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AUTOMATIC APPEAL UNDER UCMJ ARTICLE 66: TIME FOR A CHANGE

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I. Introduction

Uniform Code of Military Justice (UCMJ) Article 66 (Art. 66) requires The Judge Advocate General (TJAG) to refer to a Court of Criminal Appeals, the record of each trial by court-martial in which the approved sentence extends to death, confinement for one year or more, or dismissal, dishonorable or bad conduct discharge (BCD) of a service member.[1] In short, Art. 66 provides an automatic appeal for cases in

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[1] UCMJ art. 66(b) (2002). Article 66(b) states: The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

> (1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and (2) except in the case of a

which an accused is sentenced to a punitive discharge or confinement for one year or more.[2] Congress adopted the automatic appeal procedures set forth in Art. 66 in 1950 as a safety net to protect the rights of convicted service members in what was then considered a flawed and unfair military justice system.[3] In the more than fifty years since Congress enacted the UCMJ, the circumstances that gave rise to Congress' requirement for an automatic appeal have changed drastically. The safeguards Congress established in Art. 66 are no longer needed in many cases because of improvements at the trial level and changes in society.

As the operational tempo and deployments increase for all branches of the Armed Forces, and demands on the personnel and resources of each service's Judge Advocate General's Corps increase, it is time to reassess the breadth of the safety net that Art. 66 casts. During fiscal years (FY) 1998-2002, the Army, Navy/Marine Corps, and Air Force Courts of Appeals (the service courts) reviewed almost 15,800 cases pursuant to Art. 66.[4] For each of these cases, the federal government provided all of the resources for the appeal—from court reporting and transcription to highly qualified defense appellate counsel and, most importantly, the time and effort of a panel of service court judges to hear and decide each case. No other justice system in the country, state or federal, has such a liberal and generous appellate procedure.[5]

The burden on military units, staff judge advocate offices, government and defense appellate departments, and the service courts in

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> sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

Id.

[2] *See id.*

[3] *See generally* H.R. REP. NO. 81-491, at 2-4 (1948) [hereinafter H.R. REP. NO. 81-491] (noting congressional hearings on 1947 amendments to the Articles of War which created the BCD for the U.S. Army); Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 17 (2000).

[4] *See, e.g.*, U.S. Court of Appeals for the Armed Forces, *Annual Reports*, *available at* http://www.armfor.uscourts.gov/Annual.htm (last visited Sept. 3, 2004) [hereinafter *Annual Reports*] (listing annual reports covering each fiscal year, including the number of cases reviewed).

[5] *See* The Honorable Jacob Hagopian, *The Uniform Code of Military Justice in Transition*, ARMY LAW., July 2000, at 4; *see generally* PAUL D. CARRINGTON, JUSTICE ON APPEAL 48-96 (1976); ROBERT STERN, APPELLATE PRACTICE IN THE UNITED STATES 131-81 (2d ed. 1989).

preparing, processing, hearing, and deciding these appeals is enormous.[6] Many of these cases did not warrant full judicial appellate review. In most, the likelihood of reversible error was low and little probability existed that the conviction or discharge would have long-term stigmatizing effects on the convicted service member—especially for appeals from special courts-martial. For such cases, the potential benefits to the convicted service member do not warrant expenditure of the tremendous amount of resources required to provide a full appellate review. Other, less resource-intensive, methods of review would adequately protect the convicted service member.

To minimize the number of unnecessary automatic judicial appeals, this article proposes a change to Art. 66—eliminating the automatic judicial appeal for all special courts-martial, including those that adjudge a BCD.[7] This article proposes that the Judge Advocates General, rather than an appellate court, review all special courts-martial under the provisions of UCMJ Article 69[8] (Art. 69). The reasons for this proposed change are threefold. First, recent developments in the UCMJ and military justice provide safeguards that ensure accused service members

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[6] During FY 2002, the Armed Services sent almost 3,500 records of courts-martial to the service courts for review. *See Annual Reports*, *supra* note 4. Rule for Courts-Martial (RCM) 1103(b) requires the government to prepare a verbatim record of every general court-martial case in which:

