COMA nominations from consideration by the Senate committee best-suited to assess them. As for the informal process leading to the President's COMA nominations, the White House has permitted DOD to "take the lead" in assessing potential COMA nominees. Establishing COMA as an Art. III court runs the risk of reducing or eliminating DOD's role in that informal process. Both of the changes that might flow from establishing COMA as an Art. III court risk appointing of a COMA judge without any assessment of the impact any appointment might have on the armed forces, whose interests COMA is intended to serve.

Discussion

A. The Formal Requisites

The Uniform Code of Military Justice (UCMJ) provides for the appointment of judges to the U.S. Court of Military Appeals (for a 15-year term) by the President with the advice and consent of the Senate.

The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of the State.

[Art. 67(a)(1), UCMJ; 10 U.S.C. Section 867(a)(1)(1982)].

With the exception of the "political party requirement", the statutory requirement for the appointment of COMA judges is identical to that for judges of Federal courts established pursuant to Art. III of the Constitution. In that regard, Art. II, Section 2 of the Constitution provides the following concerning nominations by the President:

[A]nd he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and

which shall be established by Law...

(U.S. Const. Article III, Section 2).

Pursuant to Senate Rule XXXI, upon the Senate's receipt of any Presidential nomination requiring advice and consent, the nomination is referred to the appropriate Senate committee [Riddick, Senate Procedure, Precedents and Practice 748 (1981) (hereinafter Riddick)]. The question for consideration of the entire Senate is, "Will the Senate advise and consent to this nomination?", not merely whether the Senate concurs with the committee's report (Id.).

"[A]ll proposed legislation, messages, petitions, memorials, and other matters relating to . . . [the] Department of Defense" are referred to the Committee on Armed Services (Id. at 341). In contrast, matters relating to "Federal courts and judges" are referred to the Senate Committee on the Judiciary (Id. at 348). Thus, Presidential nominations of judges to sit on courts established pursuant to Art. III of the Constitution are referred to the Senate Committee on the Judiciary [See generally, H. Abraham, The Judicial Process 24-32 (5th ed. 1986) (hereinafter Abraham)]. Nominations to the U.S. Court of Military Appeals have historically been referred to the Senate Committee on Armed Services [See, e.g., Nomination of Walter T. Cox, III, To Be A Judge of the U.S. Court of Military Appeals: Hearings Before the Senate Committee on Armed Services, 98th Cong., 2d. Sess. (July 26, 1984)].

As noted thus far, the formal requirements of advice and consent for the nomination and appointment of judges to the U.S. Court of Military Appeals under Art. 67, UCMJ, would remain the same whether the court retains its status under Art. I of the Constitution or is established under Art. III. However, pursuant to Senate procedure, COMA nominations which are now referred to the Senate's Armed Services Committee would be referred instead to the Senate Committee on the Judiciary if COMA becomes an Art. III court. Thus, despite the fact that the Armed Services Committee may be better suited to assess the impact on the armed forces of all military matters (a judgment strongly implied by the Senate's referral of all military matters to that committee), Article III status for COMA would mean COMA nominations would be referred to the Senate Committee on the Judiciary, instead of the Senate Armed Services Committee.

B. The Informal Selection Process

Having described the straightforward statutory and Constitutional requirements governing Presidential appointments to COMA and Art. III courts, we turn now to the non-obligatory portion of the process. In other words, how does the process work, aside from what's demanded by the Constitution and the UCMJ?

1. Selection of Article III Federal Judges

The Constitution imposes no requirements regarding how the President selects nominees. During the administration of President Reagan, recommendations received by the White House to fill vacancies on Art. III Federal courts have been referred to a committee chaired by the President's Counsel. Also sitting on that committee are the Attorney General, the Deputy Attorney General, the Assistant Attorney General for Legal Policy, the Associate Attorney General, the White House Chief of Staff, the Assistant to the President for Congressional Relations, the Assistant to the President for Personnel, and "on some occasions", the Assistant to the President for Political Affairs (Abraham at 24). "That committee reviews recommendations for vacancies, submits these to checks by the FBI and judgments by the [American Bar Association], and then forwards its recommendation to the President," who forwards his nomination to the Senate (Id.).

2. Selection of COMA Judges

Similar to the role it plays in nominating Art. III judges, the President's Federal Judicial Selection Committee (described above) receives recommendations regarding nominees to COMA, establishes an initial consensus regarding potential nominees, and initiates the requisite FBI checks including completion of financial disclosure forms [Memorandum from Fred F. Fielding, Counsel to the President, to the Honorable William H. Taft, IV, General Counsel, Department of Defense (DOD), "U.S. Court of Military Appeals" (November 7, 1983)]. By informal agreement between DOD and the White House, DOD traditionally "takes the lead in providing recommendations on appointments" to COMA and has never submitted its recommendations to the American Bar Association for its evaluation, although the ABA has sought to participate in the process [Memorandum from William H. Taft, IV to the Honorable Fred F. Fielding (November 8, 1983)]. Within the Department of Defense, no formal process exists by which the department itself evaluates potential nominees against each other. Instead, it appears that the DOD's General Counsel and the White House Counsel share with each other any recommendations either may receive from elsewhere, whenever received. Thereafter, when a COMA vacancy appears or is expected, DOD General Counsel voices his or her views to the White House Counsel [Memorandum from Fred F. Fielding to William H. Taft, IV (December 1, 1983); Memorandum for the Honorable Fred F. Fielding from William H. Taft, IV (December 5, 1983)]. The above-cited correspondence suggests that, although there is no formal, internal process by which the Department of Defense evaluates potential nominees, the Secretary of Defense does discuss them with his General Counsel and expresses, perhaps informally, DOD's preference from among the strongest candidates. Research did not disclose any standardized criteria against which potential

nominees are judged.

A few points should be noted about the field of candidates from which COMA nominees have ultimately emerged. The DOD General Counsel's office files for 1983 through 1985 contain correspondence regarding 20 separate, potential nominees to the U.S. Court of Military Appeals. Of those twenty, five placed their own names into consideration for nomination by writing to the President (whose counsel transmitted the correspondence to the DOD General Counsel), to the Secretary of Defense, or to a Senator or Representative. Ten appeared to have been placed into contention by a Congressman (current or retired), who wrote to the President or the Secretary of Defense. The remaining five were placed into contention by various other Federal or state office holders.

Concerning the substantive credentials reflected in the 20 files examined, seven of the 20 candidates held positions as judges when sponsored. Among them were a metropolitan trial judge, a Federal magistrate, a Federal appeals judge, and state trial court judges. Several were attorneys within the Department of Defense or other Federal agency and two were serving at the Secretarial level in a military department. One had substantial service as counsel to a Congressional committee, two were in private practice (construction law and general practice), and one had 25 years of experience in private banking, including as Chief Executive Officer.

With regard to military experience, a large majority of the potential candidates had some service in the military: active, reserve, or both. However, the information in the files permitted few other generalizations regarding military experience. For example, one candidate possessed substantial appellate judicial experience, received strong congressional and White House support, and served for six years in the Air National Guard many years ago. However, little information is contained in his file showing to what degree, if any, he maintained any professional contact with or interest in military matters of any kind. This lack is not noted to suggest military expertise should be a requisite for service on COMA. Instead, it's noted only to point out that the information in each file concerning military service was so scanty that it is hardly useful. In addition, the documentation regarding other selection criteria available on most of the candidates in the DOD General Counsel's files was incomplete and was not standardized. Hence, a candidate's documentation may indicate five years active duty, but not which service, what time period, or in what capacity. Many of the files examined contained little detail on many other factors one would expect to find useful.

c. Summary

As described above, both the formal and informal processes which lead to the appointment of a COMA judge currently provide for an apparently subjective assessment of the nomination against the needs of the armed forces: any COMA nomination is referred to the Senate's Armed Services Committee and the White House permits DOD to "take the lead" in recommending nominees. If COMA is established as an Art. III court, COMA nominations would be referred to the Senate's Judiciary Committee. In addition, the White House's normal internal procedures for Art. III judges rely heavily on the Department of Justice, rather than the Department of Defense. Of course, both the White House and the U.S. Senate might alter their informal procedures and formal rules to allow DOD significant input to the nomination of judges to an Art. III COMA. However, Art. III status poses the risk that appointments to COMA may be made with little or no required assessment of the impact an appointment to COMA would have on the needs of the armed services, unless DOD were allowed to maintain its role in the selection of judges to an Art. III COMA.

POSITION

Article III status for COMA would remove COMA nominations from consideration by the Senate Armed Services Committee and DOD's role in the informal process may be reduced or eliminated.



POSITION PAPER

SUBJECT: Impact on TJAG Authority

Courts of Military Review/Military Judges. Article 66(a), Uniform Code of Military Justice (UCMJ) provides that "[e]ach Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each panel shall be composed of not less than three appellate military judges." The only limitation on the Judge Advocate General's (TJAG) authority is that each appellate military judge "must be a member of a bar of a Federal court or the highest court of a State" (id.). TJAG may appoint commissioned officers or civilians, although, except in the Navy and Coast Guard, these courts have always been staffed exclusively by judge advocate officers (Schiesser & Bensen, A Proposal to Make Courts-Martial Courts: The Removal of Commanders From Military Justice, 7 Tex. Tech. L. Rev. 559, 596 (1976)). The Chief Judge of the court is appointed by TJAG, and the former determines the individual appellate judges' panel assignments and which appellate military judge will be the senior judge of each panel (Article 66(a), UCMJ). In order to enhance uniformity among the service practices, the TJAGs "shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocate General and by Courts of Military Review" (Article 67(f), UCMJ).

A military judge is "certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member" (Article 26(b), UCMJ). The only limitation upon TJAG authority is that a military judge must be a commissioned officer and "a member of a bar of a Federal court or the highest court of a State" (id.). TJAG, or his designee, details military judges to general courts-martial (Article 26(c), UCMJ). A commissioned officer, even though certified to be qualified for duty as a general court-martial military judge, "may perform such duties only when he is assigned and directly responsible to [TJAG], or his designee, . . . and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of [TJAG] or his designee" (id.).

TJAG must retain the authority to select and assign both trial and appellate military judges. The needs of the military for job rotation and personnel flexibility are desirable and in some instances essential to the overall mission. TJAG certifies and assigns as military judges only those commissioned officers who are best qualified by reason of training, experience, maturity and judicial temperament. TJAG is in the best position to determine the nature and scope of additional judicial or nonjudicial duties which can be assigned to a military judge and

which will not compromise or conflict with the judicial independence of the military judge.

In the Federal court system, the circuit court Chief Judge exercises control over intracircuit switching of district court judges and over the intercircuit assignment of both circuit and district court judges. District court judges exercise control over the assignment of bankruptcy court judges (Article I judges). COMA exercises no control over the selection or assignment of either trial or appellate military judges. In a speech before the Military Justice Seminar, Washington State Bar Association, on October 28, 1978, former Chief Judge Albert B. Fletcher, Jr. stated:

I also believe the time is ripe to transform the 4 Courts of Military Review into a single Article I court which could be administratively supported by and co-located with our court. There should be a single trial judiciary for all services. Both of these Article [I] Courts, The Court of Review and the Trial Court to be administered by other than the Executive branch of the government.

(I Military Justice Act of 1983 Advisory Commission Report 71). Article III status to COMA would not automatically remove TJAG authority over trial and appellate military judges. An Article III COMA would be much more likely to attempt such incursions than an Article I COMA.

Attorney Certification/Discipline. Authority for Article III courts to administer ethics can be derived from two sources. First, 28 U.S.C. § 2071 provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business." Traditionally, rules governing the admission, disciplining, and disbarment of attorneys are promulgated pursuant to this grant of authority. Second, it is generally held that courts have the inherent power to suspend or disbar an attorney found guilty of conduct unbecoming the standard of propriety that should be maintained by members of the legal profession. Ex parte Wall, 107, U.S. 265 (1883); 7 AM.JUR.2D Attorneys at Law §§ 15-16 (1963). It is also generally held that the highest court of a jurisdiction has the inherent power to regulate the practice of law in the jurisdiction. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Cf. Ex parte Bradley, 75 U.S.(7 Wall.) 364, 19 L.Ed. 214 (1869). Where, as in the federal and state court systems, the statutory grant merely affirms the highest court's authority in this area, a conflict with the court's inherent power does not arise.

As the highest court in the military judicial system, the Court of Military Appeals (COMA) has promulgated rules for the admission of attorneys to the COMA bar and the disciplining of these attorneys. COMA Rules 11 and 12, respectively. On the

other hand, Rule for Courts-Martial [R.C.M.] 109, Manual for Courts-Martial [MCM] (1984), provides that "[e]ach Judge Advocate General may prescribe rules not inconsistent with this Manual to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual" (emphasis added). Pursuant to this authority, The Judge Advocate General of the Army has recently approved the Army Rules for Professional Conduct for Lawyers (Department of the Army Pamphlet 27-26), which sets forth rules for Army judge advocates, members of the Judge Advocate Legal Service, and other lawyers practicing before tribunals conducted pursuant to the UCMJ and MCM, 1984.

Thus, in the military justice system attorney discipline is controlled by the Judge Advocates General, not the courts. If granted Article III status, a real possibility exists that COMA would extend its supervisory power over attorney discipline and ethics and come in conflict with the Judge Advocates General.

Certification of Issues

One of the duties of COMA is to answer questions certified to it by The Judge Advocates General (TJAGs) of the various services. An issue arises as to whether changing the status of COMA from an Article I court to an Article III court would prohibit this practice.

Article 67(b)(2) of the Uniform Code of Military Justice (UCMJ) permits TJAGs to certify questions to COMA after review by their respective Courts of Military Review (CMR). Such certification of issues usually seeks to accomplish one of three objectives: maintain uniformity among the services; resolve discrepancies among CMR panels; or "appeal" a CMR decision that was improperly decided.

The question of the impact that a change of status would have on the certification of issues to COMA by the TJAGs goes to the very nature of COMA decisions themselves.

COMA is required to review all CMR affirmed cases that contain a sentence to death (Art. 67(b)(1), UCMJ) and all CMR reviewed cases that TJAGs order sent to the Court (Art 67(b)(2), UCMJ). COMA also reviews all CMR reviewed cases where the accused has petitioned COMA and has shown good cause for further review (Art. 67(b)(3), UCMJ).

