

**Report of the
Commission on the 50th Anniversary of the
Uniform Code of Military Justice**

May 2001

The Commission

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I. Statement of Purpose

Sponsored by the National Institute of Military Justice, a private non-profit organization dedicated to the fair administration of military justice, this Commission was formed on the occasion of the 50th anniversary of the Uniform Code of Military Justice, the greatest reform in the history of United States military law.¹ The UCMJ was drafted in the aftermath of World War II, at a time when protecting the rights of military personnel was foremost in the minds of lawmakers. The outcry of veterans' organizations and bar associations made legislators aware of the arbitrary and summary nature of many of the two million courts-martial held during the war. By setting a higher standard of due process for servicemembers accused of crimes, the UCMJ, augmented by significant revisions in 1968 and 1983, became a model for criminal justice. It protected accused servicemembers against self-incrimination fifteen years before *Miranda v. Arizona*, provided for extensive pretrial screening investigations, permitted relatively broad access to free counsel, and incorporated many of the best features of federal and state criminal justice systems.

This landmark legislation created the fairest and most just system of courts-martial in any country in 1951. But the UCMJ has failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world, in 2001. The UCMJ governs a criminal justice system with jurisdiction over millions of United States citizens, including members of the National Guard, reserves, retired military personnel, and the active-duty force, yet the Code has not been subjected to thorough or external scrutiny for thirty years. The last comprehensive study of courts-martial took place in 1971, when Secretary of Defense Melvin Laird, troubled by allegations of racism at courts-martial, appointed a task force to study the

¹ As the initial announcement of the Commission explained: "The Uniform Code of Military Justice was approved on May 5, 1950 and took effect on May 31, 1951. In § 556 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress commemorated the 50th anniversary of the Code. Among other things, Congress noted that it had 'enacted major revisions of the [Code] in 1968 and 1983 and, in addition, has amended the code from time to time over the years as practice under the code indicated a need for updating the substance or procedure of the law of military justice.' Section 556 asks the President to issue a suitable proclamation and 'calls upon the Department of Defense, the Armed Forces, and the United States Court of Appeals for the Armed Forces and interested organizations and members of the bar and the public to commemorate the occasion of [the] anniversary with ceremonies and activities befitting its importance.' Believing that an integral part of those activities should be an appraisal of the current operation of the Code and an evaluation of the need for change, the National Institute of Military Justice is sponsoring a Commission on the 50th Anniversary of the Uniform Code of Military Justice, in coordination with The George Washington University Law School."

administration of military justice.² This legislative and executive inattention is a new phenomenon; between 1951 and 1972, military justice was the focus of dozens of congressional hearings and the subject of countless official reports from government agencies.³

Based on the response to the Commission's request for comments on the current military justice system, a "bottom-up" review of military justice is long overdue. In recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago.⁴ In contrast, military justice in the United States has stagnated, remaining insulated from external review and largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies. Since the Tailhook episode in 1991, the armed forces have faced a near-constant parade of high-profile criminal investigations and courts-martial, many involving allegations of sexual misconduct, each a threat to morale and a public relations disaster. As a result of the perceived inability of military law to deal fairly with the alleged crimes of servicemembers, a cottage industry of grassroots organizations devoted to dismantling the current court-martial system has appeared, aided by the reach of the worldwide web and driven by the passions of frustrated servicemembers, their families, and their counsel.⁵ The Commission—which could not pay for the travel of witnesses, and which

² Department of Defense, Report of the Task Force on the Administration of Justice within the Armed Forces (Washington, D.C., Nov. 30, 1972). A limited review was undertaken more recently, in 1983, when Secretary of Defense Caspar Weinberger appointed an Advisory Commission to consider whether military judges should have tenure and whether they should be solely responsible for sentencing, whether the Court of Military Appeals should be an Article III court, and whether the jurisdiction of the special court-martial should be expanded. See 1 THE MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT, COMMISSION RECOMMENDATIONS 2 (1984).

³ For example, extensive, multi-day hearings were held by the House and Senate Armed Services Committees on topics related to military justice in 1962, 1965, 1966, 1968, 1971, and 1972. The services also conducted their own internal studies as well, perhaps the best known commissioned by Secretary of the Army Wilber M. Brucker, which resulted in the 1960 Powell Report.

