

Appendix A: List of Topics

COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE

Topics for Consideration

I. NEED FOR CONGRESSIONAL REVIEW

- A. Do societal and systemic changes in the demographics and organization of the Armed Forces since the enactment of the Uniform Code of Military Justice justify a complete Congressional overhaul of the system?
- B. Do any or all of the following indicate a need for revisiting the Uniform Code of Military Justice? –
 - 1. Greater number of women in uniform
 - 2. Volunteer forces
 - 3. Modern war doctrine
 - 4. Joint service commands
 - 5. Multinational commands
 - 6. Many service members are married and have dependent children
 - 7. Many military operations abroad without declaration of War
 - 8. Civilians accompanying services abroad
 - 9. International interest in human rights
 - 10. International changes in military codes of justice
 - 11. Impact of the International Criminal Court
 - 12. Evolving international human rights standards
 - 13. Technological changes, e.g., as they apply to command and control issues
 - 14. Information age changes, such as the access and shift to an Internet and electronic banking society
 - 15. Increased long-term peacekeeping operations
 - 16. Evolving standards of privacy/sexuality
 - 17. Better educated force

- C. Do the experiences in Vietnam, Southwest Asia, Bosnia, or other operations demonstrate a need for study of changes that would make the system work better in operational theaters in time of war?

II. JURISDICTION (IN PERSONAM & SUBJECT MATTER)

- A. Should civilians ever be subject to court-martial jurisdiction?
- B. Should there be exclusive jurisdiction over military members for all crimes, state, federal and military?
- C. Should jurisdiction over military members in peacetime be restricted to service-connected offenses?
- D. Should jurisdiction over death penalty cases be limited to service-connected offenses in peacetime?
- E. Should jurisdiction over retirees or those on the temporary disability retired list (TDRL) be limited?
- F. Does Article 17 need to be revised in recognition of the fact that joint commands are now common?
- G. Do Articles 1 and 2 of the Uniform Code of Military Justice need to be reevaluated in light of increased command authority?

III. ORGANIZATION OF THE MILITARY JUSTICE SYSTEM

A. CONVENING AUTHORITY

Should the role of the Convening Authority be changed in the following ways? –

1. Should court members be randomly selected by a jury commission or by a random computer selection process?
2. Should Congress create an independent Court-Martial Command and provide that decisions to prosecute be made by a legal officer serving as the equivalent of a “district attorney?”
3. Should this “district attorney” make pre-trial agreements?
4. Should funding for courts-martial, including expenses for experts, witnesses, etc., be centralized in each service rather than as a budget item for convening authorities?

5. Should the convening authority retain clemency powers, both with respect to findings and sentence, or should his powers be limited?

B. ARTICLE 32 INVESTIGATIONS

Should the Article 32 investigation be changed in the following ways? –

1. Should the requirements for an Article 32 investigation be repealed and a preliminary hearing substituted therefore?
2. Should all Article 32 proceedings be recorded and a partial or complete verbatim transcript be prepared at the request of either the government or the defense?
3. If an Article 32 investigating officer returns a finding of “no probable cause,” should that finding bar subsequent prosecution?
4. What avenue of appeal should be available to the government in the event of a finding of “no probable cause?”

C. JURISDICTION OF COURTS-MARTIAL

1. Should courts-martial be standing courts, such as Federal District Courts, having continuing jurisdiction over service members within the court-martial district?
2. Should military judges have the power to rule on all requests for release from pre-trial confinement, search warrants, requests for witnesses, or expert witnesses?
3. Should military judges oversee the jury commission in the selection of court members rather than leave the administration of the process to the staff judge advocate and the convening authority?
4. Should an enlisted military accused continue to have the right to be tried by a court composed of at least one-third enlisted members from a unit other than his own under Article 25(c), or is the right to be tried by a military judge alone sufficient to protect the enlisted accused’s interests in justice?
5. Should courts-martial be convened with an increased required number of members for each court, e.g., a special court-martial required to have at least 6 members and a general court-martial required to have at least 9 members?

7. Should court-martials sitting in judgment of capital offenses be composed of 12 members?

D. MILITARY JUDGES, TRIAL AND DEFENSE COUNSEL

1. How and by whom should military judges be selected?
2. Should civilians be permitted to serve as military judges?
3. Should military judges serve for a fixed term and be subject to a separate pay and allowance scale not fixed by military rank or grade?
4. How should military judges be disciplined or removed from office?
5. Should civilians be allowed to serve as trial counsel (e.g., Assistant United States Attorneys, Department of Justice attorneys, etc.)?
6. Should there be minimum standards for defense counsel in capital cases?
7. Should the practice of supervisors rating military trial judges be terminated?
8. Should military judges have explicit power to hold counsel in contempt for abusing process during any portion of military proceedings?
9. Should there be a separate trial defense service required by statute for each service?