COMA may act only on the findings and sentence approved by the convening authority and affirmed or set aside as incorrect in law by the CMR (Art. 67(d), UCMJ). In reviewing cases sent to the court by TJAG, COMA must restrict itself to addressing only the issues certified or raised (id.). In cases reviewed upon petition of an accused, COMA need only take action with respect to issues specified in the grant of review (id.). Regardless of

the procedural route by which cases reach COMA, all cases reviewed by COMA are seeking final resolution. The orders of COMA are binding on the parties "unless there is to be further action by the President or the Secretary concerned." (Art. 67(f), UCMJ). An issue arises, however, as to whether this latter executive approval renders any COMA decisions "advisory".

Article III of the U. S. Constitution places the Federal judiciary power in one Supreme Court and such inferior courts as deemed necessary. The judicial power of the Federal courts is set forth in Article III, § 2 of the U.S. Constitution and is limited to cases and controversies. The lack of Federal court authority to render advisory opinions dates back near the time of the ratification of the Constitution. On July 18, 1793, President Washington sent his Secretary of State, Thomas Jefferson, to present to the Chief Justice of the Supreme Court, John Jay, a perplexing legal question concerning the effect on United States neutrality if it engaged in trade with one or both of two warring nations: France and England. On August 8, 1793, the Chief Justice told the President that he should get any needed opinions and advice from his department heads and not the Supreme Court. The judicial branch was set up as an equal and independent branch of the government and to give advisory opinions would be an abdication of that role. The courts provide judicial decisions that give a final interpretive determination to cases and controversies. Advisory opinions are subject to revision and manipulation by the requester and thus, the court decisions lose their sense of finality and the courts would become a subservient instrument of the other branches. Since the Chief Justice's refusal to answer President Washington's question, it has been accepted practice that Federal courts established under Article III of the Constitution cannot and will not give advisory opinions. Therefore, if COMA were to be restructured under the authority and control of Article III, it would be precluded from supplying advisory opinions. The question is: are the opinions that COMA now renders advisory or final?

In a statement presented to The Military Justice Act of 1983 Study Commission, then Colonel D.M. Brahms, USMC, noted:

At least one perceptive commentator has questioned whether CMA issues advisory opinions in light of specific provisions for executive review in certain cases. Willis, The Constitution, the United States Court of Military Appeals, and the Future, 57 M.L.R. 27, 90 n.304 (1972). Specifically, Article 71 of the UCMJ provides as follows:

- (a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees

fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. (emphasis added)

These provisions are not the typical statute which provides for clemency as a matter of executive discretion. Rather, the UCMJ envisions the executive branch as an integral and final spoke in the wheel of justice in certain cases.

Under these circumstances, it can be argued that COMA issues advisory opinions.

II Military Justice Act of 1983 Advisory Commission Report, 1189. However, Professor Stephen Saltzburg stated in a Memorandum, dated August 5, 1984, to that same commission:

Were the President's role viewed as overriding the court's decision, then the court's decision could be termed 'advisory' and outside the proper jurisdiction of an Article III court. Personally, I would expect that the Supreme Court would regard the President's commutation power as consistent with judicial authority and would expect to see COMA jurisdiction upheld in capital cases.

In civilian practice generally, when an accused is sentenced to death, the execution is carried out unless there is legal error, an executive (governor) commutes the sentence, or clemency is granted. In the military, even after COMA has rendered a decision, the execution cannot take place until the President approves the sentence by taking positive action. Although the difference between civilian and military practice may be semantical (i.e., clemency verses approval), the result is similar. However, the requirement that the President must take a last "action" to complete the "case" is what gives certain decisions of COMA an advisory flavor.

Upon further analysis, however, it becomes obvious that COMA decisions, even those affirming a death sentence, do contain the degree of finality required to defeat the "advisory opinion" challenge. In their decisions, COMA tells parties in interest how much, if any, of the findings and sentence can be approved and/or ordered executed. It places an upper limit on these actions and the system gives the government, as the approving authority, the ability to approve less than the stated limit. Whereas this may, upon cursory examination, appear similar to the Presidential clemency power, it must be recognized that clemency

is a forgiveness of crimes and mitigation of punishment, while disapproval of findings relieves the accused of any onus of guilt. A conviction followed by clemency remains a conviction. A disapproved finding eradicates that finding.

COMA has indicated its dislike of advisory opinions. In United States v. Fisher, 7 U.S.C.M.A. 270, 22 C.M.R. 60 (1956), the Law Officer had excluded certain government evidence of the accused's intent to remain away permanently offered to establish a desertion charge. The accused was nevertheless convicted of desertion. The Board of Military Review reduced the finding to unauthorized absence for reasons unrelated to the excluded evidence. TJAG certified the issue of the correctness of the law officer's ruling excluding the evidence. COMA refused to answer the certified question, noting that any possible error by the law officer was rendered harmless by the finding of guilt on the charge for which the evidence was offered. The court further stated:

We believe it would be an undesirable course for us to render advisory opinions on evidentiary rulings which are rendered during the course of the trial but which became immaterial by verdict. For present purposes, the law officer's ruling on the question certified is the law of the case, and by discussing its propriety we would furnish nothing but an academic discussion of the rules of evidence. Regardless of our views, it would make no difference in the outcome of this case....

(22 C.M.R. at 64). See also, United States v. Kelly, 14 M.J. 196 (C.M.A. 1982) (court declined to answer certified questions when answers would be only advisory); United States v. Clay, 10 M.J. 269 (C.M.A. 1981) (court declined to answer certified questions which would not result in any "material alteration" in the case); United States v. McIvor, 21 C.M.A. 156, 44 C.M.R. 210 (1972) (questions were moot or academic and the Court declined to answer them); and, United States v. Aletky, 16 C.M.A. 536, 37 C.M.R. 156 (1976) (court declined to answer a merely academic certified question). One possible interpretation of these cases is that the court, while avoiding advisory opinions, does not consider TJAG certified issues to be such. Since its inception, COMA has handled approximately 794 requests in the form of TJAG certifications filed under Article 67(b)(2) of the UCMJ. In the last 10 years, (1976-1986), it has averaged 15.5 such certifications a year.

If COMA was to become an Article III court, it would be precluded from giving advisory opinions. COMA avoids doing so now. COMA does not believe that TJAG certified questions are advisory in nature, but rather likens the process to the Federal Courts of Appeals power to certify questions to the U. S. Supreme Court. United States v. Monett, 36 C.M.R. 335, 336 at n.1 (1966). COMA decisions are binding because they resolve the

issues and inform the party litigants of the upper limits of what they will be permitted to do or approve. While the decisions of the court cannot be disregarded, the ultimate decision that will complete a legal action in the military justice system rests with those charged with the overall responsibility for good order and discipline in the armed forces. Whether in times of peace or war, the military must have the ability to have certified questions answered expeditiously.

POSITION

TJAG's authority over the Courts of Review, military judges and attorney certification/discipline, and authority to certify questions could be adversely affected if COMA is reconstituted as an Article III court.



POSITION PAPER

SUBJECT: Prestige of Judgeships on Appellate Courts

The Judges and Their Court

An appellate court is only as good as the judges who sit on it. However, judges with excellent legal acumen and decision-making skill will not necessarily make a good court if they are hampered by poor administrative practices. When great courts are identified, it is usually by reference to their Chief Judges - Cardozo's New York Court of Appeals, the Second Circuit under Learned Hand, and the Traynor Court in California. Yet these chiefs were greater judges than administrators and their courts were deemed great largely because of the quality of their opinions.

Today the test of the greatness of a court has changed. It has two aspects: efficiency and quality of opinions. Efficiency in appellate courts is taking on greater importance. If a court cannot decide all its cases promptly, in accordance with law and justice, then a court will not garner prestige. An ideal appellate court would concern itself with efficient administration both within itself and in the lower courts and professional areas over which it has supervisory authority. Opinions of the court must be honest; the true reasons, in contrast to technical or clever formalistic ones, must be given for its decisions. The quality of its opinions and the competence with which it handles all its business will determine its greatness. R. Leflar, *Internal Operating Procedures of Appellate Courts* (1976).

ARTICLE III STATUS

It has been suggested that changing the constitutional status of the United States Court of Military Appeals (COMA) from an Article I to an Article III court would increase its prestige. Article III status provides a judge with life tenure on the bench and protects his or her salary from diminution. Article III status, however, carries few additional, inherent characteristics which bear on the prestige of a court. As one witness pointed out to Congress:

. . . Article III itself permits much flexibility; so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be possible to

provide that when a judge of that court retired pursuant to statute, a vacancy for a new appointment would not automatically be created. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals.

[Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 2d Sess., 2697 (1976) (letter of Paul Mishkin)]. Cited in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, n.28 at 75 (1982)(Brennan J. opinion).

Proponents of Article III status for COMA indicate that the change will enhance COMA's prestige by attracting more highly qualified nominees to the court and by providing greater incentive for sitting COMA judges to remain on the court, rather than seeking more prestigious jobs elsewhere. As recently reported in Brogan, Crusading to Upgrade the Military Appeals Court, Legal Times, Sept. 28, 1987 at 2, col. 1., Judge Matthew Perry, Jr., of the U.S. District Court of South Carolina stated, "Yes, I think it is necessary to give the court Article III status to attract better qualified people. An Article III judgeship with life tenure is more desirable, and that certainly factored into my decision when I decided to leave the [COMA] court." While the argument for changing COMA's status appears on its face to have merit, a closer examination reveals it lacks substance.

An examination of the quality of COMA judges in relation to judges on the Federal circuit courts of appeals fails to reveal any remarkable differences. The table at the Appendix obtained from Goldman, Reagan's Second Term Judicial Appointment: The Battle at Midway, 70 Judicature 324, 331 (1987), which has been modified to include data on COMA judges, illustrates this point. With respect to occupation, experience and education, the qualifications of COMA judges are similar to those of courts of appeals judges. Unfortunately nominees to COMA are not rated by the American Bar Association. In conducting its ratings, the American Bar Association not only evaluates a nominee's professional experience to determine suitability for the bench, but also examines his or her judicial temperament and integrity by conducting interviews and reviewing the nominee's writings. Nevertheless, the table demonstrates that nominees who receive the American Bar Association's lowest satisfactory rating are frequently appointed to the bench. Evidently, political affiliation and party activism are important factors considered in nominating a candidate for the Federal Bench. In summary, the above comparison of the qualifications of COMA and courts of appeals judges does little to support an argument that COMA is composed of inferior judges and that quality lawyers will not serve on it.

COMA as an Article I Court

The argument that reconstituting COMA from an Article I to an Article III court will restrain sitting COMA judges from pursuing other job opportunities is unpersuasive. Of the 13 judges who have sat on COMA, only three voluntarily resigned. With the exception of Judge Fletcher who was removed for physical disability, the remaining judges completed their terms, retired or died while on the bench. Therefore, experience does not support a claim that Article III status is needed to retain COMA judges or achieve prestige for the court.

COMA, as an Article III court with jurisdiction not restricted to review of courts-martial, will become overwhelmed by the added volume of cases for review and lose its expertise in military justice. The Congressional intent behind the establishment of COMA as an Article I court would not be fulfilled. The suggestion that Federal Article III judges from other circuits could sit in for absent COMA judges would also result in a loss of the court's expertise in military justice matters. The timely and thorough judicial review of courts-martial would not be achieved.

Discussion

If COMA became an Article III court and retained its limited jurisdiction of review courts-martial, its prestige will not be greatly enhanced by merely changing its status. The goal of the military justice system is to maintain good order and discipline while ensuring justice to the accused. Whatever increased prestige COMA may gain if it was reconstituted as an Article III court has little bearing on the manner in which the military justice system (a) promotes good order and discipline or (b) protects the accused's rights. The court's prestige is of interest almost solely to the individual judges. As the U.S. Supreme Court has consistently stated:

The military is a "specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history" [citation omitted]. Moreover, "it is the primary business of armies and navies to fight wars should the occasion arise" [citation omitted]. Brown v. Glines, 444 U.S. 348, 354 (1980).

and

The need for special regulations in relationship to military discipline and the consequent need and justification for a special and exclusive system of justice, ... [is obvious]; no military organization can function without strict discipline and regulation that

would be unacceptable in a civilian setting [citation omitted]." In the civilian life of a democracy many command few; in the military necessity makes demands on its personnel, "without counterpart in civilian life [citation omitted]."...The laws and traditions governing that discipline have a long history; but they are found on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress. Chappell v. Wallace, 449 U.S. 966 at 1068 (1983).

In light of the unique nature of the military justice system, a change in COMA's status will not increase the precedential value of its decisions or the image of the court. As an Article III court, absent a substantial change in its jurisdiction, COMA will not confront the wide range of constitutional, statutory and common law issues of other Article III courts, such as abortion, busing, affirmative action, etc. As COMA's jurisdiction is narrowly limited to military criminal law cases, the court rarely must deal with the kinds of controversial, emotional issues that affect the lives of everyday Americans and whose judicial resolution necessarily enhances the power and prestige of the court.

COMA can, however, gain prestige through well reasoned and scholarly opinions on constitutional law issues [e.g., Solorio v. US, 107 S.Ct. 2924, (1987)] and analysis of the Military Rules of Evidence [e.g., Mustafa v. U.S., 107 S.Ct. 444, (1986)], which have applicability to Federal criminal law practice. Military cases reviewed by COMA and appealed to the U.S. Supreme Court are reported in the Supreme Court Reporter, the Criminal Law Reporter (BNA), the Federal Rules of Evidence News and other national publications. COMA's approved analysis and treatment of issues by the high Court are read by a broad audience.

Within the military, COMA's prestige is very high as the judges on COMA have precedence above generals and admirals (four star grade) and above under secretaries of the military departments (Precedence List, U.S. Department of State). This point is illustrated by Chief Judge Everett's statement, "They (the military) treat us like four-star generals when we visit [military installations]" (Brogan, supra, at 2). Due to a lack of knowledge about the court, its prestige in the civilian community may not be as high as in the military. As an example of the lack of knowledge about COMA, Chief Judge Everett is reported as stating:

even Solicitor General Charles Fried once gave the impression that he was unaware the court was independent of the military.