⁴ This modernization has focused on both increasing the impartiality of court-martial procedures and respecting the human rights of servicemembers. Two of the most prominent cases decided during the last decade are *Findlay v. United Kingdom*, 24 EUR. CT. H.R. 221 (1997) and *R. v. Genereux*, [Canada 1992] 1 S.C.R. 259, 88 D.L.R. 4th 100 (1992), but reform efforts have affected military justice in Australia, India, Ireland, Israel, Mexico, and South Africa as well as in the United Kingdom and Canada. See Eugene R. Fidell, A WORLD-WIDE PERSPECTIVE ON CHANGE IN MILITARY JUSTICE, 48 A.F. L. REV. 195, 195-96 (2000) (analyzing military-legal reform in countries around the world).

⁵ See, e.g., the websites of Citizens Against Military Justice (www.militaryinjustice.org), the United States Council on Veterans Affairs (www.uscova.org), Sailors United For Self Defense (<http://communities.msn.com/SAILORSUNITEDFORSELFDEFENSE>), American Gulf War Veterans Association (<http://www.gulfwarvets.com>), and www.militarycorruption.com.

publicized its hearings largely by word-of-mouth--heard testimony from citizens who traveled to Washington, D.C., from states around the country, including those who came from Washington, Colorado, Massachusetts, and Louisiana to make their voices heard, joining hundreds who submitted written comments.

In order to address this need for public scrutiny and reform, the Commission began its work by soliciting comments in order to formulate a list of topics to be addressed.⁶ Thereafter, a public hearing was held on Tuesday, March 13, 2001, at The George Washington University Law School.⁷ More than 250 individuals, representing themselves and more than a dozen organizations, submitted written comments to the Commission. Nineteen testified in person.⁸ This Report, intended for submission to the House and Senate Committees on Armed Services, the Secretary of Defense, the Service Secretaries, and the Code Committee, was prepared to convey the results of the hearing and the Commission's deliberations about military justice to those who can help the UCMJ live up to its promise when it was implemented in 1951.

In this Report, the Commissioners seek to:

- (1) Provide a record of submissions and testimony;
- (2) Make specific recommendations for improvement; and
- (3) Identify issues warranting further study and consideration.

The Commission's work is not intended to substitute for congressional hearings or officially sponsored government studies of military justice, both of which the Commissioners would heartily welcome. However, the depth and breadth of the Commission's experience should make any observer pause before dismissing its recommendations. Chaired by the Honorable Walter T. Cox III, the Commission's cumulative experience with the armed forces and the law exceeds 150 years. Its members have served in the uniforms of the United States Army, Navy, Air Force, and Coast Guard and are members of multiple bars. They have practiced, studied, taught—and made—military law under the UCMJ.

Judge Cox, in addition to serving in the United States Army, has been a Judge of the South Carolina Circuit Court and an Acting Associate Justice of the Supreme Court of South Carolina, and has served on the United States Court of

⁶ This list of topics, reflecting the concerns of the Commissioners as well as those who submitted suggestions for topics, is at Appendix A.

⁷ The proceedings were recorded on videotape. Copies may be ordered by contacting Mr. Andrew Laurence, Media Center Supervisor, The George Washington University School of Law, Jacob Burns Law Library, 716 20th Street N.W., Washington, D.C., 20052.

⁸ See Appendix C for the submissions and Appendix B for the list of witnesses.

Military Appeals and the United States Court of Appeals for the Armed Forces, including four years as Chief Judge. Captain Guy R. Abbate, Jr., JAGC, USN (Ret), a senior instructor at the Naval Justice School and a consultant to the Defense Institute of International Legal Studies and the Naval Justice School, served in the Navy Judge Advocate General's Corps for 20 years. Professor Mary M. Cheh is the Elyce Zenoff Research Professor of Law at The George Washington University Law School and a member of the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces. A former Judge Advocate General of the Navy and a veteran of 28 years of service, Rear Admiral John S. Jenkins, JAGC, USN (Ret), is Senior Associate Dean for Administrative Affairs at The George Washington University Law School. Lieutenant Colonel Frank J. Spinner, USAF (Ret), represents military personnel in court-martial trials and appeals as an attorney in private practice after retiring from the United States Air Force Judge Advocate General's Department in 1994.