> (i) Any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or (ii) A bad-conduct discharge has been adjudged.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103(b) (2002) [hereinafter MCM]. RCM 1103(c) makes the provisions of RCM 1103(b) applicable to special courts-martial. *See id.* R.C.M. 1103(c). Trial counsel are required to prepare an original and four copies of any record of trial that requires review under Art. 66. *See id*. R.C.M. 1103(g); *see also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 5 (14 Oct. 2002) [hereinafter AR 27-10] (providing detailed instructions on the preparation, authentication, and handling of records of trial), U.S. DEP'T OF ARMY, REG. 27-13, COURTS OF MILITARY REVIEW—RULES OF PRACTICE ASND PROCEDURE (29 May 1986) [hereinafter AR 27-13] (providing a detailed description of the appellate review process).

[7] *See* UCMJ art. 66. Up until 2002, RCM 201(f)(2)(B) limited the amount of confinement that could be adjudged at a special court-martial to 6 months. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B)(i). In 2002, the President of the United States increased the maximum confinement at a special court-martial to one year. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B)(i).

[8] UCMJ art. 69.

receive high quality trials[9] that are only infrequently set aside on appeal.[10] Second, service members separated with a BCD from a special court-martial no longer suffer any serious disadvantages or societal stigma based on their receipt of a BCD.[11] Civilian hiring practices and Veteran's Administration practices illustrate that receiving a BCD in today's world has little effect on a convicted service member's future employment, benefits, and lifestyle.[12] Third, reviewing special courts-martial cases under Art. 69 saves significant post-trial resources because such review does not require the preparation of verbatim records of trial.[13] This article includes specific recommendations for changes to the language of Art. 66, related Rules for Courts-Martial (RCM), service regulations, and for changing human resource allocations to accommodate the shift in workloads from the appellate courts to the offices of The Judge Advocates General.

II. History and Background of the BCD and UCMJ Art. 66

A. Separate Systems of Justice Before World War II

First enacted in 1951, the UCMJ consolidated and revised the existing laws governing the separate branches of the service (the Articles of War (AOW)[14] and the Articles for the Government of the Navy[15]) into

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[9] *See* Cooke, *supra* note 3, at 18-19.

[10] *See* data compilations, *infra* note 99.

[11] *See* Captain Charles E. Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 MIL. L. REV. 1, 44 (1978). In this article, the author reviewed various justifications traditionally advanced for imposing punitive discharges and other punishments on offenders. *See id.* Captain Lance surveyed over 1,300 employers, businesses, unions, institutions of higher learning, professional licensing boards, and personnel agencies seeking to ascertain what effect a punitive discharge had upon an applicant's chances of securing employment or securing admission for higher education. *See id.* Using the results of this survey, CPT Lance concluded that, the effectiveness of the punitive discharge as a punishment had decreased as demonstrated by the public's changing attitudes toward former service members who had been separated with punitive discharges. *See id.*

[12] *See id.*

[13] *See* UCMJ art. 69; MCM, *supra* note 6, R.C.M. 1103(b)(2)(B).

[14] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 1, The Articles of War (1928) [hereinafter AoW]. Congress amended the AoW multiple times until the UCMJ supplanted them in 1951.

[15] *See generally* U.S. DEP'T OF NAVY, NAVY REGULATIONS (1920) (reprinted, 1941, with all changes up to and including No. 22) [hereinafter AGN]. This publication was the repository for all regulations issued by the Secretary of the Navy, including those dealing with military justice. The regulations were collectively referred to as the Articles for the

one standard code. These systems of justice were similar in many ways. Both allowed for non-judicial punishment of enlisted service members,[16] and for three levels of courts-martial,[17] roughly equivalent to the three levels set out in the current UCMJ. In the Navy, the three levels included the deck court-martial, the summary court-martial, and the general court-martial.[18] The Army had a summary court-martial, a special court-martial, and a general court-martial.[19]

The most significant difference between the two systems was that the punishment at a Navy summary court-martial could include a BCD.[20] Up until 1948, the AoW had no such discharge; the only discharges Army courts-martial could adjudge were dismissals for officers and Dishonorable Discharges (DD) for enlisted members.[21] The Navy's pre-UCMJ BCD was not, however, considered serious punishment. Although authorized as part of a court-martial sentence, the BCD was akin to the administrative discharges used today.[22] No apparent stigma attached to such a discharge.[23] The Navy separated thousands of sailors

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Government of the Navy. The military justice regulations were superceded by the UMCJ in 1951.