(Id.). Chief Judge Everett related that he approached the

Solicitor General after the latter had delivered a luncheon address before the Princeton Club last fall. Chief Judge Everett told Fried he was happy to meet the man who would argue Solorio v. United States, supra, one of the first cases granted a writ of certiorari on appeal from the U.S. Court of Military Appeals, and that the Chief Judge would like to hear the argument before the high Court. According to Everett, Fried responded "It would be nice to have the judges present, and perhaps you should wear your uniform" (Brogan, supra at 2). Fried, who was unable to recall what comments he made to Everett after the luncheon, stated, "I may have said that, I really can't say. I meet and shake hands with so many people" (id.).

"We have a strange status", stated Chief Judge Everett, "This kind of confusion relates to the whole perception of military justice and whether service members are getting a fair, impartial review of their cases" (id.). Although the Solicitor General may have been mistaken about Chief Judge Everett's civilian status, the wearing of a military uniform is not something to be ashamed of and that wearing one has nothing to do with impartiality, fairness, or judicial temperament.

The COMA's prestige will be raised by increasing the public's awareness of its composition and role than by changing its status. Efforts to increase public awareness may include:

a. Issuing timely and well reasoned opinions in those cases where COMA does hear issues potentially of substantial civilian interest, such as cases involving AIDS, urinalysis testing and the 4th Amendment, or Military Rules of Evidence issues, such as the handling of victim hearsay statements in child abuse cases. Such action may lead to COMA opinions being cited as authority by civilian courts and thereby greater national recognition.

b. Changing the Court's title to remove any misconception that the judges are in the military, e.g., U.S. Court of Appeals for the Military Circuit. This title is similar to U.S. Court of Appeals for the Federal Circuit.

c. Greater efficiency and better case management of cases by COMA can be achieved by setting time standards for disposition of cases See the American Bar Association's Standards Relating to Appellate Courts, (1977) or adopting a "term of court" practice where cases must be disposed of within the term they are filed.

Merely changing COMA's status to an Article III court will not enhance its image. Efforts to increase the court's prestige should be directed more to increasing the public's knowledge about the court by scholarly and well reasoned opinions and developing a reputation as an efficient court system rather than by changing its status.

POSITION

A mere change in status to an Article III court will not significantly enhance COMA's prestige.

TABLE

A comparison of the qualifications/factors of COMA's judges with those of U.S. Courts of Appeals judges who are listed according to the President who appointed them to the bench.

	COMA % Number	Reagan % Number	Carter % Number	Ford % Number	Nixon % Number	Johnson % Number
<u>Occupation prior to assuming the bench</u>						
Politics/gov't	46.2% 6	4.8% 3	5.4% 3	8.3% 1	4.4% 2	10.0% 4
Judiciary	30.8% 4	50.8% 32	46.4% 26	75.0% 9	53.3% 24	57.5% 23
Law firm by size						
100+ members		3.2% 2	1.8% 1			
50-99		3.2% 2	5.4% 3	8.3% 1	2.2% 1	2.5% 1
25-49		7.9% 5	3.6% 2		2.2% 1	2.5% 1
10-24		4.8% 3	14.3% 8		11.1% 5	7.5% 3
5-9		6.4% 4	1.8% 1	8.3% 1	11.1% 5	10.0% 4
2-4		1.6% 1	3.6% 2		6.7% 3	2.5% 1
Solo practice			1.8% 1			5.0% 2
Professor of law	15.4% 2	15.9% 10	14.3% 8		2.2% 1	2.5% 1
Other		1.6% 1	1.8% 1		6.7% 3	
Unknown	7.7% 1					

	COMA % Number	Reagan % Number	Carter % Number	Ford % Number	Nixon % Number	Johnson % Number
<u>Experience</u>						
Judicial	46.2% 6	57.1% 36	53.6% 30	75.0% 9	57.8% 26	65.0% 26
Prosecutorial	15.4% 2	22.2% 14	32.1% 18	25.0% 3	46.7% 21	47.5% 19
Neither one	38.5% 5	39.7% 25	37.5% 21	25.0% 3	17.8% 8	20.0% 8
<u>Law school education</u>						
Public supported	46.2% 6	34.9% 22	39.9% 22	50.0% 6	37.8% 17	40.0% 16
Private (not ivy)	38.5% 5	42.9% 27	19.6% 11	25.0% 3	26.7% 12	32.5% 13
Ivy league	15.4% 2	22.2% 14	41.1% 23	25.0% 3	35.6% 16	27.5% 11
<u>Gender</u>						
Male	100.0% 13	93.6% 59	80.4% 45	100.0% 12	100.0% 45	97.5% 39
Female		6.4% 4	19.6% 11			2.5% 1
<u>Race</u>						
White	84.6% 11	96.8% 61	78.6% 44	100.0% 12	97.8% 44	95.0% 38
Black	15.4% 2	1.6% 1	16.1% 9			5.0% 2
Hispanic		1.6% 1	3.6% 2			
Asian			1.8% 1		2.2% 1	

	COMA % Number	Reagan % Number	Carter % Number	Ford % Number	Nixon % Number	Johnson % Number
<u>ABA rating</u>						
Exceptionally well qualified		15.9% 10	16.1% 9	16.7% 2	15.6% 7	27.5% 11
Well qualified		39.7% 25	58.9% 33	41.7% 5	57.8% 26	47.5% 19
Qualified		44.4% 28	25.0% 14	33.3% 4	26.7% 12	20.0% 8
Not qualified				8.3% 1		2.5% 1
Not rated	100.0% 13					2.5% 1
<u>Party</u>						
Democratic	*		82.1% 46	8.3% 1	6.7% 3	95.0% 38
Republican	*	98.4% 62	7.1% 4	91.7% 11	93.3% 42	5.0% 2
Independent	*		10.7% 6			
Other	*	1.6% 1				
<u>Past party activism</u>	69.3% 9	68.2% 43	73.2% 41	58.3% 7	80.0% 27	57.5% 23
<u>Total No. of Appointees</u>	13	63	56	12	45	40
<u>Average age of Appointees</u>	53.9	49.7	51.9	52.1	53.1	52.2

* unknown

Note: Mr. Goldman cautions that the percentages reported in the table must be treated carefully because of the relatively small number of judges in each column.



REMOVAL

I. Synopsis.

Article 67, Uniform Code of Military Justice (UCMJ), provides for removal of COMA's judges by the President following notice and hearing, but only for conduct directly related to performance of judicial duties. Article III judges may be removed only by impeachment, including for criminal conduct not directly related to their performance of judicial duties. Although Art. III status would broaden the grounds for removal of a COMA judge, the impeachment process is far more cumbersome than the removal process. Moreover, the duration of the impeachment process alone could cripple the functioning of COMA and severely threaten the administration of military justice. COMA should, therefore, remain an Article I court. However, Art. 67 of the UCMJ should be amended to permit removal of a COMA judge for conviction of a felony and for conduct involving moral turpitude, in addition to the existing grounds for removal.

II. Discussion.

A. Removal of COMA Judges Under Art. 67, UCMJ

1. In General.

Article 67(a)(2), UCMJ, provides the following bases for the removal of COMA judges:

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

[10 U.S.C. Section 867(a)(2), (1982)].

2. Procedure

The procedural requirements are straightforward. Prior to removal, a COMA judge must be given both notice and a hearing. Since the statute confers tenure on a COMA judge for a fixed term of years, notice and an opportunity to be heard are necessary to satisfy minimum due process requirements [Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-545 (1985)]. Moreover, the President's power of removal is constrained by the grounds listed in Art. 67(a)(2) [Humphrey's Executor v. U.S., 295 U.S. 602, (1935)].

3. Substance

There are only four substantive bases for removal authorized by Article 67(a)(2), UCMJ: malfeasance in office, neglect of

duty, mental disability, and physical disability. These terms or similar ones have been used in a number of statutes defining the tenure of public officers and officials and, as a general rule, have been narrowly construed by the courts. (Mental and physical disability will not be addressed here because their determinations are comparatively objective.) Federal case law does not construe either "malfeasance in office" or "neglect of duty."

The term "malfeasance in office" encompasses conduct which occurs in the course of an officer's official duties [Wilson v. Council of City of Highland Park, 284 Mich. 96, 278 N.W. 778 (1938)]. In Wilson, the Michigan Supreme Court defined "malfeasance in office" and held that membership in a secret, racially discriminatory organization which advocated illegal action did not suffice for removal from office:

It is well-settled the misconduct, misfeasance, or malfeasance, under our law to warrant plaintiff's removal from office, must have direct relation to and be connected with the performance of official duties and amount to either maladministration or to willful and intentional neglect and failure to discharge the duties of the office at all. It does not include acts and conduct which, though amounting to a violation of the criminal laws of the state, have no connection with the discharge of official duties. The misconduct which will warrant the removal of an officer must be such as affects his performance of his duties as an officer and not such only as affects his character as a private individual. In such cases, it is necessary to separate the character of the man from the character of the office. The misconduct charged and established must be something plaintiff did, or did not do, in his official capacity.

(Id. at 98, 278 N.W. at 780).

Other courts, which have considered the issue, have also limited application of the term "malfeasance in office" to official, as opposed to private, activities [e.g., State v. Wallace, 214 A.2d 886 (Del. 1963); Jacobsen v. Nagel, 255 Minn. 200, 96 N.W.2d 569 (1959); Fannin v. Commonwealth, 331 S.W.2d 726 Ky. Ct. App. 1960) (Justice of Peace retaining judgment monies paid to the court for prevailing litigant is malfeasance in office)].

The term "malfeasance in office" has been narrowly construed to apply to only more serious offenses. In State v. Coleman, 115 Fla. 119, 155 So. 129 (1934), the Florida Supreme Court characterized the term as having "reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful, which he has no right to perform or which he has not contracted to do" (Id. at 132). Minor

neglects of duties, administrative oversights, or minor violations of the law do not constitute malfeasance [See Deats v. Carpenter, 403 N.Y.S. 2d 128 (1961)]. In a similar vein, disagreements over the official's position or an official's erroneous interpretations of law are insufficient [Jacobsen v. Nagel, 225 Minn. 200, 96 N.W. 2d 569 (1959); Kemp v. Boyd, 275 S.E.2d 297, 305-06 (W.Va. 1981)]. Malfeasance in office has, thus, been held to "pertain to illegal acts of a public officer in the exercise of the duties of his office" [State v. Wallace, 214 A.2d 886, 890 (Del. 1963)].

The term "neglect of duty" is less clearly defined. However, courts have interpreted this term as requiring more than mere oversight. State v. Wilson, 108 Kan. 641, 196 P. 758 (1921). Conduct on the level of repeated or habitual neglect of a clear duty of the office will suffice [See State v. Henderson, 145 Iowa 657, 124 N.W. 767 (1910)(Mayor's sustained, daily intoxication); In re Augenstein, 374 N.E.2d 160 (Ohio 1977)]. For example, the Florida Supreme Court has advanced this definition:

Neglect of duty has reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law. It is not material whether the neglect be willful, through malice, ignorance, or oversight. When such neglect is grave and the frequency of it is such as to endanger or threaten the public welfare it is gross.

[State v. Coleman, supra at 132 (Sheriff's refusal to receive a citizen's report of a beating death constitutes "neglect of duty")].

From the above cases, it appears that COMA judges can be removed from office only for conduct directly related to performance of their official duties (malfeasance/neglect of duty) or for physical or mental disability. As shall be seen, Article III judges do not enjoy such protection. In other words, an Article III judge can be removed from office for conduct having no direct connection to the performance of official duties.

B. Impeachment of Article III Judges.

1. In General.

Judges appointed under Article III, U.S. Constitution, "shall hold their offices during good Behavior" (U.S. CONST art. III, § 1). While the use of the term "good behavior" suggests that a breach of that standard of conduct might provide grounds for impeachment, the prevailing view is that the term merely defines tenure [See, Conduct of Harry E. Claiborne, U.S.

District Judge, District of Nevada: Hearings on H.R. 461 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 38 (1986)(Testimony of Judge Charles E. Wiggins)] (See also "Substance" below. The Constitution deals with the scope of impeachment in Article II, Section 4:

The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

2. Procedure

U.S. CONST art. I, § 2 states "[t]he House of Representatives . . . shall have the sole Power of Impeachment." Similarly, U.S. CONST art. I, § 3 describes the Senate's role:

The Senate shall have the sole Power to try all Impeachments.

When sitting for that Purpose, they shall be on Oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The impeachment process is generally conceded to be immensely cumbersome, diverts the attention of Congress for long periods of time and often generates intense controversy in some cases [See The Removal of Federal Judges Other Than by Impeachment, Federal Legislation Report, New York City Bar Ass'n, 1 (April 1977)]. The impeachment of one Federal judge consumed three years, five months before House action was completed and nine months for trial in the Senate [Dechsler's Precedents of the U.S. House of Representatives, Vol. 3, Ch. 14, Sec. 3.13 at 459 (1977)]. In the recent case of U.S. District Court Judge Harry E. Claiborne, articles of impeachment were submitted on August 12, 1986, and the Senate vote, judgment, and removal of Judge Claiborne from office took place on October 9, 1986. Although the formal proceedings thus took only four months, it's worth noting that the criminal conviction of Judge Claiborne, which led to his removal by impeachment, occurred in August of 1984. From 1984, Judge Claiborne pursued appeals of his conviction until April 1986. Therefore, it can fairly be said that it took two years to remove Judge Claiborne by impeachment, from criminal conviction to his removal [Proceedings Of The U.S. Senate In The Impeachment Trial of Harry E. Claiborne, S. Doc. 99-48, 99th Cong., 2d Sess. (1986)]. More to the point, Judge Claiborne remained a U.S. District Court judge for the entire period until removed, having refused to resign.

3. Substance

As noted earlier, Art. III judges hold office during "good behavior", but may be removed by impeachment for "treason, bribery, or other high crimes and misdemeanors" (U.S. Const. art. III, § 1 and art. II, § 4. The issue, of course, is what conduct, apart from treason and bribery, violates the mandate of "good behavior" and qualifies as a "high crime" or "misdemeanor" sufficient to warrant removal by impeachment.