Before setting forth its recommendations, the Commission wishes to acknowledge the unique atmosphere in which military justice operates. During hostilities or emergencies, it is axiomatic that commanders must enjoy full and immediate disciplinary authority over those placed under their command. The Commission believes that none of its suggestions will interfere with the recognized need of commanding officers to function decisively and effectively during times of war as well as peace.

II. Executive Summary

The Commission recommends immediate action to address four problem areas of court-martial practice and procedure. These recommendations, addressed at length in Part III below, are:

1. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.
2. Increase the independence, availability, and responsibilities of military judges.
3. Implement additional protections in death penalty cases.
4. Repeal the rape and sodomy provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct. Replace them with a comprehensive Criminal Sexual

Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code.

Other issues warrant consideration as well. Part IV lists several concerns of the Commission, including the proper role of the staff judge advocate, the question of fairness in administrative processes, the wisdom of the Feres doctrine in light of present-day tort practice, the sentencing authority of military judges, the trial instructions used in cases of conscientious objection, and the jurisdiction of military appellate courts. Further study and more extensive hearings would help to resolve the many questions that plague servicemembers and military legal practitioners who confront these important areas of military law.

Consistent with its emphasis on enhancing the perceived and actual fairness of military justice under the UCMJ, the Commission also urges the adoption of a more open process for studying and altering the UCMJ as necessary. The current system of recommending changes to the Code, which involves closed meetings and little opportunity for input from civilian and military practitioners, has failed to encourage much-needed reform while contributing to a public image of courts-martial as immune from external scrutiny. Implementing a more transparent process to consider changes to court-martial rules and procedures would correct the impression that the military justice system is unresponsive to the legitimate concerns of the public.

III. Recommendations

The Commission identified four areas in need of immediate attention, based on its first-hand observations as well as the submissions received and the testimony heard. We recommend the following changes be effected as soon as possible:

A. Modify the pretrial role of the convening authority in both selecting court-martial members and making other pre-trial legal decisions that best rest within the purview of a sitting military judge.

As many witnesses before the Commission pointed out, the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces. Fifty years into the legal regime implemented by the UCMJ, commanding officers still loom over courts-martial, able to intervene and affect the outcomes

of trials in a variety of ways. The Commission recognizes that in order to maintain a disciplinary system as well as a justice system commanders must have a significant role in the prosecution of crime at courts-martial. But this role must not be permitted to undermine the standard of due process to which servicemembers are entitled.

The submissions that appear in Appendix C describe many possible ways to reduce the impression of unfairness created by the role of convening authorities in military criminal justice. The question of what role such authorities should play in the disciplinary and criminal structure of the modern armed forces warrants further study. But based on the Commission's experience, and on the input received in submissions and testimony, there is one action that should be taken immediately: Convening authorities must not be permitted to select the members of courts-martial.

There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits—indeed, requires—a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority. The Commission trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial. But there is no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates. Members of courts-martial should be chosen at random from a list of eligible servicemembers prepared by the convening authority, taking into account operational needs as well as the limitations on rank, enlisted or officer status, and same-unit considerations currently followed in the selection of members. Article 25 of the UCMJ should be amended to require this improvement in the fundamental fairness of court-martial procedure.

While the selection of panel members is clearly the focal point for the perception of improper command influence, the present Code entrusts to the convening authority numerous other pretrial decisions that also contribute to a perception of unfairness. For example, the travel of witnesses to Article 32 hearings, pretrial scientific testing of evidence, and investigative assistance for both the government and the defense are just a few of the common instances in which the convening authority controls the pretrial process and can withhold or grant approval based on personal preference rather than a legal standard. While the responsibility for such matters shifts to the military judge upon referral to court-martial, the delays created before the trial begins undermine due process for both sides at a court-martial. The need for the availability of a sitting judge,

from at least the moment of preferral of the charges, is discussed at length in III.B. below, but it is the perception that the convening authority can manipulate the pretrial process to the advantage of either side that mandates this change in authority over pretrial legal matters. This issue goes to the core of a serviceperson's rights to due process and equal protection under the law. Pretrial decisions involve legal judgments that can—and often do—affect the outcome of trials. For that reason, like the selection of panel members, decisions on pretrial matters should be removed from the purview of the convening authority and placed within the authority of a military judge.