[16] *See* AoW, *supra* note 14, art. 104; AGN, *supra* note 15, art. 24.

[17] *See* AoW, *supra* note 14, art. 3; AGN, *supra* note 15, arts. 24, 26-34, 35-60.

[18] *See* AGN, *supra* note 15, arts. 24, 26-34, 35-60.

[19] *See* AoW, *supra* note 14, art. 3.

[20] *See* AGN, *supra* note 15, arts. 24, 26-34, 35-60.

[21] *See To Amend the Articles of War To Improve the Administration of Military Justice, To Provide for More Effective Appellate Review, To Insure the Equalization of Sentences, and for Other Purposes: Hearing on H.R. 2575 Before the House Subcomm. on Armed Services*, 80th Cong. 1931-33 (1947) [hereinafter Hearing on H.R. 2575] (testimony of MG Thomas H. Green, The Judge Advocate General of the Army); *see also* United States v. Mitchell, 58 M.J. 446, 448 (2003); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 487 (2d ed. 1970).

[22] *See* NAVAL JUSTICE, U.S. NAVY, 53 (October 1945). Guidance for commanders in this publication stated:

> [A] bad-conduct discharge is seldom an appropriate punishment in time of war. If executed, it results in a loss of manpower [to the Navy] while placing both the offender and the service in anomalous position under the Selective Service Law. . . [I]f the offender is not reinducted in some branch of military service, the ultimate result is restoration to civil life with little difficulty in obtaining a safe and comparatively lucrative position. . . . It is noteworthy that the Army special court-martial . . . has no power to adjudge discharge.

Id.

[23] *See id.*; *see also* Hearing on H.R. 2575, *supra* note 21, at 1932 (testimony of Rear Admiral Cacough, The Judge Advocate General of the Navy).

with BCDs during World War II (WWII) with no procedure for judicial appellate review.[24]

B. Pre-UCMJ Military Justice and Early Reform Efforts

Before enactment of the UCMJ, both the Naval and Army justice systems were seriously flawed. The systems were intended to secure obedience and to ensure Soldiers and Sailors served the commander's will.[25] Although both systems provided for courts-martial, the courts looked nothing like today's courts. Courts-martial were merely a tool of the commander to carry out his intentions regarding discipline.[26] There was little, if any, relation to civilian criminal justice. Protecting the rights of the individual was not a primary purpose of the system.[27] As a result, great injustices were done in the name of discipline.[28]

One such injustice in World War I (WWI) sparked interest in reforming the military justice system. In August of 1917 sixty-three soldiers were court-martialed on charges of mutiny and murder stemming from racially charged riots in Houston, Texas.[29] Of the sixty-three soldiers tried, many were acquitted; however, others were sentenced to prison terms and thirteen, all black, were sentenced to death by hanging.[30] The sentences were carried out the day after the trial.[31] No report or message about the trials or the impending sentence was sent to any superior unit or to Washington, D.C.[32] The soldiers were simply hung in compliance with the law in existence at the time.[33] This incident

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[24] *See* Hearing on H.R. 2575, *supra* note 21, at 1932; *see also* Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 42-48 (1972) (reviewing the development of the military justice system from colonial times forward, emphasizing the lack of appellate review provided for convicted service members by either military authorities or the civilian courts before the advent of the UCMJ).

[25] *See* Cooke, *supra* note 3, at 3.

[26] *See id*.; *see also* Willis, *supra* note 24, at 43.

[27] *See* Cooke, *supra* note 3, at 3.

[28] *See id.* at 5.

[29] *See* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980 40 (2001).