In 1970, a special subcommittee of the House of Representatives submitted its report regarding the impeachment of Associate Justice Douglas. The report addressed the conduct of an Article III judge which will subject him or her to removal by impeachment.

Reconciliation of the differences between the concept that a judge has a right to his office during "good behavior" and the concept that the legislature has a duty to remove him if his conduct constitutes a "misdemeanor" is facilitated by distinguishing conduct that occurs in connection with the exercise of his judicial office from conduct that is nonjudicially connected.

. . . . Both concepts ["good conduct" tenure and impeachment for a "misdemeanor"] would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involve criminal conduct in violation of law, or (2) that involve serious dereliction from public duty, but not necessarily in violation of positive statutory [or] common law. Sloth, drunkenness on the bench and unreasonable [partiality] for a prolonged period are examples of misconduct, not necessarily criminal in nature that would support impeachment.

. . . . Both concepts would allow a judge to be impeached for conduct not connected with the duties or responsibilities of the judicial office which involves criminal acts in violation of law. (Emphasis added.)

[Final Report By The Special Subcomm. On H. Res. 920 (Impeachment Of Associate Justice Douglas) Of The House Comm. On The Judiciary, 91st Cong., 2d Sess. (1970) reprinted in part in Dechsler, supra, at 463.]

That impeachment may result from conduct of an Art. III judge not directly related to his or her official duties is demonstrated by the impeachment of Harry E. Claiborne, formerly a judge of the U.S. District Court of Nevada. Judge Claiborne's removal from office in 1986 resulted from his Federal conviction in 1984 for willfully filing false tax returns in 1979 and 1980 [Proceedings of The U.S. Senate In The Impeachment Trial of Harry E. Claiborne, S. Doc. 99-48, 99th Cong., 2d Sess. (1986)]. In

addition, impeachment articles have been brought against a Federal judge for "intoxication off the bench as well as on" [Constitutional Grounds For Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, House Committee on the Judiciary, Committee Print, 93d Cong., at 19 (1974)]. The conclusion seems inescapable that Congress' impeachment power reaches the conduct of an Art. III judge even when the conduct bears no direct relation to the judge's official duties, at least when the judge's conduct is criminal.

C. Summary.

Considered alone, the conduct which will permit removal of a COMA judge under Art. 67, UCMJ, (as an Art. I court) is narrower than that which will support impeachment of a Federal judge sitting pursuant to Art. III of the Constitution. This is so because the state case law interpreting "malfeasance in office" or "neglect of duty", suggests the terms apply only to official conduct. To the contrary, Congress' impeachment power over Art. III judges clearly reaches the judge's private conduct, at least if it is criminal conduct.

The described advantage enjoyed currently by COMA judges may be illusory, however. The cumbersome and undeniably political nature of the impeachment process surely affords a great deal of insulation to an Art. III judge in comparison to the mere "notice and hearing" requirements in Art. 67, UCMJ. "[J]udges and others appear to have concluded that as a matter of reality impeachments pose minimal threat of removal" [Wheeler, R. and Levin, A., "Judicial Discipline and Removal in the United States", for Symposium: Popular Participation and Justice (Fed. Jud. Ctr. 1979)]. Since no COMA judge has been removed from office for malfeasance or neglect of duty, that statistic is meaningless. The relevant question is whether Art. 67, UCMJ, in toto, currently affords more protection to a COMA judge than would Article III of the Constitution. In comparison to the minimal due process requirements of Art. 67, UCMJ, the impeachment process which would apply to an Art. III COMA can be viewed only as a major obstacle to removal of its judges. Impeachment might delay removal for years, during which the COMA judge could not be replaced, and would cripple the effective functioning of the court. When one considers that COMA is a three-judge court, the impact of such a delay on the administration of military justice is surely obvious.

III. AN ALTERNATIVE.

Research has disclosed only one instance where the removal provisions of Art. 67, UCMJ, have caused any controversy whatever. In that case, the criminal conviction of a COMA judge for an offense committed in October 1984 ultimately led to his

removal by the President in September 1985, but for physical disability. In the interim, the judge did not participate in COMA decisions. While the judge's conduct was under consideration, the DoD General Counsel's office explicitly rejected any DoD role in the resolution of the issue, lest COMA's independence from DoD be called into question. Instead, it suggested that the Department of Justice should provide whatever legal support and advice were desired by the White House.

As noted, the COMA judge was ultimately removed for physical disability, rather than for malfeasance in office or neglect of duty. One conceivable reason for this outcome is that the judge's criminal conduct bore no direct relation to his official duties. Hence, a determination may have been made that the judge's conviction did not constitute "malfeasance in office" or "neglect of duty" within the meaning of Article 67, UCMJ, consistent with the case law to that effect cited above. If so, Article 67, UCMJ, should be amended in some fashion to provide that the criminal conviction of a COMA judge for a felony or other conduct of a COMA judge involving moral turpitude, even though they are unrelated to his position as judge, are bases for removal of that judge by the President following the notice and hearing afforded presently by Art. 67, UCMJ.

POSITION

COMA should remain subject to the Article 67, U.C.M.J., removal process, which should be amended to permit removal of a COMA judge for conviction of a felony and for conduct involving moral turpitude, in addition to the existing grounds for removal.



POSITION PAPER

SUBJECT: Retirement System

ARTICLE III COURT PRACTICE

Article III judges and justices hold office during good behavior for life (U.S. CONST. art. III. § 1). By statute, there exist three circumstances by which Article III judges or justices may end their active service on the bench and continue to receive a post-service salary: (1) retirement at age 65 with at least 15 years in office, with a lifetime annuity equal to the salary that was being received at the time of retirement [28 U.S.C. § 371(a) (1982)]; (2) retirement from service, but retention of the office, at age 65 with at least 15 years in office, with a lifetime, full salary for the office held [28 U.S.C. § 371(b) (1982)]; and, (3) retirement due to permanent disability with 10 years of service, with a lifetime full salary for the office held, or if less than ten years of service, with a lifetime salary of one-half the salary of the office held [28 U.S.C. § 372(a) (1982)]. Under (1) and (2), above, for each year the judge or justice serves in office after age 65 until age 70, the required years in office may be reduced by one year so that at age 70, only 10 years in office are required.

Article III judges or justices may also elect participation in a survivors' benefit program which would permit annuities for any surviving spouses and dependent children. The amount of the annuity for a surviving spouse shall not exceed 50 percent of the judge's average annual salary for the judge's three highest paid years in office, nor be less than 25 percent of such average annual salary [28 U.S.C. § 376(1) (1982)]. If a judge or justice elects to come within the statute, five percent of his or her salary will be deducted to help fund the survivor's annuity [28 U.S.C. § 376(b) (1982)].

ARTICLE I COURT PRACTICE

A. United States Tax Court

Judges of the United States Tax Court are appointed for 15 year terms [26 U.S.C. § 7443(e) (1982)]. They are paid the same salary as United States District Court judges [26 U.S.C. § 7443(c)(1) (1982)].

Judges of the Tax Court have their own statutory retirement system that is divorced from the Civil Service retirement system except for general purposes of administration. However, the Civil Service requirement for employees to contribute seven

percent of their basic pay toward retirement still applies to judges of the Tax Court [26 U.S.C. § 7447(g) (1982) and 5 U.S.C. § 8334(a)(1) (1982)]. The Tax Court's statutory retirement system provides four circumstances wherein the judge may leave office and receive a lifetime salary: (1) Mandatory retirement at age 70, regardless of the number of years of service as a judge [26 U.S.C. § 7447(b)(1) (1982)]; (2) Retirement at age 65 with at least 15 years of service, or retirement at any age over 65 until age 70, with the required number of years of service being reduced by one year (*e.g.*, the judge may retire at age 69 with having served only 11 years on the bench) [26 U.S.C. § 7447(b)(2) (1982)]; (3) Retirement, regardless of age, by failure of reappointment at the expiration of the term of office, provided the judge has served on the court for at least 15 years and had provided notice to the President of a willingness to accept reappointment to the Tax Court [26 U.S.C. § 7447(b)(3) (1982)]; and, (4) Retirement due to permanent disability [26 U.S.C. § 7447(b)(4) (1982)].

Unless retired for disability, a judge of the Tax Court receives retired pay at a rate which is based upon the following ratio: the retired pay is to the judge's full salary as is the number of years of service as a judge is to ten, except the retired pay may not exceed full pay. (Thus, a judge who serves a full 15 year term and retires at age 65 will receive his or her full salary for life.) If the judge retires because of permanent disability and had served for at least ten years, the judge will receive a full salary as retirement pay. For service of less than ten years, a permanently disabled Tax Court judge will receive half salary as retirement pay [26 U.S.C. § 7446(d) (1982)].

Judges of the Tax Court also have a statutory scheme for annuities to surviving spouses and dependent children [26 U.S.C. § 7448 (1982)]. The judge must affirmatively elect survivor coverage and 3.5 percent of the judge's salary will be withheld to help fund the annuity [26 U.S.C. §§ 7448(b) and (c) (1982)]. An annuity for a surviving spouse shall not exceed 50 percent of the to Court judge's average annual salary, nor be less than 25 percent of such average annual salary [26 U.S.C. § 7448(m) (1982)].

B. Judges in Territories and Possessions

Judges of the District Courts in Guam, the Northern Mariana Islands, and the Virgin Islands are appointed for a term of ten years, and receive the salary of United States District Court judges [48 U.S.C. §§ 1424b, 1694, and 1614(a) (1982)]. By statute, these judges may retire from office after attaining age 65 with at least 15 years of service. For each year over the age of 65 until age 70, the requisite years of service may be reduced by one year. The retired pay is a lifetime annuity equal to the salary received by the judge at the time of retirement plus

periodic cost of living adjustments under 5 U.S.C. § 8340(b)(1982), except the total annuity may not exceed 95 percent of the pay of a U.S. district judge in regular active service [28 U.S.C. §§ 373(a) and (g) (1982)]. Also, if these judges are removed for disability or are not reappointed by the President, they are entitled, upon attaining age 65 (or whenever they leave office if then older than 65), to a lifetime salary equal to their salary upon leaving office if their judicial service was for at least 15 years. However, if the judicial service was less than 15 years, but not less than ten years, the life time annuity will equate to the ratio of the judge's total years of judicial service to fifteen multiplied by the judge's salary upon leaving office [28 U.S.C. § 373(e) (1982)]. Because the statute is silent as to any retirement pay when such judges become disabled or fail to be reappointed and have less than ten years service, such judges apparently may claim whatever is their entitlement from the Civil Service system.

The annuity provisions for surviving spouses and dependent children of judges of the District Courts for Guam, the Northern Mariana Islands, and the Virgin Islands are identical to those for Article III judges and justices [28 U.S.C. § 376(a) (1982)].

C. United States Claims Court

Judges of the United States Claims Court are appointed for 15 year terms at a salary as determined by the Federal Salary Act of 1967 [28 U.S.C. § 172 (1982)]. This Article I court [28 U.S.C. § 171(a) (1982)] was created in 1982 when Congress established the United States Court of Appeals for the Federal Circuit (an Article III court that encompasses the former United States Court of Claims and United States Court of Customs and Patent Appeals). However, Congress failed to include any retirement provisions for the Claims Court. Consequently, the retirement benefits for judges on the Claims Court are determined under the retirement provisions for Civil Service employees. The retirement annuity for Civil Service employees is computed by totaling:

- (1) 1.5 percent of the individual's average pay for the first five years of service;
- (2) 1.75 percent of the individual's average pay for the next five years of service; and
- (3) Two percent of the individual's average pay for service exceeding 10 years.

[5 U.S.C. § 8339(a) (1982)]. Retirement annuities under the Civil Service system are entitled to yearly cost of living adjustments [5 U.S.C. § 8340(b) (1982)].

The Civil Service system further provides for annuities for surviving spouses and dependent children unless the employee and the spouse jointly waive the spouse's right to a survivor annuity [5 U.S.C. § 8341 and 8339 (j)(i) (1982)]. If not waived, the provision for a survivor annuity will reduce the employee's retirement annuity by 2 1/2 percent for the first \$3,600, plus 10 percent for any amount exceeding \$3,600 [5 U.S.C. § 8339 (j)(4) (1982)]. The survivor's annuity will ordinarily be limited to 55% of the employee's retirement annuity [5 U.S.C. § 8341 (1982)].

[Note: Recent legislation has been introduced to make the Claims Court similar to the Tax Court in operational and administrative aspects, as well as in the benefits and salaries of the judges. One provision includes treating the judges of the Claims Court as officers and employees of the judicial branch under the Civil Service retirement system. [S. 1608, 100th Cong., 1st Sess. (1987)]].

D. Bankruptcy courts

Congress has authorized the creation of bankruptcy courts as a unit of the United States district courts within each Federal judicial circuit [28 U.S.C. § 151 (1982)]. Bankruptcy judges "serve as judicial officers of the United States district court established under Article III of the Constitution" and are appointed for 14 year terms by the United States courts of appeals for the circuit in which the bankruptcy judge will sit [28 U.S.C. § 151(a)(1) (1982)]. Salaries of bankruptcy judges are determined under the Federal Salary Act of 1967 [28 U.S.C. § 153(a) (1982)]. Currently, bankruptcy judges come under the provisions of the Civil Service retirement system.

Legislation has recently been introduced in the Senate and House of Representatives to specifically provide for retirement and survivors' annuities for bankruptcy judges and magistrates [S. 1630 and H.R. 2586, 100th Cong., 1st Sess. (1987)]. The proposed legislation would allow any bankruptcy judge who retires after serving 14 years to receive a lifetime annuity, beginning at age 65, equal to the salary being received at the time the judge left office. If the judge served less than 14 years, but at least eight years in office, the judge would receive an annuity at age 65 equal to that proportion of the salary being received at the time the judge left office which the aggregate number of years of service bears to 14. The pending bills also permit disability retirement after five years in office with at least a 40 percent lifetime annuity. The bills further provide for cost-of-living adjustments. Annuity benefits for survivors would be the same as for survivors of Article III judges.