The Commission is aware of the 1999-2000 comprehensive study completed by the Joint Service Committee on Military Justice of the Department of Defense, which concluded that the present allocation of responsibility among convening authorities and military judges should be retained. We respectfully disagree with the conclusions reached by that body. The combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.

B. Increase the independence, availability and responsibilities of military judges.

Complaints against the military justice system have long been fueled by allegations that military judges are neither sufficiently independent nor empowered enough to act as effective, impartial arbiters at trial. Since the adoption of the UCMJ, the authority of military judges (initially “law officers” under the 1950 UCMJ) has gradually increased, to the point where many judges now possess, either by regulation or by custom and tradition of the services, at least some modicum of judicial independence. The Commission is convinced that further and innovative change is needed to complete the process of making military trial and appellate judges full-fledged adjudicators of criminal law and procedure.

The Commission believes that three immediate changes would enhance the military judiciary and its ability to accomplish its mission and, at the same time, provide greater protections for accused persons. The changes would also enhance the prosecutors' ability to process courts-martial in an orderly and effective fashion. First, the Commission recommends the creation of standing judicial circuits, composed of tenured judges and empowered to manage courts-

martial within geographic regions. Variants of this system are already in use in some regions and branches of the service, but it is crucial that a judge be identified and made available to all accused servicemembers, as well as to the prosecution, after charges are preferred. Under the current system, neither defense counsel nor prosecutors have a judicial authority to whom to turn until very close to the date of trial. This creates delay, inefficiency, and injustice, or at a minimum, the perception of injustice, as described in III.A. above.

Second, establishing fixed terms of office for military judges would also enhance the overall independence of the military judiciary. The Joint Service Committee of the Department of Defense in a recent report to the Code Committee recognized that this was desirable and feasible, but stopped short of recommending a legislative fix. The Commission believes that increased judicial independence is critical, given the central role of judges in upholding the standards of due process, preserving public confidence in the fairness of courts-martial, and bringing United States military justice closer to the standards being set by other military criminal justice systems around the world.

Third, either the President through his rule making authority, or Congress through legislation, should establish clear processes and procedures for collateral attack on courts-martial and authorize appellate military courts to both stay trial proceedings and to conduct hearings on said matters within their jurisdiction. The present ad hoc system of appellate courts ordering post-trial hearings without any clear guidelines or procedures is contrary to the practice of the United States District Courts and state trial courts throughout the land.

C. Implement additional protections in death penalty cases.

Given the increased scrutiny focused on capital litigation in the United States, the operation of the death penalty in the armed forces deserves close attention. Opponents of capital punishment have raised substantial questions of whether the modern military needs a death penalty, particularly during peacetime (an issue that the Commission feels deserves further study), but even the most ardent supporters of the death penalty accept the critical need for procedural fairness in capital cases. The Commission recommends that three steps be taken to improve capital litigation in the military:

1. Require a court-martial panel of 12 members.
2. Require an anti-discrimination instruction.
3. Address the issue of inadequate counsel by studying alternatives to the current method of supplying defense counsel.

Among all of the United States criminal jurisdictions that may impose a sentence of death, only at a court-martial does that sentence not require the verdict of a twelve-person jury. A general court may adjudge death with as few as five members, an anomaly that corrupts the legitimacy of both panel selection and the verdict itself.⁹ Because citizens in uniform deserve no less consideration than their civilian peers, the UCMJ should be amended to require twelve members in capital cases. Already the Manual for Courts-Martial requires special procedures for capital courts-martial, and the Court of Appeals for the Armed Forces has recognized the burdens that capital litigation imposes on both accused servicemembers and the resources of military justice. Requiring twelve members to serve on capital courts-martial (and implementing our first recommendation overall, calling for random selection of eligible members) would raise the standard of procedural justice for accused servicemembers to the level already established in civilian capital litigation.