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See To Improve the Establishment of Military Justice, Hearing on S. 64 Before the Senate Comm. on Military Affairs, 66th Cong., 1st Sess.* 1879-80 (1918). Major General Ansell testified:

and others, however, eventually received significant national attention leading to sweeping reform including review of the courts-martial system.[34]

During WWII, over sixteen million men and women served in the armed forces.[35] Commanders conducted over 2,000,000 courts-martial, resulting in many hundreds of thousands of convictions and stiff sentences. After the war, individuals and institutions lobbied Congress for changes to the system, highlighting its flaws—defense counsel (DC) were not lawyers, law officers who presided over trials were not lawyers, sentences were unable to be revised and trial mistakes could not be corrected.[36] Some of the longstanding complaints were expressed to TJAG of the Army, Major General Crowder, in a letter from the Secretary of War following WWI.[37] In response to these criticisms, Congress, in 1947, attempted its first large-scale effort to reform the military justice system.

The 1947 revisions to the AoW included two important reforms. First, Congress created court-martial review boards within the office of

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> The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been advised.

Id.

[34] *See* LURIE, *supra* note 29, at 40-1 (stating that the initial response to this incident from Washington, D.C., was to issue General Order No. 7, requiring that no sentence of death be carried out until the case had been reviewed in the Office of The Judge Advocate General).

[35] *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED; U.S. MILITARY PERSONNEL SERVING AND CASUALTIES 2 (2003), *available at* http://www.dior.whs.mil/mmid/casualty/wcprincipal.pdf (last visited Dec. 1, 2004) [hereinafter DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED; U.S. MILITARY PERSONNEL SERVING AND CASUALTIES].

[36] *See id.*

[37] *See* Letter from Major General E.H. Crowder, Judge Advocate General, U.S. Army, to Newton D. Baker, Secretary of War, U.S. Army (Mar. 10, 1919), *in* MILITARY JUSTICE DURING THE WAR: A LETTER FROM THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE SECRETARY OF WAR IN REPLY TO A REQUEST FOR INFORMATION, Government Printing Office, (1919); *see also* SENATE COMMITTEE OF ARMED FORCES, A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575; AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY 4-8 (H.R. 3687; S.1338)) (Comm. Print 1948).

TJAG.[38] While not appellate courts, these review boards were responsible for reviewing serious court-martial cases, including cases in which the accused was sentenced to confinement for a year of more or to a punitive discharge.[39]

Second, Congress created a new punitive discharge for the Army—the BCD—that a special or general court-martial could adjudge.[40] Congress specifically modeled the new Army BCD on the BCD the Navy had in place during WWII.[41] While Congress intended this new discharge to be a less severe punishment than the DD, it recognized that some service members receiving this discharge might have difficulty gaining employment in a country where one in every eight people was a military veteran.[42] To lessen the likelihood that a trial error would result in a soldier being sentenced to a BCD, Congress ensured the new review boards would review court-martial cases that adjudged BCDs.[43] It must be remembered, however, that at that time, most other facets of the military justice system had not changed. There were still problems with command influence and a lack of trained DC or judges at most trials was still the norm.[44]

In the next few years, the pace of military justice reform quickened. With the creation of the U.S. Air Force, the debate turned toward the need for a case review authority outside the office of TJAG, and for a more uniform system of military justice.[45] As a result, Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950. With the enactment of the UCMJ, Congress began to change the thrust of military justice from a command-dominated system to one more like the civilian criminal justice system with emphasis on due process and fairness.[46] The UCMJ brought many notable changes to the system. It created the position of law officer – the forerunner of the military judge—so that a

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[38] *See* H.R. REP. NO. 80-1034, at 6 (1947) [hereinafter H.R. REP. NO. 80-1034]. Congress passed the bill, which was the subject of this report, amending the AoW in 1947. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 1, The Articles of War (1949).

[39] H.R. REP. NO. 80-1034, *supra* note 38, at 21.

[40] *See id.* at 6.

[41] *See* Hearing on H.R. 2575, *supra* note 21, at 1930-33.

[42] *See* Cooke, *supra* note 3, at 3.

[43] *See* H.R. REP NO. 80-1034, *supra* note 38, at 2.

[44] *See* Cooke, *supra* note 3, at 9.

[45] *See id.* at 19.