IV. CRIMES AND OFFENSES

- A. Should Articles 133 and 134 be repealed and instead new punitive articles adopted to enact into the Code those offenses described or enumerated by the President in the Manual for Courts-Martial?
- B. Should there be a distinction in degree and maximum punishment for the offenses of being raped by an acquaintance and being raped by a stranger?
- C. Should Congress enact a modern criminal sexual misconduct statute similar to the Model Penal Code and repeal the current statutes on rape and sodomy?
- D. Should Congress enact an offense that proscribes relationships between and among officers and enlisted personnel, e.g., fraternization, undue familiarity, adultery?

- E. Should Congress repeal Article 88 that prohibits officers from criticizing certain public officials or at least limit this article to active-duty personnel?
- F. Should Congress modify Article 46 to authorize contempt procedures for witnesses and participants in the Court-Martial, both military and civilian?
- G. Should offenses based upon a simple negligence element be deleted from the Uniform Code of Military Justice?
- H. Should a punitive article prohibiting child neglect and abuse be adopted?
- I. Should Article 124, Dueling, be eliminated from the Code?
- J. Should the definition of grievous bodily harm under Article 128 be revised?
- K. Should consensual sodomy be decriminalized?
- L. Should adultery be eliminated as an offense, or in the alternative, specifically codified so that it is only a crime under circumstances that directly affect "good order and discipline?"

V. SENTENCING AND PUNISHMENTS

- A. Should capital punishment be eliminated for peacetime offenses?
- B. Should a service member have the option of being tried by a court-martial of members on the question of guilt or innocence but be sentenced by a military judge following a conviction?
- C. Should member sentencing be abolished?
- D. Should sentencing guidelines be adopted in order to eliminate the need for a contested sentencing proceeding?
- E. Should pre-trial agreements be binding on both parties thus eliminating the need for a sentencing hearing?
- F. Should sentencing in time of war always be by judge alone, except in capital cases?
- G. Should the requirement to produce witnesses for sentencing proceedings in time of war be abolished?
- H. Should new sentencing considerations be authorized, such as community service, suspension of eligibility for promotion or pay increases, required counseling for

violent or sex offenders, or other measures that would return a convicted accused to duty rather than incarceration, discharge, or dismissal from service?

- I. Should a military judge have the right to suspend a sentence and adjudge a probationary sentence?
- J. Should the military judge or his successor in office retain jurisdiction over the accused until the sentence is satisfactorily served?
- K. Should a sentence ordering separation from the service without loss of either retirement or other service-connected benefits be authorized?
- L. Should the Code be reevaluated in light of the fact that most accused members have families, and thus existing punishments may not be the most effective in meeting discipline goals?
- M. Should enhanced punishments for certain offenses committed during times of war (e.g., desertion) be reevaluated in recognition of the frequent deployment of forces to hostile areas not technically qualifying as war?
- N. Should a provision to allow consideration for expungement of a conviction after a specified number of years be enacted?
- O. Would adoption of any sentencing guidelines be fruitless in light of the reality that most accuseds do not become repeat offenders due to separation proceedings?
- P. Should sentencing procedures be made more equitable by permitting reduction in rank or loss of numbers for all officers as a valid punishment?

VI. EVIDENCE

- A. Should evidence of good military character be barred at the findings portion of courts-martial?
- B. Should exculpatory defense polygraph evidence be allowed?
- C. Should pleas without admissions of guilt be permitted at courts-martial as they are in most jurisdictions?
- D. Should conscientious objection be a permissible affirmative defense?

VII. TRIAL PROCESS

- A. Should the military judge, rather than trial counsel, administer the oath to witnesses?
- B. Should *voir dire* of court members by the attorneys be a matter of right?
- C. Should more peremptory challenges be authorized to an accused and the government?
- D. Should Racial Justice Act instructions be required in capital courts-martial?
- E. Should a jury of twelve members be required to sentence a service member to death?

VIII. APPEALS

- A. Should the government have the right to appeal a decision of the Courts of Criminal Appeals and eliminate the Judge Advocate General certification process?
- B. Should the Courts of Criminal Appeals be eliminated or their function reduced to reviewing the record for appropriateness of sentence?
- C. By whom should military Courts of Criminal Appeals Judges be selected, and should their service be for a fixed term of office?
- D. Should Senior Judges of the United States Court of Appeals for the Armed Forces and retired military judges be allowed to serve on the Courts of Criminal Appeals without being recalled to active duty?
- E. Should an accused have to file a Notice of Appeal in order to have his case considered by a Court of Criminal Appeals?
- F. Should there be threshold requirements before an appeal is automatic to the Court of Criminal Appeals, such as a sentence to 5 years or more?
- G. Should there be an automatic right of appeal to the Court of Criminal Appeals in a guilty plea case, or should an accused Notice his Intent to Appeal?
- H. Should a decision of a Court of Criminal Appeals ever be rendered by fewer than three judges?
- I. Should every judge who sits on an appeal at a Court of Criminal Appeals certify that he or she has read the entire record of trial at the time a decision is rendered?