Like requiring twelve-member panels in capital cases, our second recommendation could be implemented without major cost or change in existing procedures. We recommend that military judges instruct panels in capital cases that they may not consider the race of the accused servicemember or the victim(s) in deciding whether to impose death.¹⁰ The racial disparities of military death row mirror the disparities evident in civilian criminal jurisdictions that impose death. Of the six servicemembers currently on military death row, four are African American, one is a native Pacific Islander, and one is white; all were convicted for killing white victims. An explicit instruction prior to sentencing would remind courts-martial of the importance of ensuring racial justice amid the high stakes and emotions of capital cases.

Addressing the Commission's third concern is more difficult, but no less important, than addressing the issues of panel size and racial disparities in the administration of the military death penalty. Inadequate counsel is a serious threat to the fairness and legitimacy of capital courts-martial, made worse at court-martial by the fact that so few military lawyers have experience in defending capital cases. The current system of providing and funding defense counsel shortchanges accused servicemembers who face the ultimate penalty. It has been long recognized by every U.S. jurisdiction with a death penalty that only qualified attorneys may conduct death penalty cases. The paucity of military death penalty referrals, combined with the diversity of experience that is

⁹ See the submissions of the Bar Association of the District of Columbia and the American Civil Liberties Union for a full explication of the ramifications of the unfixed, small size of capital courts-martial.

¹⁰ For models of such an instruction, see 21 U.S.C. § 848(o) (1988) and 18 U.S.C. § 3593 (f) (1994).

required of a successful military attorney, leaves the military's legal corps unable to develop the skills and experience necessary to represent both sides properly. The Commission believes that Congress should study and consider the feasibility of providing a dedicated source of external funding for experienced defense counsel if military capital litigation continues to be a feature of courts-martial in the 21st century.

D. Repeal the rape and sodomy provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct. Replace them with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code.

Of all of the topics that appeared on the Commission's long list of possible areas for consideration, the issue of prosecuting consensual sex offenses attracted the greatest number of responses from both individuals and organizations. The Commission concurs with the majority of these assessments in recommending that consensual sodomy and adultery be eliminated as separate offenses in the UCMJ and the Manual for Courts-Martial. Although popular acceptance of various sexual behaviors has changed dramatically in the fifty years since the UCMJ became effective, the Commission accepts that there remain instances in which consensual sexual activity, including that which is currently prosecuted under Articles 125 and 134, may constitute criminal acts in a military context. Virtually all such acts, however, could be prosecuted without the use of provisions specifically targeting sodomy and adultery. Furthermore, the well-known fact that most adulterous or sodomitical acts committed by consenting and often married (to each other) military personnel are not prosecuted at court-martial creates a powerful perception that prosecution of this sexual behavior is treated in an arbitrary, even vindictive, manner. This perception has been at the core of the military sex scandals of the last decade.

Because it is crucial that servicemembers are both made aware of and held accountable for sexual activities that interfere with military missions, undermine morale and trust within military units, or exploit the hierarchy of the military rank structure, the Commission recommends that a new statute be drafted to replace the current provisions. Many issues presented in the modern context simply do not fit the current statutes. For example, adultery, indecent exposure, indecent acts, unprotected sexual intercourse by an HIV-positive servicemember, wrongful cohabitation, fraternization, and numerous other offenses are not specified in the Uniform Code of Military Justice but are instead prosecuted under the general article of the Code as "conduct prejudicial to good order and

discipline or service discrediting conduct.” The same is true of incest, the sexual abuse of minors, pandering or pornography.

A comprehensive Criminal Sexual Conduct statute would more realistically reflect the offenses that should be proscribed under military law. The new statute would reconfigure the entire field of “Criminal Sexual Conduct” in the military context, replacing the outdated “rape and carnal knowledge,” “sodomy,” and general article offenses with a modern statute similar to the laws adopted by many states and in Title 18 of the United States Code.¹¹ The Commission urges that the new statute recognize that military rank and organization may produce an atmosphere where sexual conduct, although apparently consensual on its face, should be proscribed as coercive sexual misconduct. There are many models from civilian life that make similar legal distinctions, including laws that govern sexual activity between teachers and students, doctors and patients, probationers and counselors, and corrections officers and prisoners. The Commission believes that this type of statute is appropriate and relevant in a military organization with its attendant subordinate-superior and special trust relationships.