[46] *See id*. at 10.

lawyer, rather than a line officer, presided over courts-martial.[47] The UCMJ afforded the accused, for the first time, the right to be represented by a qualified attorney in general courts-martial.[48] The UCMJ also codified protections against self-incrimination fifteen years before the Supreme Court's decision in *Miranda v. Arizona*.[49]

Of course, the UCMJ also incorporated some aspects of the old AoW system.[50] Among these were the BCD and automatic review provisions Congress added to the AoW in 1947. These provisions were non-controversial by the time of the congressional debates on the UCMJ. Congress incorporated their substance into UCMJ Art. 66 with little comment or discussion.[51] While there have been some minor changes to Art. 66 over time, the substance of Art. 66's automatic review provision has not changed since it was enacted in 1950.[52]

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[47] *See id*. at 9. MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 4e (1951) [hereinafter 1951 MCM]

[48] *See id*. 1951 MCM, *supra* note 47, para. 6a-6b.

[49] 384 U.S. 436 (1966). *See* Cooke, *supra* note 3, at 10*; see also* Honorable Walter T. Cox, III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 14 (1987).

[50] *See* Cox, *supra* note 49, at 9.

[51] *See generally* THE U.S. ARMY COURT OF MILITARY REVIEW, AN AUTHORITATIVE INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE 1950 1333-3027 (1985) (demonstrating that there was virtually no debate on the substance of Art. 66; most comments in the legislative history note only that Art. 66 was taken essentially verbatim from prior AoW provisions). Article of War 50(e) stated:

> . . . Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad conduct discharge . . . and every record of trial by general court-martial involving a sentence to confinement in a penitentiary . . . shall be examined by the Board of Review . . . .

See AoW, *supra* note 134, at 289. The language of AoW 50(e) was reflected in Art. 66(b) of the UCMJ in 1950, which stated:

> The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence . . . extends to death, dismissal of an officer . . . dishonorable or bad-conduct discharge, or confinement for more than one year.

See JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION 582 (2000).

[52] The original AoW did not provide for appellate review. The military first provided appellate boards of review for each service in 1918. *See* Headquarters, Dep't. of Army, Gen. Orders No. 7 (7 Jan. 1918). The jurisdiction and powers of the boards of review

It is not surprising that Congress put an automatic appeal provision in the UCMJ in 1950. While the UCMJ brought extraordinary changes to military justice, it did not fix all of the pre-WWII problems with the system. These included continuing problems with fairness and errors at the trial level.[53] Moreover, in the early 1950s, the situation in our country and military was not much different from WWII. The country was still on a war-footing, fighting the Korean War.[54] The Armed Forces, while smaller than during WWII, were still much larger than today, and had a large number of conscripted troops in their ranks.[55] As large numbers of veterans returned from war, punitively discharged

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were limited to cases involving death sentences, dismissals, and dishonorable discharges. *See id.* The 1947 amendment to the AoW gave the boards of review power to weigh evidence and to review all cases in which the sentence included a punitive discharge. *See* AoW, *supra* note 14, at 288. Congress adopted the jurisdiction and function of the boards of review set up in the AoW into the UCMJ in 1950. *See* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION, *supra* note 51, at 581-82. The 1968 amendments to the UCMJ altered Art. 66 by removing the words "Board of Review" and replacing them with "Court of Military Review." *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 64 (1985). The function of the boards of review and the Courts of Military Review were essentially the same. The 1983 amendments to the UCMJ altered Art. 66 by adding a provision that stated "(B) a notice of appeal under section 861 of this title (article 61) that has not been waived or withdrawn." *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE 1983 197 (1985). In 1994, Congress again changed the name of the service courts of military review to their current name, the service Courts of Criminal Appeals. *See* Pub. L. No. 103-337, 108 Stat. 2831 (1994). There was no change to the service courts' jurisdiction or function. *See id.* The service Courts of Criminal Appeals stated appellate jurisdiction includes: (1) cases in which the sentence, as approved by the convening authority, extends to death, dismissal of a commissioned officer, dishonorable or BCD, or confinement for one year or more; and (2) cases in which the accused has not waived or withdrawn an appeal, except death penalty cases. *See* UCMJ art. 66(b) (2002). The service Courts of Criminal Appeals are unique in that their jurisdiction does not extend solely to trial court errors. Rather, the courts have jurisdiction to determine whether they are convinced of the accused's guilt beyond a reasonable doubt, after "weigh[ing] the evidence, judg[ing] the credibility of witnesses, and determin[ing] controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(c).