E. District of Columbia Courts

Congress has established two Article I courts for the District of Columbia: the District of Columbia Court of Appeals and the Superior Court of the District of Columbia [D.C. CODE ANN. § 11-101 (1981)]. Judges of these courts are appointed for terms of 15 years, with mandatory retirement required at age 74 [D.C. CODE ANN. § 11-1502 (Supp. 1985)]. Judges of the District of Columbia Court of Appeals receive a salary equal to 90% of the salary for judges of the United States Courts of Appeal, with the chief judge receiving an additional \$500 per year [D.C. CODE ANN. § 11-702 (1981)]. Judges of the Superior Court of the District of Columbia receive a salary to 90% of the salary for judges of the United States District Courts, with the chief judge receiving an additional \$500 per year [D.C. CODE ANN. § 11-904 (1981)].

Judges on these District of Columbia courts are eligible to retire upon completion of ten years of service or upon reaching age 74 (mandatory retirement age), and if the judge served 20 or more years, the judge may begin receiving retirement pay at age 50, or if the judge served less than 20 years, the retirement pay will begin at age 60, unless the judge elects to receive a reduced retirement salary beginning at age 55 or anytime before reaching age 60 [D.C. CODE ANN. § 11-1562 (1981)]. These judges may also retire after five years of service, if they become mentally or physically disabled [D.C. CODE ANN. § 11-1156(c) (1981)]. The retired salary of these judges bears the same ratio to the judge's salary immediately prior to retirement as the total aggregate years of the judge's service bears to 30 years, but in no event will the retired pay exceed 80 percent of the judge's basic salary prior to retirement. If the judge elects early receipt of retirement pay, the retirement salary is reduced by 1/12th of one percent for each month, or fraction of a month, the judge is under age 60 at the time the judge begins receiving retirement pay. If retired for disability, the judge will receive a salary not less than 50 percent, nor more than 80 percent of the judge's basic salary prior to retirement [D.C. CODE ANN. § 11-1564 (1981)]. Each judge contributes 3.5 percent of his or her basic pay to help fund the retirement system [D.C. CODE ANN. § 11-1563(a) (1981)].

A District of Columbia judge may also elect to provide annuity coverage for a surviving spouse and dependent children. If the judge elects participation, three percent of the judge's salary will be deducted to contribute toward the annuity fund. Computations based on the judge's years of service will determine the exact amount of any annuity, but in no event may the annuity exceed 44 percent of the judge's average annual salary [D.C. CODE ANN. §§ 11-1567-1169]. Any annuity or retired salary for these judges will be increased for cost of living adjustments, as determined by 5 U.S.C. § 8340 [D.C. CODE ANN. § 11-1571 (1981)].

F. United States Court of Military Appeals (COMA)

COMA PRACTICE

Judges of the United States Court of Military Appeals are appointed for 15 year terms and are paid the same salary as judges of the United States Courts of Appeals [10 U.S.C. § 867(a)(1)].

Before the enactment of Public Law 98-94, 97 Stat. 701 (1983), COMA judges were treated the same as other Civil Service employees regarding retirement benefits. The Legislative History of Public Law 98-94 reflects that Congress saw the Civil Service retirement system as a disincentive to service as a COMA judge. Therefore, pending further examination of the necessity for retirement reform for COMA judges, Congress felt it appropriate in 1983 to make changes in the Civil Service retirement system so that COMA judges would have a system at least as beneficial as that available to Members of Congress (S. Rep. No. 174, 98th Cong., 1st Sess. 253, reprinted in U.S. CODE CONG. & AD. NEWS 1143).

The present retirement system for COMA judges under the Civil Service retirement system, as modified by the 1983 legislation, provides that a COMA judge is entitled to receive a retirement annuity if the judge is separated from the Civil Service after reaching age 62 and completing five years of service, or after completing the term of service for which appointed [5 U.S.C. § 8336(1) (1982)]. If a COMA judge leaves office after completing five years, the judge becomes entitled to a annuity beginning at age 62 [5 U.S.C. § 8338(c) (1982)]. However, if the judge is separated from the Civil Service before age 60 or elects to receive the annuity before becoming age 60, the annuity will be a reduced one (defined below) [5 U.S.C. §§ 8336(1) and 8338(c) (1982)].

The 1983 legislation modified the standard Civil Service formula for retirement annuities for COMA judges by providing that they will receive an annuity calculated per normal Civil Service rules, except the annuity is computed by multiplying two and one-half percent of their average pay by the number of years served on COMA, as well as for any years as a member of Congress, as a congressional employee, or in the military service (up to five years). However, the retirement annuity may not exceed 80% of the judge's basic pay [5 U.S.C. §§ 8339(d)(6) and (f) (1982)]. A reduced annuity reduces the retirement annuity by one-twelfth of one percent for each full month not in excess of 60 months and one-sixth of one percent for each full month in excess of 60 months that the judge is under age 60 at the date of separation [5 U.S.C. § 8339(h) (1982)].

The present system further provides for a disability annuity. If a COMA judge completes five years of Civil Service and becomes disabled to perform judicial duties, the judge will be entitled to an annuity in an amount which is the smaller of: (1) 40 percent of the judge's average pay; or (2) the sum obtained under the normal 2 1/2 percent rule for years of service after increasing the judge's service by the number of years between the date of separation and the judge's 60th birthday [5 U.S.C. §§ 8337(a) and 8339(g) (1982)]. However, if the judge is eligible for a higher annuity based upon his or her actual years of service, the judge may receive the higher annuity.

Prior to the present system, COMA judges participated in the Civil Service retirement system by contributing seven percent of their salary into the system. However, when Congress modified COMA's retirement system, it increased each judge's contribution to eight percent (the same as for a Member of Congress) [5 U.S.C. § 8334(c) (1982)].

Annuities for surviving spouses and dependent children of COMA judges are based upon normal Civil Service employee's rules [5 U.S.C. § 8341 (1982)] (see discussion under Article I Court Practice, United States Claims Court, above).

DISCUSSION

Although COMA presently has a retirement system which gives the court special treatment in comparison to other Civil Service employees and provides an equally beneficial retirement system as that available to Congress, COMA's retirement system is not as lucrative as that for Article III courts or most other Article I courts. Most assuredly, the trial judges of the Tax Court and district courts in the territories and possessions of the United States have a more favorable retirement system than that which exists for COMA judges. Even the judges on the only other Article I appellate court, the District of Columbia Court of Appeals, who also serve 15 year terms and whose decisions are also reviewable upon writ of certiorari by the Supreme Court of the United States, have a more lucrative retirement plan, albeit their salary is ten percent less than COMA judges. Yet, in comparison to United States Claims Court judges and bankruptcy court judges under those courts' present retirement systems, COMA judges have a more favorable retirement system.

The upgrading of COMA's retirement system in 1983 was done largely to dissuade a qualified candidate from declining an appointment to COMA, or for a judge, once appointed, from prematurely leaving office to seek more lucrative job opportunities. Although the 1983 legislation enhanced COMA's retirement system, it continues to fall short of other judicial retirement plans. Because of the shortcomings in COMA's retirement system when compared to other Federal courts, the goal

of the 1983 legislation in enhancing the quality and stability of COMA judges through more attractive retirement benefits may not be realized.

Retirement for judges and justices of Article III courts was premised on their having life tenure. Their lifetime status led Congress to provide a lucrative retirement system that allows these judges and justices to retire from active service in a senior status or to retire fully from their office while continuing to receive a full salary. The retirement systems for Article I courts seem to have no solid rationale behind the differences found among them. However, when considering the terms of appointment, level of salary, the court's jurisdiction and its level of practice, COMA judges should be entitled to a retirement system that closely parallels that of the most favorable retirement system existing for an Article I court.

If COMA becomes an Article III court, any necessary upgrading of the retirement system would automatically be resolved since, by definition, the judges would come under the retirement plan for Article III judges and justices covered by 28 U.S.C. § 371 (1982). However, if COMA remains an Article I court, Congress could accomplish any desired changes to COMA's retirement system through legislation, as Congress has done in the past for COMA and other Article I courts.

POSITION

While COMA judges should be entitled to a retirement system that closely parallels that of the most favorable retirement system existing for an Article I court, any desired changes to COMA's retirement system can be accomplished without reconstituting COMA as an Article III court.

ARTICLE I COURTS' RETIREMENT SYSTEMS*

COURT	SALARY	TERM OF OFFICE	CONTRIBUTION	RETIREMENT ELIGIBILITY**	RETIRED PAY
Tax Court (pp.1-2 of position paper)	Same as US District Court Judge	15 yrs	7%	- Mandatory at age 70 - 65 w/ 15 yrs service - 15 yrs and no reappointment	- full salary - full salary
Territorial Judges (pp. 2-3)	Same as US District Court Judge	10 yrs	?	- 65 w/ 15 yrs service - 15 yrs service and no reappointment	- full salary - full salary at age 65
Claims Court (pp 3-4)	Federal Salary Act	15 yrs	7%	Civil Service Retirement	See pp 3-4 of Position Paper [NOTE: Legislation pending to increase retired pay of Claims Court.]
Bankruptcy courts (pp. 4-5)	Federal Salary Act	14 yrs	8%	Civil Service Retirement	See pp 3-4 of Position Paper for Claims Court
1987 Pending Legislation:	Federal Salary Act	14 yrs	?	- 14 years	- full salary at age 65
DC Court of Appeals (pp.5-6)	90% of US Court of Appeals' judge	15 yrs	3.5%	Mandatory at age 74;	- yrs service 30 salary, but not to exceed 80% of salary. [If served 20 or more years can receive pay at age 50; if served less than 20 yrs, pay begins age 60.]
DC Superior Court (pp.5-6)	90% of US District Court Judge	"	"	"	"

ARTICLE I COURTS' RETIREMENT SYSTEMS*

COURT	SALARY	TERM OF OFFICE	CONTRIBUTION	RETIREMENT ELIGIBILITY**	RETIREED PAY
COMA (pp. 6-7)					
(1) prior to 1983:	Same as US Court of Appeals Judge	15 yrs	7%	Civil Service Retirement	See pp. 3-4 of Position Paper
				<u>e.g.</u> ,	
				15 years	- 26.25% of full salary
				30 years	- 46.25% of full salary
(2) After 1983:	"	"	8%	<u>e.g.</u> ,	
				15 years	- 37.5% of full salary
				30 years	- 75.0% of full salary

* Does not include disability or survivors' benefits.

** Represents extract of some rules/situations.

POSITION PAPER

SUBJECT: Salaries of COMA Judges

Federal Court Practice

Under Article III, U.S. Constitution, the compensation of a judge may not be diminished during his continuation in office. The compensation clause has its roots in the long-standing Anglo-American tradition of an independent judiciary. It is an acknowledgment that control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces in the government. The legislative and executive branches will not be able to dominate the judiciary through coercive manipulation of judges' livelihood and continuance in office.

By freeing judges from political influence, Article III protects the judiciary, preventing the political branches from infringing individual rights or otherwise exceeding their powers. By securing the independence of the judiciary, the tenure and salary requirements help maintain the proper allocation of power among the branches of the national government.

The compensation clause also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice - more often than not more lucrative than the bench - the compensation of the new post will not diminish. Such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice.

The present annual salaries of federal judges are: Court of Appeals judges, \$95,000; District Court judges, \$89,500; Claims Court judges, \$82,500; U.S. Magistrates and Bankruptcy judges, \$72,500.

Court of Military Appeals Practice

Each judge on the COMA is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Court of Appeals. They do not have the salary protection guaranteed Article III judges. Conceivably, Congress could change the pay of a COMA judge, or exclude COMA from a periodic increase granted to federal judges. It is significant that such a change would have to come from the legislative branch, not the executive branch and Department of Defense.

Discussion

Neither the Supreme Court nor Congress has read the Constitution as requiring every Federal question or even every criminal prosecution, be tried in an Art III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and the Supreme Court have recognized that legislative courts are appropriate forums in which Federal questions and Federal crimes may at times be tried. The requirements of Art. III, which are applicable where laws of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particular needs and warranting distinctive treatment [See United States v Palmore, 411 U.S. 389, 407 (1973)].

The Supreme Court in Palmore concluded that Congress can create courts solely pursuant to Article I without granting to these courts Article III protections. The Court reasoned that if the establishment of a particular court would jeopardize constitutional policies of separation of powers, federalism, and judicial integrity, then Article III should apply to render the court unconstitutional. If, however, the existence of the court has no bearing on these constitutional policies, then Article III is irrelevant and the creation of a court should be upheld as a valid exercise of Congress' power to establish Article I courts.

The military court system can be constitutionally justified under the Palmore analysis. COMA's jurisdiction covers service members and matters over which the political branches have primary control. The Article I status of COMA does not threaten the separation of powers. In fact, extensive judicial intervention in military affairs might itself endanger the legitimate prerogatives of the other branches.

POSITION

Although the salaries of COMA judges are not absolutely protected against reduction, the present system, whereby the COMA judges' salaries are identical to those of the U.S. Courts of Appeals judges, and increase as those salaries increase, is acceptable.

POSITION PAPER

SUBJECT: Senior Judges

COMA PRACTICE

Article 67(a)(4), UCMJ, provides:

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

Added to the Code by an Act of June 15, 1968 [Pub. L. 90-340, 82 Stat. 178 (1968)], this provision was intended to make retired COMA judges available if an active judge died, became disabled, or if the workload caused the court's docket to be backlogged [see S. Rep. No. 806, 90th Cong., 1st Sess. 3 (1967)]. The only amendment to the bill (S. 2634) as originally offered replaced the mandatory language "shall become a senior judge, shall occupy offices in a Federal building, shall be provided with a staff assistant" (emphasis added) with the following permissive language "may become a senior judge, may occupy offices in a Federal building, may be provided with a staff assistant whose compensation shall not exceed the rate prescribed for GS-9 in the General Schedule under section 5332 of title 5," (emphasis added) (*id.* at 1, 5). The bill was passed as amended by the Senate on 28 November 1967 [113 Cong. Rec. 33910 (1967)].