IV. Discussion of Additional Issues

The Commission stands ready to assist in the implementation of the recommendations set forth above. These proposals, however, do not exhaust the need for reform within the military justice system. Additional matters worthy of further consideration include:

A. Staff Judge Advocates. The impression that staff judge advocates (SJA’s) possess too much authority over the court-martial process is nearly as damaging to perceptions of military justice as the over-involvement of convening authorities at trial. The broad authority granted some staff judge advocates creates a number of unwanted, contradictory images of courts-martial: that over-zealous prosecutors can pursue charges at will and are rewarded for aggressive prosecution, that convening authorities routinely disregard the legal advice of their SJA’s in order to pursue unwarranted or even vindictive prosecutions, and that lawyers, rather than line officers, control the military justice apparatus. Staff judge advocates, who act as counsel to commanding officers and not as independent authorities, should not exert influence once charges are preferred,

¹¹ See, e.g., 18 U.S.C.A. §§ 2241 & 2242 (2000); Model Penal Code § 213 (1962). Numerous states have enacted similar statutes.

should work out plea bargains only upon approval of the convening authority, and deserve a clear picture of what their responsibilities are.

It has been recognized since the adoption of the UCMJ that the invidiousness of command influence strikes at the heart of the fairness of the process. Too often, however, critics have focused exclusively on the inappropriate actions of convening authorities in pointing out instances of command influence that violate Article 36 of the UCMJ. In reality, the threat is as likely to come from SJA's and "others subject to the Code," see Article 36 (b), as from convening authorities. The Code and the Manual for Courts-Martial should be amended to stress the need for impartiality, fairness and transparency on the part of staff judge advocates as well as all attorneys, investigators, and other command personnel involved in the court-martial process. These amendments should be drafted so as to make clear that violation of these principles as well as the trust inherent in these tasks is punishable under the UCMJ.

B. Administrative processes. The Commission's focus is on military criminal justice, but we would be remiss in ignoring the impression of unfairness created by the growing use of administrative discharge action in lieu of court-martial. While the services must be afforded considerable latitude to manage their personnel, there is no denying that administrative action, from non-judicial punishment to administrative withdrawal of qualifications, certifications, and promotion opportunities, can have a devastating effect on an individual's enlistment or career. The misuse, or the perception of misuse, of these administrative processes subverts the fundamental protections of the UCMJ, destroying the notion of fundamental fairness that is so critical to a professional military force. The Commission recognizes that an aggrieved servicemember may seek administrative redress at either the appropriate military administrative appeal board or in federal court, but in most instances these processes cannot make these individuals whole. Rarely can servicemembers be returned to normal career tracks once they have been unfairly administratively sanctioned and fallen behind their career peer groups. Thus, the Commission recommends an overall review of the military disciplinary system should consider, and, where necessary, reform, the administrative disciplinary and sanctioning process.

Three aspects of the current system in particular concern the Commission. First, the manner in which discharges are characterized is a relic of the past and should be updated to reflect contemporary realities. The current U.S. military is a volunteer-mercenary force, not a conscripted armed force. It may be sufficient simply to "fire" a servicemember who does not conform to the standards and norms of military service rather than stigmatizing that person with a negative discharge. This shift in the characterization of military discharges would permit servicemembers to receive veterans' entitlements based on criteria such as their

length of good service and whether they were medically disabled while on active duty, rather than relying on an arcane hierarchy of discharge categories.

Second, the current system encourages disparate treatment of servicemembers: One member may be administratively discharged for felonious conduct, such as use of controlled substances, and another subjected to court-martial for the same offense. The member who is tried by a court-martial ends up with a federal criminal felony record, the other none. Such widely varying punishments are inconsistent with the UCMJ's fundamental goal of standardizing and modernizing criminal sanctions in the armed forces and should be corrected.

Finally, the current system does not provide ready access to the federal courts or other appellate review. Consideration should be given to providing for military appellate review of administrative discharges. The military appellate courts are already in place and are capable of reviewing administrative discharges in a manner similar to their current review of court-martial convictions. Likewise, the United States Court of Appeals for the Armed Forces could review the military appellate courts upon petition in the same way that it currently reviews courts-martial convictions.