[53] *See* Cooke, *supra* note 3, at 13. In *O'Callahan v. Parker*, 395 U.S. 258 (1969), in criticizing the military justice system under the UCMJ up until that time, the Supreme Court stated: ". . .[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 265.

[54] *See* Cooke, *supra* note 3, at 10.

[55] *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED; U.S. MILITARY PERSONNEL SERVING AND CASUALTIES, *supra* note 35 (during the years of the Korean War, 1950-1953, an average of 5,720,000 service members served on active duty).

service members might expect real difficulties obtaining employment.[56] As it did in the 1947 AoW amendments, Congress enacted an automatic court-martial review provision into the UCMJ to protect service members from the potential stigma of a punitive discharge. Today, however, the military justice system has matured.[57] Improvements in the system undercut the need for close appellate scrutiny of many courts-martial cases Congress deemed necessary over 50 years ago.

III. Changes to UCMJ Reduce the Need for Art. 66 Automatic Appeal

Over the past 50 years, the UCMJ and military justice system has changed significantly.[58] The two changes that have perhaps had the most impact on the quality of justice done at the trial level was the creation in 1968 of a dedicated trial judiciary, and the creation in 1980 of the Trial Defense Service (TDS). The improvements in the system brought about by the creation of a dedicated military trial judiciary and dedicated, independent DC has resulted in a justice system notable for high quality courts-marital, the findings and sentences of which are rarely set aside on appeal.[59]

A. The Effect of Military Judges on the Military Justice System

During the first major overhaul of the UCMJ in 1968, Congress created the position of military judge to preside over courts-martial proceedings, including special courts-martial empowered to adjudge a BCD.[60] Before 1968, the UCMJ provided a "law officer" to preside over courts-moartial. Designated as the "legal arbiter" for a court-martial, the law officer was a judge advocate, a member of the staff judge advocate's staff, designated by the convening authority for each court-martial.[61] The law officer ruled on questions of law and instructed

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[56] *See generally* Hearing on H.R. 2575, *supra* note 21, at 2025 (testimony of MG Thomas H. Green, The Judge Advocate General of the Army, discussing the large numbers of veterans and the potential problems punitively-discharged service members might have obtaining employment).

[57] *See* Cooke, *supra* note 3, at 17.

[58] *See generally id.* (detailing the development of military justice and the UCMJ from 1775 to 2000).

[59] *See* discussion *infra* pt. III.C.

[60] *See* Cox, *supra* note 49, at 19.

[61] *See* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION, *supra* note 51,

the court members prior to their deliberation. The law officer also ruled on motions to dismiss, or even declared mistrials when necessary.[62] However, law officers were not assigned to special courts-martial, even those that could adjudge a BCD.[63]

The addition of the military judge in 1968 was a revolutionary leap forward that gave the courts-martial enough power and authority to offset the influence commanders formerly held over the system.[64] In creating the position of military judge, Congress raised the level of military justice practice to conform more closely to trial procedures in U.S. District Courts.[65] This change also enhanced the prestige and effectiveness of the judge advocates presiding over courts-martial, equating their status to that of civilian trial judges.[66] The rulings of the military judge at trial were binding on the members and sessions of court were totally controlled by the judge.[67]

Further enhancing the power of the military judge, the 1968 amendments to the UCMJ created a wholly independent trial judiciary.[68] As stated above, before 1968, the convening authority designated the law officer for each court-martial. The law officer was subject to the convening authority's control and beholden to the chain of command for efficiency reports and discipline.[69] Since 1968, military judges have been free of those types of concerns because they are assigned by and directly responsible to The Judge Advocates General or his designee, the

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at 1152-4 (Mr. Larkin speaking before the House Committee on Armed Services on March 31, 1949); *see also* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 233 (statement of MG Kenneth J. Hodson, The Judge Advocate General of the Army before the House Subcommittee on Armed Forces, September 14, 1967); 1951 MCM, *supra* note 47, para. 4e.