The House held full committee hearings on 24 April 1968 [A Bill to Establish the Court of Military Appeals as the United States Court of Military Appeals Under Article I of the Constitution of the United States, and for Other Purposes: Hearings on S. 2634 Before the House Comm. on Armed Services, 90th Cong., 1st Sess. 8427-37 (1968)] (hereinafter Hearings). Congressman Philbin indicated that the use of retired judges was not a new idea as such use existed in the federal courts prior to that time (see Federal Practice, infra); however, retired federal judges would not be available to assist COMA since the federal pool was already overloaded with federal court work (Hearings at 8430). The committee had no objection to the use of senior COMA judges and recognized the experience that such judges could bring to this specialized area of law, but was concerned that a civil

service position (staff assistant) would be created and the assistant would receive pay even if there was not any work to be done (Hearings at 8429-36). The committee was also concerned about having an additional judge actively sitting on a three judge court. Mr. Philbin indicated that the senior judge would act on petitions and motions which required the action of only a single judge and that cases requiring a full decision would be handled by the court (Hearings at 8434). In order to clarify these two matters, the bill was referred back to a subcommittee (Hearings at 8436).

The subcommittee met on 8 May 1968 and heard testimony from three COMA judges (H.R. Rep. No. 1480, 90th Cong., 1st Sess. 27 May 1968). Chief Judge Quinn noted that senior judges would lend valuable service in times of need, such as in the event of sickness or temporary illness of a sitting judge. The staff assistant's assignments would be subject to the approval of the chief judge (Hearings at 2056). Judge Ferguson believed that the use of senior judges was essential to the court's ability to keep its docket current (Hearings at 2057). Judge Kilday stated that the use of senior judges and any assistants would be responsibly handled so long as it was under the administration of the chief judge (*id.*). The committee report indicated that making retired judges available to sit with the court if the chief judge should find that their services were needed would parallel the availability of retired judges of the courts of appeals to sit with their courts (Hearings at 2054). The report also stated that the "chief judge would also control the tenure and workload of the staff assistant, so as to be certain that his services are best utilized, while still being of assistance to the retired judge. At any time that the staff assistant was no longer performing a useful function to the court as a whole, then the chief judge would terminate his services" (*id.*).

When the full committee took the bill up again on 21 May 1968 (Hearings at 8470-73), the clarification of the use and tenure of the staff assistant that was made at the subcommittee hearings was acceptable to the full committee. Mr. Philbin stated that "the chief judge would control the workload of the staff assistant who, although technically under civil service, would be on an exempted roster and therefore would not have any tenure." (Hearings at 8470). In response to a question from Congressman Bates as to what happens to the staff assistant when the retired judge terminates his or her senior status, Mr. Philbin stated that "[h]e is automatically dropped. He doesn't have any tenure. . . . His services would terminate at that time." (Hearings at 8472). The committee also clarified that the senior judge would receive full active judge pay, but not any additional pay (i.e. retired pay) (*id.*). The bill (S. 2634) was reported out without objection by the committee on 21 May 1968, was passed without objection by the House on 3 June 1968 [114 Cong. Rec. 15804 (1968)], and was signed by the President on 15 June 1968.

Since the amendment was passed in 1968, three COMA judges have taken senior judge status. Judge Ferguson retired after a fifteen year term on 2 May 1971 and took senior judge status the same day. He was twice asked to perform full time duty (23 June 1971 - 17 December 1971 and 17 February 1974 - 21 May 1976), agreed on both occasions, and continued as a senior judge until his death on 17 December 1982. Chief Judge Darden is listed in the historical notes of Military Justice Reporter as having resigned his commission on 29 December 1973; however, due to extensive prior federal service, he was retirement-eligible at the time he left the bench. He is listed as a senior judge, but has not accepted any offer to perform active duty. Judge Cook retired on 1 April 1985 and after taking senior status was asked to perform full-time duty the next day. Senior Judge Cook performed full-time duty from 2 April 1984 until 30 June 1984 and, although he is still a senior judge, he is not actually available to serve active duty on COMA due to health reasons. Nonetheless, Senior Judge Cook is provided with a GS-9 administrative assistant and with an office by DOD, although it is not located in the COMA courthouse.

FEDERAL PRACTICE

The federal practice of senior judges began with the Act of February 25, 1919 (Pub. L. 65-265, 40 Stat. 1156, 1157) which provided that judges, who held office during good behavior and were eligible to resign (10 years continuous service and age 70: Act of March 3, 1911, 36 Stat. 1161), could retire with full salary instead of resigning. Such retired judges would still be available to be called upon by the senior circuit judge (chief judge) of the retired judge's circuit to perform such judicial duties as the retired judge was willing to undertake. The Chief Justice could call upon such retired judges to perform judicial duties in other circuits, as could the presiding judge or senior circuit judge of the other circuit.

Congressman Steele, while debating the 1919 bill before the Committee of the Whole House, stated the rationale for senior judges as follows:

It frequently happens, however, that a judge qualified to retire is also qualified to perform judicial duties of a limited character which he would be glad to perform. The bill therefore contains a further provision for the voluntary retirement of district or circuit judges who may be called upon to perform such judicial duties as such retiring judges may be willing to undertake. ...The merit of this provision is that instead of resigning the judge simply retires and is still enabled to perform such judicial services as he is capable of performing when the business of the district demands it. The district thereby receives the benefit of such services without any additional expenses to the government.

(57 Cong. Rec. 368). Although the original judicial retirement law of 1869 (Cong. Globe, 41st Cong., 1st Sess. 647) did not envision any retired judges performing judicial duties, but was designed to induce superannuated judges to relinquish their offices without any loss of pay, the 1919 law clearly envisioned such service. The retirement in lieu of resignation provision was noncontroversial since Congress had eight years prior provided for retirement at age 70 with 10 years of service, albeit with a resignation. Congressman Gard summed up the feelings of Congress when he noted that

the thing which the people of the United States want is service; and the particular part of this bill which says that a man may not be compelled to resign but that he may retire, and that his service may be utilized as he can render it, is most commendable, because there are parts of law work -- there are parts of the administration of justice -- which a man who is advanced in years may do and other things which he may not properly do.

(id. at 383).

The focus of the floor debate was on a highly controversial provision which permitted the President, if he found that a judge was unable to discharge efficiently all the duties of his office by reason of mental or physical disability of a permanent character, to appoint, by and with the consent of the senate, an additional judge when necessary for the efficient dispatch of business. The disabled judge would still hold the title of judge and receive full pay, but was, in effect, replaced. When an amendment to the controversial provision inadvertently would have deleted the retirement in lieu of resignation provision, Congressman Graham noted that the retirement feature

put as a reserve force those gentlemen who were able to discharge some of the duties of the office, but who wished to retire from the more active work after their service of 10 years, and not passing the age of 70. They constituted a retired list which could be called upon, if they would be willing to serve, to help out in any emergency in the business and work of the court. I respectfully submit to you gentlemen that that paragraph ought to be retained irrespective of what your opinion may be of the last clause or section of the bill.

(id. at 428). The proponent of the amendment corrected his amendment and the retirement provision was retained.

Article III of the Constitution expressly confers upon the Congress the power to ordain and establish "inferior courts." In United States v. Union Pacific Railroad Co., 98 U.S. 569 (1878), the Supreme Court stated that "with the exception of the Supreme Court the authority of Congress in creating courts and in

conferring on them all or much or little of the judicial power of the United States is unlimited by the Constitution." The 1919 bill did not include any provision for Supreme Court Justices to take senior status. So long as the bill did not interfere with the two features of Supreme Court Justice status protected by the Constitution (tenure and salary), it was a proper exercise of Congressional power. The senior judge practice was amended in 1929 by deleting the requirement that the 10 years service be continuous (Act of March 1, 1929, Pub. L. 70-870, 45 Stat. 1422, 1423) and in 1938 by deleting the requirement that retired judges reside in the circuit in which they serve (Act of February 11, 1938, Pub. L. 75-425, 52 Stat. 28).

Prior to the 1944 amendment, a retired judge could sit in his own court acting by the color of his original commission without any prerequisite designation or assignment [Maxwell v. United States, 3 F.2d 906 (4th Cir. 1925), aff'd, 271 U.S. 647 (1926)]. Instances of retired judges walking into courtrooms and demanding that cases be assigned to them even when their services were not needed caused the 1940 Conference of Senior Circuit Judges to recommend the designation and assignment limitations [Reprot of the Judicial Conference of Senior Circuit Judges 14 (1940)]. Congress, while recognizing the valuable service rendered by retired judges, nevertheless concluded that designation and assignment limitations were necessary for the orderly administration of justice [87 Cong. Rec. 4679 (1941)]. Thus the senior judge practice was amended by the Act of May 11, 1944 (Pub. L. 78-299, 58 Stat. 218) to allow the judicial counsel of the circuit (in addition to the senior circuit judge) to call a retired judge to active judicial service, to clarify that retired judges could perform judicial duties only when specifically authorized under the statute, and to authorized the Chief Justice to call upon retired Supreme Court Justices to perform judicial duties as such Justices may be willing to undertake [90 Cong. Rec. 3871 (1944)].

In 1948 all of the provisions concerning retired judges [28 U.S.C. §§ 375, 375a, and 375f (1940 ed.)] were consolidated into 28 U.S.C. § 294 (Assignment of retired justices or judges to active duty) (Act of June 25, 1948, Pub. L. 80-773, 62 Stat. 869, 901). The language of the previous statutes was streamlined to a concise restatement of the law as follows:

(a) Any retired Chief Justice of the United States or associate justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any retired circuit or district judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such judge for service within his circuit shall be made

by the chief judge or judicial council of the circuit. Designation and assignment for service elsewhere shall be made by the Chief Justice of the United States.

(c) Any retired judge of any other court of the United States may be called upon by the chief judge of such court to perform such judicial duties in such court as he willing to undertake.

(d) No retired justice or judge shall perform judicial duties except when designated and assigned.

An amendment to subsection (b) in 1956 permitted retired judges of the Court of Claims to perform judicial duties as they were willing to undertake in any circuit (if so designated by the Chief Justice) and on the Court of Claims (if so designated by the Chief Judge) (Act of July 9, 1956, Pub. L. 84-659, 70 Stat. 497). In 1957 subsection (d) was redesignated as subsection (e) and a new subsection (d) was added which: for the first time referred to these retired judges as "senior judges"; required the Chief Justice to maintain a roster of senior judges who were willing and able to perform special judicial duties in a particular court or courts or generally in any court; required senior judges to specifically request if they desired to be on the roster; required the Chief Justice to remove senior judges names from the roster if they were unwilling or unable to perform such duty; and permitted the designation and assignment of senior judges by the Chief Justice to any court other than the Supreme Court, upon presentation of a certificate of necessity by the chief judge of such court (Act of August 29, 1957, Pub. L. 85-219, 71 Stat. 495).

In 1958, subsections (a) and (e) were reenacted without change and subsections (b)-(d) were amended by: revising and rearranging the subject matter to apply the phrase "senior judge" to all judges who retire from regular service under 28 U.S.C. §§ 371(b) and 372(b) while retaining their commissions, rather than merely to those who ask to be placed on the Chief Justice's roster; lodging solely in the chief judge and judicial council of the circuit concerned the intracircuit assignment authority; and, giving the Chief Justice the sole power to assign senior judges beyond their circuits or special courts (Act of August 25, 1958, Pub. L. 85-755, 72 Stat. 848).

28 U.S.C. § 294 as it now reads is based on the 1958 amendments. Subsections (a) and (e)[redesignated from (d)] are identical to the 1944 version. Subsections (b)-(d) read as follows:

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to

undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

The most recent amendment to the statute was to delete "or district" in subsection (c) and inserting in lieu thereof ", district or bankruptcy judge" and by striking out "or district judge" in subsection (d) and inserting in lieu thereof ", district judge or bankruptcy judge" (Act of November 6, 1978, Pub. L. 95-598, 92 Stat. 2660, made effective June 28, 1984 by the Act of March 31, 1984, Pub. L. 98-249, 98 Stat. 116).

In the federal courts, the pool of senior judges has proven to be a valuable adjunct to the courts. In the last ten years senior judges have comprised 20-30 percent of the total judges available to the circuit and district courts.

TOTAL JUDGES AVAILABLE

YEAR	COURT OF APPEALS		DISTRICT COURT	
	AUTHORIZED	SENIOR	AUTHORIZED	SENIOR
1977	97	48	398	120
1978	97	46	399	119
1979	132	46	516	127
1980	132	45	516	126
1981	132	45	516	126
1982	132	54	515	163
1983	144	55	515	175
1984	144	52	515	185
1985	168	59	575	191
1986	168	41	575	156

(Reports of the Judicial Conference of the United States, 1977-1986). These senior judges provide a significant source of manpower within their circuits and in the last four years have accounted for approximately 65 percent of the intercircuit assignments [48 Senior Circuit, 75 Senior District and 7 Senior International Trade judges (total 130) out of 195 judges (Reports of the Judicial Conference of the United States, 1983-1986)].

DISCUSSION

Senior judge status is a practical and beneficial way to relieve older judges of the burdens of full time active service while still retaining their expertise and limited service. The federal courts use senior judges quite extensively. On a three judge court such as COMA, even one senior judge can make a difference in times of vacancies or backlogs. COMA has not been able to take full advantage of its senior judge provisions because so few judges have attained that status. Senior Judge Ferguson provided several years of valuable service, but Senior Judge Darden has expressed no interest in serving and Senior Judge Cook, although provided with office space and an assistant, is unable to serve. Judges who do take senior status should be provided with government office space and an administrative assistant only when the chief judge certifies that the senior judge is performing services substantial enough to justify facilities and that the administrative assistant is gainfully employed.

Judges who have retired from COMA could provide valuable service; federal senior judges would not. If federal senior judges were available, their large number would not offset their lack of experience in military justice matters. Although the Chief Judge of COMA, as the receiving court judge, could refuse the services of a senior judge who did not have the requisite experience, it is uncertain if any chief judge would refuse proffered help. On a three judge court, one inexperienced judge could cause instability in the law. Even if the senior judge had retired from COMA, it is imperative that the judge remain current in the law. A senior judge who has not handled any cases for many years cannot expect to be a productive member of the court if he or she has not retained an active interest in military law.