C. Feres Doctrine. The Commission was not chartered with the idea that our study would include matters such as the Feres Doctrine. However, given that it was articulated the same year that the UCMJ was adopted, and that many former servicemembers have been frustrated by its constraints on their ability to pursue apparently legitimate claims against the armed forces, many of which bear little if any relation to the performance of military duties or obedience to orders on their merits, the Commission believes that a study of this doctrine is warranted. An examination of the claims that have been barred by the doctrine, and a comparison of servicemembers' rights to those of other citizens, could reform military legal doctrine in light of present day realities and modern tort practice. Revisiting the Feres Doctrine would also signal to servicemembers that the United States government is committed to promoting fairness and justice in resolving military personnel matters.

D. Sentencing. The Commission believes the sentencing process at court-martial deserves further review. Suggestions for reform have ranged from the use of sentencing guidelines to making military judges responsible for all sentencing. An anomaly of the court-martial sentencing process is that a military accused may request to be sentenced by military judge alone only if he or she elects to be tried without court members. The Commission urges Congress to authorize a military accused to permit the military judge to pass on a sentence even if a trial has proceeded before court members. Further, the Commission

recommends that serious consideration and study be given to making military judges responsible for all sentencing in all cases, and to granting military judges the authority to suspend all or part of a court-martial sentence. Such judicial powers are closely related to the Commission's suggestion that the military judges be given enhanced independence and authority to manage pretrial matters.

E. Instruction on conscientious objection. The armed forces' current management of conscientious objectors is hindered by inadequate trial instructions and administrative shortcomings, both of which the Commission believes should be addressed. Protecting the rights of conscientious objectors is a particular concern at court-martial, where an individual who has professed principled opposition to military service is judged by persons who have embraced that very service. Military judges should issue clear instructions explaining the legal status and responsibilities of a servicemember who has made a claim of conscientious objection but is awaiting a decision on his or her status. The services should also study ways to coordinate better the criminal and administrative processes in these cases, particularly when criminal charges are brought against a servicemember whose discharge for conscientious objection is pending.

F. Jurisdiction of the military appellate courts. In the aftermath of the Supreme Court's decision to limit the authority of the United States Court of Appeals for the Armed Forces in *Clinton v. Goldsmith*,¹² the Commission believes that further study to clarify the jurisdiction of appellate courts should be undertaken.¹³ However, if the authority of military judges were enhanced as suggested above in III.B., the question of appellate jurisdiction would begin to resolve itself, since military appeals courts clearly possess authority under the UCMJ to review the rulings of military judges at trial.

G. Pre-trial and trial procedures. The Commission received a number of suggestions concerning improvements to the actual trial process. For example, many submissions suggested that the Article 32 officer should be either a military judge or a field grade judge advocate with enhanced powers to issue

¹² See *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (holding that the United States Court of Appeals for the Armed Forces did not have jurisdiction under the All Writs Act to prevent the Air Force from dropping a convicted servicemember from its rolls).

¹³ Challenges to the jurisdiction of the court have proliferated since *Clinton v. Goldsmith*, creating uncertainty about the legitimacy of the court's much-needed authority over many aspects of military justice. See, e.g., *United States v. White*, 54 M.J. 469 (2001); *United States v. Sanchez*, 53 M.J. 393 (2000); *United States v. Salahuddin*, 54 M.J. 918 (A.F.Ct.Crim.App., 2001); *Ponder v. Stone*, 54 M.J. 613 (N.M.Ct.Crim.App., 2000); *United States v. Kinsch*, 54 M.J. 641 (Army Ct.Crim.App., 2000); *United States v. Ouimette*, 52 M.J. 691 (C.G.Ct.Crim.App., 2000).

subpoenas, and to make binding recommendations to dismiss charges where no probable cause was found. Others recommended increasing the number of peremptory challenges for both the government and the defense, permitting lawyer voir dire, granting military judges contempt power over both military personnel and civilians during trial, and allowing witnesses to be sworn by either military judges or clerks. The Commission takes no position regarding these suggestions, but believes that like many of the other issues presented, these comments are worthy of further study and full consideration.

V. Appendices

- A. List of Topics
- B. List of Witnesses
- C. Submissions
- D. Independent Judiciary Report of the Joint Service Committee on Military Justice
- E. Bibliography on Reform and Military Law
- F. Military Justice Websites