[62] *See* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION, *supra* note 51, at 1154.

[63] *See id.* at 1152-4.

[64] *See* Cooke, *supra* note 3, at 13.

[65] *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 64.

[66] *See id*.

[67] *See id.; see also* Hagopian, *supra* note 5, at 2-3.

[68] *See* Cooke, *supra* note 3, at 14.

[69] *Cf.* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 230-31 (statement of Hon. Charles E. Bennett before House Subcommittee on Armed Forces, September 14, 1967, discussing merits of law officers not appointed by the convening authority).

Chief of the Trial Judiciary.[70] As a result, accused service members need not worry that the person sitting on the bench has ulterior motives when hearing or presiding over cases.

Most importantly for this discussion of Art. 66, however, was Congress' decision in 1968 to provide a military judge for special courts-martial empowered to adjudge a BCD (BCD special). Before 1968, a service member could be punitively discharged with a BCD at a special court-martial where (1) no DC represented him, and (2) no one trained in the law could make legal determinations.[71] One can only imagine the immense potential for error prejudicial to the accused inherent in a pre-1968 BCD special court-martial. With neither a DC nor a judge present, legal errors were common and the rights of the accused were often ignored.[72] Today, the presence of highly qualified military judges at

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[70] UCMJ art. 26(c) states:

> The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member 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 that Judge Advocate General or his designee.

UCMJ art. 26(c) (2002); *see also* Cooke, *supra* note 3, at 14.

[71] *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 41(explaining the amendments contained in the report of the Senate Subcommittee on Armed Forces, Senate Report No. 90-1601).

[72] *See id.* at 74-80 (reciting committee discussions regarding problems with special courts-martial in which there was no judge or defense counsel. Congressman Bray highlighted a Marine Corps case where a Marine, later judged to be insane, was punitively discharged with a BCD).

BCD special courts-martial ensure trials are conducted fairly and in accordance with the law, and the rights of the accused protected.[73]

B. The Effect of TDS Counsel on the Military Justice System

Before 1978, Army DC worked in, and for, the office of the staff judge advocate (SJA).[74] The SJA determined who would be a DC and for how long.[75] The SJA was also the rater or senior rater for every DC.[76] As a result, commanders, for whom the SJA worked, could influence DC to the detriment of their clients.[77] This situation posed a serious problem for the system.[78]

To compound this problem, SJAs often assigned the most inexperienced or least competent judge advocates to serve as DC.[79] These were the very officers who were most likely to be affected by improper command pressures, whether deliberately applied or not. Critics credibly alleged that DC assigned and controlled in this way had a

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[73] *See* Weiss v. United States, 510 U.S. 163, 194 (1994). Justice Ruth Bader Ginsburg stated,

> The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate . . . .

Id. (Ginsburg, J., concurring); *see also* Loving v. United States, 517 U.S. 748 (1996); Cooke, *supra* note 3, at 9.

[74] *See* Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 5 (1983).

[75] *See id*.

[76] *See id.*

[77] *See id*.

[78] *See generally* Colonel Robert B. Clarke, *Exercise of Independent Professional Judgment by Defense Counsel*, ARMY LAW., Sept. 1979, at 39 (stressing the importance of resisting improper command influences and the necessity to report such exploitation attempts, *reprinting* Memorandum, The Judge Advocate General, U.S. Army, to the Assistance Judge General for Civil Law for the U.S. Army Trial Defense Service/Field Defense Service Office, subject: Exercise of Independent Professional Judgment by Defense Counsel (19 July 1979)).