- J. Should there be a deferral of confinement if an appellate issue could result in an acquittal or if a new trial could be ordered, as is allowed by the bail process in many jurisdictions?
- K. Should the Court of Appeals for the Armed Forces dismiss a petition if no issues are assigned for review?
- L. Should the Court of Appeals for the Armed Forces be required to hear all appeals where a sentence to 5 years' confinement or more is rendered?
- M. Should there be a right to oral argument before the appellate courts upon request of an accused or by the government?
- N. Should the number of judges on the Court of Appeals for the Armed Forces be reduced to three in order to comport with all other federal courts of appeals?
- O. Would it be appropriate to limit membership on military courts of appeals to retired judge advocates who are voluntarily recalled to active duty for a term of years?
- P. Should the practice of supervisors rating military appellate judges be abolished?

IX. ARTICLE 15 PUNISHMENT

- A. Should Article 15, Non Judicial punishment, be repealed or amended?
 - 1. To abolish the right of the service member to refuse punishment for minor infractions with serious limitations upon available punishments
 - 2. To abolish the right of appeal for minor infractions but allow an Article 138 complaint or IG complaint if the service member feels aggrieved
 - 3. To forbid a record of non-judicial punishment for minor infractions from becoming a part of a member's service record and making the results inadmissible in other judicial or administrative proceedings including bar to reenlistment, promotion boards, etc.
 - 4. To create a military magistrate by statute with the power to adjudicate more serious but albeit minor allegations of misconduct referred to the magistrate by an accused's commander with the power to order punishment under circumstances similar to existing non judicial punishment with the corresponding right to refuse such punishment and demand a trial. The results of the proceedings would become part of the

member's record. Also, adjudication by the magistrate would bar further prosecution under double jeopardy rules.

- B. Should the 1950 Naval exceptions (e.g., paragraph 132, MCM implementing Article 15(b), Uniform Code of Military Justice) that deny Naval and Coast Guard personnel the right to demand trial by court-martial be extended to unified commanders whose units may be deployed under similar circumstances?
- C. Should the Naval exceptions, e.g., Article 15(a)(2)(B)(F), be repealed?

X. SUMMARY COURTS-MARTIAL

- A. Should Article 20, Uniform Code of Military Justice, be amended to (a) permit punishment of officers and (b) extend the scope of enlisted punishment?
- B. Should the summary court-martial be abolished?

IX. POST CONVICTION

- A. Should the UCMJ be amended to provide a comprehensive statutory scheme for collateral attacks on courts-martial similar to the one found in Title 28 U.S.C.A for Habeas Corpus in federal district courts and in "Post Conviction Relief Acts" of the various states?
- B. Should the holdings in United States v. Dubay and its progeny be codified in the UCMJ to provide jurisdiction and authority for military judges to entertain collateral attacks on courts-martial?
- C. Should military judge advocates be authorized by statute to represent military defendants in civilian federal district courts and appeals courts?
- D. If a comprehensive post conviction relief scheme is adopted in the UCMJ, should that provide the exclusive remedy for a military defendant or should "habeas corpus" in a Federal district Court be thereafter available?

MISCELLANEOUS

- A. Should the Code Committee be abolished?

- B. Should retired regular officers, if qualified by education and experience, be eligible for appointment to the United States Court of Appeals for the Armed Forces?
- C. Should the political balance test for appointees to the United States Court of Appeals for the Armed Forces be repealed?
- D. Should there be certification requirements by the Courts of Criminal Appeal and the United States Court of Appeals for the Armed Forces for appellate counsel?
- E. Should all military judges and military lawyers be required to maintain active status in good standing as a member of a state bar or the District of Columbia Bar?
- F. Should the Code Committee or the United States Court of Appeals for the Armed Forces be given the additional responsibility of administering a single military bar with uniform standards of professional responsibility thereby replacing the requirement that military members be admitted to a state bar?
- G. Should the rulemaking contemplated by Article 36 be conducted by a broad-based advisory committee with civilian as well as military membership?
- H. Should the trial and appellate defense services be consolidated into one defense service for each service, or should there be a consolidated defense service for all services?
- I. Should the creation of independent investigative support for military defense counsel be made statutory?
- J. Should JAG officers or Law Specialists be required to serve at least one year as trial counsels who litigate a minimum amount of cases before being assigned as defense counsels in order to provide more effective counsel to enlisted personnel, who usually cannot afford civilian representation?
- K. Should Board of Corrections for Military Records (BCMR) decisions be reviewable as a matter of right to a federal court, such as the Court of Appeals for the Armed Forces?

Appendix B: List of Witnesses