To tap the potential reservoir of talent that senior judges can offer, a modest easing of the requirements for taking senior status may be appropriate. This would obviously have to be done in connection with the retirement system. Such a modification would have to ensure that the judge had served long enough to merit retirement, yet could retire at an early enough age to induce the judge to accept requests to perform future service. When judges must serve for lengthy periods of time to qualify for retirement, they are often disinterested in future service or have become too frail or ill to provide such service. Such a modification could entail what is colloquially known as a "rule of eighty", which permits a judge to retire when the number of years he has served on the bench when added to his age equals eighty, assuming always a minimum length of service (10 years) coupled with a minimum age (60 years). The following will illustrate retirement eligibility:

AGE	60	61	62	63	64	65	66	67	68	69	70
YEARS OF SERVICE	20	19	18	17	16	15	14	13	12	11	10

Such an easing of the retirement eligibility requirements may induce judges to take senior status while they are young enough to provide productive service as senior judges.

POSITION

Senior judges who have retired from COMA should be more fully utilized in times of vacancies to reduce backlogs; however the availability to COMA of Article III senior judges is not necessarily in the best interest of the military justice system.

QUINN - APPOINTED 20 JUN 51 - REAPPOINTED 28 APR 66 - RETIRED 25 APR 75
LATIMER - APPOINTED 20 JUN 51 - TERM EXPIRED 20 JUN 61
BROSMAN - APPOINTED 20 JUN 51 - DIED 21 DEC 55
FERGUSON - APPOINTED 1 MAY 56 - TERM EXPIRED 21 MAY 71
KILDAY - APPOINTED 25 SEP 61 - DIED 12 OCT 68
DARDEN - APPOINTED 13 NOV 68 - RESIGNED 29 DEC 73
DUNCAN - APPOINTED 29 NOV 71 - RESIGNED 11 JUL 74
COOK - APPOINTED 21 AUG 74 - RETIRED 31 MAR 84
FLETCHER - APPOINTED 30 APR 75 - REMOVED (PHYSICAL DISABILITY) 11 SEP 85
PERRY - APPOINTED 18 FEB 76 - RESIGNED 22 SEP 79
EVERETT - APPOINTED 16 APR 80
COX - APPOINTED 6 SEP 84
SULLIVAN - APPOINTED 6 JUN 86
SENIOR JUDGES
FERGUSON - 2 MAY 71 - 17 DECEMBER 82 (DEATH)
[23 JUN 71 - 17 DEC 71 & 17 FEB 74 - 21 MAY 76 (FULL TIME)]
COOK - 1 APRIL 84 - 30 JUNE 84 (ACTIVE SERVICE) &
30 JUNE 84 - PRESENT (FULL RETIRED)



POSITION PAPER

SUBJECT: Staffing

Court of Military Appeals

The judges of the COMA are nominated by the President and confirmed by the Senate. Their positions are classified accordingly to the senior executive service (SES) schedule. The Director of the Central Legal Staff and the Clerk of Court are also SES employees. The other employees of the court are classified according to the General Schedule (GS) regulations of the executive branch. The classifications of the court employees are provided at the attachment.

The total of employees at COMA is 43. They can generally be divided into three groups: the judge's chambers; the central legal staff; and the Administrative personnel. In each of the judge's chambers are the judge, 2 attorneys (grade GS-15) and 2 secretaries. On the central legal staff are the director (a member of the SES), 7 attorneys (grade GS 13/14), and 4 legal technicians. The clerk of court (a member of the SES) heads the administrative section, which has 16 personnel.

The attorneys and staff of COMA fill positions that are excepted from the competitive service. Most are schedule A employees who hold positions which are not confidential or policy determining in nature for which it is not practicable to require written examination. They acquire tenure after meeting the minimum time in service requirements. Two of the attorney's employed by the court and each of the judges' secretaries are schedule C employees. They fill positions of a confidential or policy determining character. They hold positions at the pleasure of the court.

The ultimate hiring authority for all personnel has been exercised by the Chief Judge. Insofar as consistent with personnel limitations and tenure of the incumbent, the selection of attorneys to serve in the chambers of the judges has been delegated to the individual members of the court.

The employees of COMA are civil service employees. In 1977 twelve employees of COMA sued the COMA judges, the Secretary of Defense, and the Chairmen of the Civil Service Commission, seeking to overturn a decision of the Civil Service Commission that the court was part of the judicial branch and thus not subject to the civil service system. The case was terminated by stipulation. The judgement established that "employees of the Court of Military Appeals are entitled to continue to be under the civil service system" [Miele v Brown, No. 77-1346 (D.D.C. 29 Aug 1977) cited in Mundy v Weinberger, 554 F. Supp. 811, 819 (D.D.C. 1982)].

The role of the Department of Defense (DOD) in the court's employment process was at issue in the case of Mundy v Weinberger, supra. It had been alleged that DOD blocked the promotion of a court employee which had been granted by the Chief Judge, thereby illegally interfering with the court's internal personnel matters and indirectly with its statutory independence. DOD maintained that the problem was a result of reorganization of the classification structure within the Executive branch and the creation of SES positions. The U.S. District Court for the District of Columbia held that by overruling or ignoring the personnel decisions of the Chief Judge acting for the court, DOD violated the letter and the spirit of the congressional mandate that the COMA be an independent, judicial tribunal which is a part of the Department for administrative purposes only.

There have been no other instances of DOD pursuing an active role in the court's employment/staffing process.

Federal Courts

Judicial branch employees are classified according to the Judicial Salary Plan (JSP). The personnel office of the Administrative Office of the United States Courts (the Administrative Office) controls the classification of the positions. Unlike the GS system, the JSP does not have SES positions or competitive positions. All employees, except the judges, hold their positions at the pleasure of the court.

The court appoints the Clerk of Court who, in turn appoints subordinates (subject to the approval of the court). Discharge of court personnel is initiated by the appointing officer, subject to the courts approval. There is no statutory procedure for employee grievances.

Breaking the staff of the federal courts into the three subsets as above, the judge's chambers are staffed by the judge, his secretaries, and up to three law clerks. The criteria used in the federal courts for the assignment of clerks is attached. Most law clerks of federal judges are term clerks (grade JSP 9/11), although a few are career law clerks (grade JSP 13). Some Federal Courts of Appeals use staff law clerks, roughly equivalent to the central legal staff at COMA. However, these central staffs are small. In the Court of Appeals for the District of Columbia for example, a court with twelve active judges, there are 9 attorneys on the central legal staff. On the Court of Appeals for the Federal Circuit, with 10 active judges, there are 3 patent attorneys on a central staff that supports the court. The administrative office that supports the federal courts is roughly equal to COMA, except courts that administer their own budgets, such as the Court of Appeals for the Federal Circuit, are augmented with budget personnel.

Discussion

An obvious and significant impact of article III status for COMA is the removal of the court personnel from the civil service system. The protections of tenure and grievance will be lost. All employees will become what is known in the civil service as excepted employees, that is, their service will be at the pleasure of the court.

The positions at the court will have to be graded by the Administrative Office of the United States Courts. There is no equivalent in the judicial pay system to the SES. Two COMA employees, the director of the central legal staff and the clerk of court are SES employees. Law clerks in the federal courts make considerable less salary than the present law clerks at COMA. And although the unique work load of COMA may justify a larger central legal staff than other federal courts, the positions are not likely to be graded as generously as at present. The attached chart compares COMA, the Court of Appeals for the Federal Circuit and the Court of Appeals for the District of Columbia.

The budget of the court will likely be handled in house by the court itself, as is the case in the Court of Appeals for the Federal Circuit. In that case more personnel will need be added to the administrative office of the court.

The substantial personnel changes outlined above may cause COMA personnel to seek to remain in the civil service and switch jobs to other executive branch positions.

Conclusion

There will be a major impact in this area if Article III status for COMA is approved. Comparable positions in the judiciary are paid less, and it is unlikely that the central legal office, presently with eight attorneys, will be as generously staffed. The employees of the court will no longer be civil service employees, but will switch to the Judicial Salary Plan. All employees will lose job protections presently guaranteed under the civil service system. Judiciary employees hold their positions at the pleasure of the court. The court will likely manage its own budget. To remain independent of the Department of Defense the administration of the budget will fall to the court, requiring augmentation of the court staff.

POSITION

Reconstituting COMA as an Article III court might result in personnel turbulence harmful to the military justice system.

COURT STAFFING

		COMA	Court of Appeals	
			Fed Cir	D.C. Cir
Judges				
Chambers	Judges	3	10	12
	Clerks(ea.)	2	2	3
		(career)	(career & term)	
Staff Attorneys		8	3	10
Administrative personnel		16	unk	unk
Budget		support from WHS	Does own	support of Admin office US Courts

SALARIES

	COMA	Federal Courts
Law clerks	GS-15 \$53,830-69,976	career clerks JSP 13 \$38,727-50,346
		term clerks JSP 9 \$22,458-29,199

1. Chief judge

- 2. atty GS-15 sched A
- 3. atty GS-15 sched A
- 4. sec GS-10/11 sched C
- 5. sec GS-9 sched C

6. Associate Judge

- 7. atty GS-15 sched A
- 8. atty GS-15 sched C
- 9. sec GS-10/11 sched C
- 10. sec GS-9 sched C

11. Associate Judge

- 12. atty GS-15 sched A
- 13. atty GS-15 sched C
- 14. sec GS-10/11 sched C
- 15. sec GS-9 sched C

16. Director - Central Legal Staff SES(career)

- 17. atty GS-13/14 sched A
- 18. atty GS-13/14 sched A
- 19. atty GS-13/14 sched A
- 20. atty GS-13/14 sched A
- 21. atty GS-13/14 sched A
- 22. atty GS-13/14 sched A
- 23. atty GS-13/14 sched A

24. legal technician sched A
25. legal technician sched A
26. legal technician sched A
27. legal technician sched A
28. Clerk of Court SES(career)
- A 29. Dep. Clerk of Court/Reporter of Decisions GS-15 sched A
30. Exec. Secretary GS-8
31. Counsel for Extra. Writs/Motions GS-15 sched A
32. Administrative Officer GS-11 sched A
33. Asst. Administartive Officer GS-8 sched A
34. Admin. Support GS-5 sched A
35. Admin. Support GS-5 sched A
36. Supervisor Docket Clerk GS-9 sched A
37. Extra. Writ/Motion Docket Clerk GS-8 sched A
38. Senior Docket Clerk GS-7 sched A
39. Docket Clerk GS-5/6 sched A
40. Computor Specialist Clerk GS-13 sched A
41. Computor Specialist Clerk GS-9 sched A
42. Tech. Info. Spec. (Librarian) GS-11 sched A
43. Tech. Info. Spec. (Librarian) GS-7/8/9 sched A

Guidelines 1/ for the Employment of Secretaries and Law Clerks
by Circuit Judges, District Judges, and Bankruptcy Judges

1. A district judge may employ a law clerk and a secretary and one additional employee as a law clerk or as an assistant secretary or a crier, subject to the JSP grade levels and qualification standards adopted by the Judicial Conference.
2. A circuit judge may employ a secretary, an assistant secretary, and up to three other such personnel as law clerks or assistant secretaries, subject to the JSP grade levels and qualification standards adopted by the Judicial Conference.
3. The chief judge of each circuit and the chief judge of each district court having five or more district judges may employ an additional secretary or law clerk, subject to the JSP grade levels and qualification standards adopted by the Judicial Conference.
4. A bankruptcy judge may employ a secretary and a law clerk, subject to the JSP grade levels and qualification standards adopted by the Judicial Conference.
5. With the provision that no incumbent will be separated or reduced in grade, the maximum grade levels authorized by the Judicial Conference for law clerks, secretaries, and criers are as follows:

Law Clerk, JSP-12*
Secretary, JSP-10
Assistant Secretary, JSP-10
Crier, JSP-6

- * A law clerk who has served a Federal judge for four years or more, three of which were at JSP-12, will be eligible for JSP-13.
- ** An individual who has served as a secretary in a Federal court for four years or more, three or more years at the JSP-10 level, will be eligible for grade JSP-11.

6. The Director of the Administrative Office may approve overlapping appointments of secretaries and law clerks of up to two weeks where the turnover of personnel would hinder the continuity of staff support for the judges. As a general rule, overlapping appointments shall not be authorized for judges with two or more secretaries or law clerks.

1/ As established by Conf. Rpt., Sept. 1979, pp. 75-77 and subsequently amended by: Conf. Rpt., Sept. 1981, pp. 68-69; Conf. Rpt., Sept. 1982, p. 78; Conf. Rpt., Mar. 1984, pp. 10-11; Conf. Rpt., Mar 1985, p. 13; Conf. Action, Sept. 1985.



POSITION PAPER

SUBJECT: Substitution of Judges

COMA was established as a specialized court to administer appellate justice in the military. The Supreme Court has recognized that civilian courts are "ill-equipped" to establish policies regarding matters of military concern because they cannot determine the precise balance to be struck between the rights of servicemen and the demands of discipline and duty (See United States v. Solorio, 107 S.Ct. 2924 (1987)). Testimony during the Congressional debate on the 1951 Uniform Code of Military Justice (UCMJ) described military justice as:

a field of law which requires not only a thorough familiarity with criminal law -- but also experience and training in military matters . . . Military law in itself embodies hundreds of complicated problems of status arising out of customs of the service as well as statute and regulation.

[96 Cong. Rec. 1292 (1950), reprinted in 2 Index and Legislative History to the Uniform Code of Military Justice, 1950, at 1718 (1985)].

A committee consisting of the judges of COMA, together with The Judge Advocates General of the services, is required by Article 67(g), UCMJ, to make an annual comprehensive survey of the military justice system and render a report on their findings and any recommendations to specified legislative and executive agencies. By fulfilling the requirements of Article 67(g), the judges of COMA serve in an advisory capacity to review and remedy defects in the military justice system; more important, the judges gain valuable experience and insight into military law.

COMA judges also gain valuable insight into the particularized needs of the military by worldwide travel on judicial field trips to military installations. By better understanding of the environment in which the servicemembers must live and work, COMA judges can more appropriately balance the individual rights of servicemembers with the imperative of military discipline. The steady stream of exclusively military criminal law cases that COMA must decide also provides the opportunity for greater understanding of military necessity. As COMA judges gain experience from their service on the bench, their participation on the code committee, and their judicial field trips, they develop a skill in recognizing the critical role that military justice plays in protecting our nation's ability to field an effective fighting force in time of war.

As a result of the specialized experience required of judges of COMA, the Supreme Court accords deference to the opinions of COMA. In Middendorf v. Henry, 425 U.S. 25, 43 (1976), the Court noted that, "Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference." The issue that this position paper addresses is whether restructuring COMA as an Article III court, wherein the potential for substitute judges inexperienced in military law is greater, would jeopardize this deference.

COMA PRACTICE

As enacted in 1951, the "substitute judge" provision for COMA was, "If any judge of the Court of Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of the United States Court of Appeals to fill the office for the period of disability" [Art. 67(a)(4), UCMJ (1951)]. Although no Court of Appeals judge has ever sat on COMA, the possible infringement upon the separation of powers, that would result from the executive requiring the judiciary to perform Article I duties, caused Congress to amend the UCMJ by the Act of June 15, 1968 (Pub. L. 90-340; 82 Stat. 178). The Senate report accompanying the 1968 legislation stated:

In the event of a temporary disability by one of the judges, the bill would permit the President to designate a judge of the District of Columbia circuit of the U.S. Court of Appeals

to fill the office during the period of such disability. Since judges of the District of Columbia may be given functions under article I and article III of the Constitution, this specific designation authority should resolve any possible question about whether a purely article III judge may be designated to perform duties of a judge of a legislative court under article I.

(S. Rep No. 806, 90th Cong., 1st Sess. 3 (1967), reprinted in 113 Cong. Rec. 33911). After Senate passage of the legislation (S. 2634), the House Armed Services Committee held hearings on the bill. All three sitting COMA judges testified at the hearings, but only Judge Paul J. Kilday made any statement concerning this provision. Judge Kilday noted that

[t]he present provision of the Uniform Code of Military Justice provides that in the case of such disability, 'the President may designate a judge of the United States Court of Appeals to fill the office.' During the hearings on the life tenure bill this provision was seriously questioned. The objection being that a judge of a court created under article III of the Constitution could not, or would not be required to, perform duties on a court created under article I of the Constitution. The life tenure bill contained

language similar to this language in the present bill. The point is that it has been held that courts of the District of Columbia exist under both articles I and III of the Constitution. That is, the power of the Congress under article I to exercise exclusive legislation over the seat of Government and under article III establishing the judiciary.

(Hearings on S. 2634 Before the House Committee on Armed Services, 90th Cong., 1s Sess. (1968)(statement of Judge Paul J. Kilday). The House report accompanying the bill, while agreeing with the purpose of the bill as stated by Judge Kilday and the Senate report, noted that

[a]s a practical matter, however, the present judges of the Court of Appeals for the District of Columbia are so overburdened as not to be available to help anywhere else.

[H.R. Rep. No. 1480, 90th Cong., 1st Sess. 3 (1968)].

The legislation as enacted, now provides: "If a judge of the United States Court of Military Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of the United States Court of Appeals for the District of Columbia Circuit to fill the office for the period of disability" (Art. 67(a)(3), UCMJ) [Note: Pub. L. 98-209, § 13(d) inserted "Circuit" after "District of Columbia"]. Thus, although there exists a mechanism to designate substitute judges from the U.S. Court of Appeals for the District of Columbia Circuit, substitute judges (other than COMA Senior Judges) have never sat on COMA. Nevertheless, a conversion of COMA to an Article III court would eliminate the Presidential authority to designate substitute judges.

FEDERAL PRACTICE

28 U.S.C. §§ 291-96 establishes the authority for substitute judges in the federal courts. Section 291 provides that the assignment of circuit judges to other courts is authorized as follows:

- (a) The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises.
- (b) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary

duty therein, to hold a district court in any district within the circuit.

Section 293(a) sets forth the authorization for the substitute assignment of judges of the Court of International Trade as follows:

- (a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of International Trade to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit in which the need arises.

If COMA judges become Article III judges, they would probably be subject to substitute assignment by the Chief Justice of the United States. A separate provision may be added to § 293, as COMA would be a specialized court like the Court of International Trade, or COMA may just come under the general provisions of § 291(a). Once so assigned, COMA judges would then be subject to further reassignment by the chief judge or circuit justice of the circuit pursuant to § 291(b).

Intercircuit assignments, which require Chief Justice approval, are handled by the Committee on Intercircuit Assignment of the Judicial Conference of the United States (28 U.S.C. § 331). The committee has established the following guidelines, which were approved by the Chief Justice in November, 1984:

- (1) Assignment of United States judges from their statutory base is on the basis of need of the receiving court. This standard will govern all intercircuit assignments for both active and senior judges. The chief of the receiving circuit must execute a certificate of need.
- (2) A circuit which 'lends' active judges on intercircuit assignment may not 'borrow' judges from another circuit (except for emergencies).
- (3) A circuit which 'borrows' active judges by intercircuit assignment may not 'lend' active judges for assignment to another circuit.
- (4) The 'lender-borrower' rule may be relaxed with respect to senior judges, circuit or district, provided the circuit is not 'borrowing' and provided the chief judge of the circuit approves.
- (5) When active judges are borrowed or lent for a particular case or cases, for example, because of disqualification of judges in the borrowing circuit to hear a case or cases, the 'lender-borrower' rule will not apply.

- (6) The 750-mile travel limitation does not apply to senior judges who are assigned to work on circuit courts.
- (7) Except to meet an emergency, a judge assigned to work on the general calendar of a district court must serve at least two weeks if the travel is less than 750 miles and for at least one month if the travel exceeds 750 miles.
- (8) The 'lender-borrower' rule does not apply to the United States Court of Appeals for the Federal Circuit, and to the Court of International Trade.
- (9) On assignment to either a circuit or district court, judges may take either a law clerk or a secretary; reimbursement for additional supporting personnel is not permitted. The court to which a judge is assigned is expected to furnish any additional supporting personnel needed.
- (10) In the future no intercircuit assignment of judges will be approved to take effect more than eight months after the date of the Certificate of Need.

(1985 Report of the Proceedings of the Judicial Conference of the United States 18). The pending legislation (S. 1625, 100th Cong., 1st Sess.) provides for COMA judges to sit on other Circuit courts. If, like the Court of Appeals for the Federal Circuit and the Court of International Trade, COMA is exempted from the "lender-borrower" rule, then the judiciary will have the power to send COMA judges elsewhere in the federal system and bring other federal judges onto COMA regardless of the impact on military justice cases.

DISCUSSION

Assuming that the establishment of COMA under Article III of the Constitution will result in the capability of COMA judges to sit in other federal courts, as well as having other federal judges sit in COMA, the special expertise of the court, as well as the deference accorded to it, will be jeopardized. Non-COMA judges would lack the necessary expertise to strike the balance between the rights of the servicemen and the demands of discipline and duty. Just as civilian courts are "ill-equipped" to establish policies regarding military matters, the judges of non-COMA federal courts are similarly ill-equipped. See Rosen, Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial, 108 Mil. L. Rev. 5, 9 n.29 ("The danger is that federal judges, who have had only limited association with the armed forces, will give little credence to the determinations of the military courts because of "knee-jerk" disapprobation of the military.")

It is argued that non-COMA judges can learn military law through appellate briefs. However, appellate briefs are not the sole source of the COMA judge's training and experience. The non-COMA judges do not possess the experience that COMA judges gain through the annual review required by Article 67(g), UCMJ.

Moreover, if non-COMA judges sit on military cases, it is possible the Supreme Court would refuse to accord any special deference to the opinions of COMA.

Military justice could suffer further detriment if COMA judges are permitted to sit on other federal courts. Such a practice could result in delays in military cases.

POSITION

Article III status for COMA would adversely impact on military justice if Presidential authority to designate substitute judges is eliminated, and the possibility of COMA judges being absent from COMA and inexperienced judges sitting on COMA is increased.

ARTICLE 67. REVIEW BY THE COURT OF MILITARY APPEALS

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

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

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

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

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

- (1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;
- (2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
- (3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

(c) The accused may petition the Court of Military Appeals for review of a decision of a Court of Military Review within 60 days from the earlier of--

- (1) the date on which the accused is notified of the decision of the Court of Military Review; or
- (2) the date on which a copy of the decision of the Court of Military Review, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Military Appeals shall act upon such a petition promptly in accordance with the rules of the court.

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Military Review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

(e) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(f) After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(g) (1) A committee of the judges of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense shall meet at least annually. The committee shall make an annual comprehensive survey of the operation of this chapter. After each such survey, the committee shall report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate.

(2) Each member of the committee appointed by the Secretary of Defense shall be a recognized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

(3) The Federal Advisory Committee Act (5 U.S.C. App.I) shall not apply to the committee.

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

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



100TH CONGRESS
1ST SESSION

S. 1625

To enhance the effectiveness and independence of the United
States Court of Military Appeals

IN THE SENATE OF THE UNITED STATES

AUGUST 7 (legislative day, AUGUST 5), 1987

MR. SANFORD introduced the following bill; which was read twice
and referred to the Committee on the Judiciary

A BILL

To enhance the effectiveness and independence of the United
States Court of Military Appeals

Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This act may be cited as the "United States Court of
Military Appeals Improvement Act of 1987."

SEC. 2. ESTABLISHMENT OF COURT UNDER ARTICLE III OF THE
CONSTITUTION

Subsection (a) of section 867(a) (article 67) of title 10, United States Code, is amended to read as follows:

"(a) (1) There is a United States Court of Military Appeals established under article III of the Constitution of the United States. The court consists of three judges.

"(2) The judges of the United States Court of Military Appeals shall be appointed from civil life by the President, by and with the advice and consent of the Senate.

"(3) No person is eligible for appointment to the United States Court of Military Appeals who is not a member of the bar of a Federal court or the highest court of a State.

"(4) Each judge of the United States Court of Military Appeals is entitled to the same salary, travel allowances, retirement pay, entitlements, rights, privileges, precedence, and other appurtenances of office as are, and from time to time may be, provided for judges of the United States Courts of Appeals.

"(5) The United States Court of Military Appeals may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum.

"(6) A vacancy in the United States Court of Military Appeals does not impair the right of the remaining judges to exercise the powers of the court.

"(7) Judges of the United States Court of Military Appeals shall hold office during good behavior.

"(8)(A) If a judge of the United States Court of Military Appeals is unable to perform the duties of his office or the office is vacant, the Chief Justice of the United States, upon application by the Chief Judge of the United States Court of Military Appeals, may designate a judge of a United States Court of Appeals to sit as a judge of the United States Court of Military Appeals until the illness or other disability has been terminated or the vacancy has been filled, as the case may be.

"(B) If any judge of the United States Court of Military Appeals has recused himself with respect to any matter, the Chief Justice of the United States, upon application by the Chief Judge of the United States Court of Military Appeals, may designate a judge of a United States Court of Appeals to sit as a judge of the United States Court of Military Appeals in such matter until the matter is resolved.

"(9) A judge of the United States Court of Military Appeals shall be eligible to take senior status under the same terms and conditions, and with the same rights and benefits, as apply to a judge of a United States Court of Appeals.

"(10) A judge of the United States Court of Military Appeals shall be eligible to sit from time to time as a judge of a United States Court of Appeals in a circuit designated by the Chief Justice of the United States.

"(11)(A) The United States Court of Military Appeals may accept facilities and administrative support furnished by the Department of Defense.

"(B) The Secretary of Defense shall furnish such facilities and administrative support to the United States Court of Military Appeals as the Chief Judge of the court requests in order for the court to carry out its responsibilities."

SEC. 3. CIVIL SERVICE RETIREMENT

(a) CONTRIBUTIONS. -- The first sentence of section 8334(a)(1) of title 5, United States Code, is amended by striking out "and a judge of the United States Court of Military Appeals".

(b) IMMEDIATE RETIREMENT. -- Section 8336(1) of title 5, United States Code, is amended --

(1) in the first sentence, by striking out "A judge of the United States Court of Military Appeals who" and inserting in lieu thereof "An employee who is a judge of the United States Court of Military Appeals and"; and

(2) in the second sentence, by striking out "A judge who" and inserting in lieu thereof "An employee who is a judge of such court and".

(c) DISABILITY RETIREMENT. -- The fourth sentence of section 8337(a) of title 5, United States Code, is amended by striking out "A judge of the United States Court of Military Appeals who" and insert in lieu thereof "An employee who is a judge of the United States Court of Military Appeals and".

(d) DEFERRED RETIREMENT. -- Section 8338(c) of title 5, United States Code, is amended --

(1) in the first sentence, by striking out "A judge of the United States Court of Military Appeals who" and insert in lieu thereof "An employee who is a judge of the United States Court of Military Appeals and"; and

(2) in the second sentence, by striking out "A judge of such court who" and inserting in lieu thereof "An employee who is a judge of such court and".

SEC. 4 TRANSITION PROVISIONS

(a) CONTINUED SERVICE. -- The President is urged and requested to nominate for appointment to the office of judge of the United States Court of Military Appeals each judge who is actively serving as a judge of such court on the day before the date of enactment of this Act.

(b) RETIRED STATUS. -- Any judge who is receiving retired pay as a senior judge on the day before the effective date specified in section 5(a) may continue to receive the same benefits to which such judge would be entitled under subsection (a)(4) of section 867 (article 67) of title 10, United States Code, as such subsection is in effect on the day before such effective date.

SEC. 5. EFFECTIVE DATE; APPLICABILITY

(a) EFFECTIVE DATE. -- Section 867(a) (article 67(a)) of title 10, United States Code, as amended by section 2, shall take effect on the first day of the fourth calendar month beginning on or after the date of the enactment of this Act.

(b) APPLICABILITY. -- Paragraphs (2), (3), (4), (7), (8), (9), and (10) of section 867(a) (article 67(a)) of title 10, United States Code, as amended by section 2, shall apply only in the case of persons appointed to the United States Court of Military Appeals under section 867 (article 67) of title 10, United States Code, on or after the effective date specified in subsection (a).



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