[79] *See* Howell, *supra* note 74, at 46.

tendency to cooperate with the government at the expense of their clients.[80] At the very least, the system sent mixed messages, and fostered conflicts of interest for both the SJA's office and DC.[81] These conditions undermined the quality of defense services, and caused the public to lose confidence in the essential fairness of the military justice system.[82]

Another problem with SJA control of DC was that they were completely dependent on the SJA office for support.[83] This disadvantaged DC in many ways. First, they had no separate source of funds. If a DC needed to travel to interview a witness or even a client, he or she had to go to the SJA for funding.[84] At best, this allowed many DC activities to be monitored by the government. At worst, the SJA could refuse to provide the necessary funds, impairing the representation. Second, DC had no independent means or mechanisms for training and guidance.[85] They were essentially on their own. This lack of experience coupled with a lack of training adversely impacted on the quality of representation available to military clients. However, with the creation and assignment of all Army DC to TDS in 1980, many of the above problems were finally eliminated.[86]

All branches of the armed forces now assign DC to a separate defense services office.[87] In the Army, TDS is a "stove-pipe" organization completely separate from the local chain of command.[88] This protects DC against actual or potential threats to their professional independence and judgment.[89] It also further reduces the opportunities for improper command influence.[90] Along with a general increase in aggressiveness which is beneficial to their clients, being assigned outside

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[80] *See id.*

[81] *See* Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 2; *see also* Howell, *supra* note 74, at 5.

[82] *See* Howell, *supra* note 74, at 5.

[83] *See* Masterton, *supra* note 81, at 4.

[84] *See id.*

[85] *See generally* Masterton, *supra* note 81, at 2 (noting that not until 1974 did the Army's Judge Advocate General encourage local SJAs to designate "senior defense counsel" to advise and assist other defense counsel within their commands).

[86] The Army was the last Service to create a special office to which all defense counsel were assigned. The Air Force and Navy established separate trial defense organizations in 1974. *See* Howell, *supra* note 74, at 25.

[87] *See id.*

[88] *See* Masterton, *supra* note 81, at 1.

[89] *See* Howell, *supra* note 74, at 46.

[90] *See id.*

the local SJA office emboldens DC to sniff out, report, and even capitalize on instances of command influence or attempts at it.[91] In addition, the Army generally assigns more experienced lawyers to TDS,[92] and provides them with highly qualified and experienced senior and regional DC to train and guide them.[93] While DC activities are still funded mainly from the resources available to the local SJA, regulations and memorandums of agreement between commands and TDS mandate a level of support for DC at least equal to that received by government counsel.[94] In addition, TDS can independently fund travel for training, attendance at UCMJ Art. 32 proceedings, and courts-martial hearings.[95]

While the 1968 amendments to the UCMJ fixed a serious flaw in the military justice system by requiring qualified DC at both BCD special courts-martial and general courts-martial, the advent of the services' independent DC organizations ensured that service members received the full benefit of this important change to the UCMJ.[96] The services' defense organizations are dynamic, flexible, and efficient organizations

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[91] *See* Masterton, *supra* note 81, at 23*; see also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE sec. 6-7 (5th ed. 1999). Unlawful command influence in a case can result in the findings and sentence being set aside or "drastic measures" such as a dismissal with prejudice. *See, e.g.*, United States v. Levite, 25 M.J. 334, 340 (C.M.A. 1987) (setting aside the trial court's findings and sentence because of unlawful command influence); United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986). In a warning to commanders about unlawful command influence, the Court of Military Appeals stated:

> Recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law, we are confident that events like those involved here will not be repeated. However, if we have erred in this expectation, this Court -- and undoubtedly other tribunals -- will find it necessary to consider much more drastic remedies.

Thomas, 22 M.J. at 400.

[92] *See generally* Howell, *supra* note 74, at 34. The Judge Advocate General at the time the Army JAGC developed the TDS, insisted that judge advocates to be assigned to TDS be certified under UCMJ Art. 27(b) as both trial and defense counsel, have at least twelve months remaining on their service obligations, and remain in TDS for at least one year. His requirement for Senior Defense Counsel was that they have career status, and at least two full years of trial experience. *See id.* Most TDS counsel have similar qualifications today.

[93] *See id.* at 46.

[94] *See, e.g.*, AR 27-10, *supra* note 6, at ch. 6 (containing detailed instructions for SJAs as to required support for TDS offices within their commands).

[95] *See* Masterton, *supra* note 81, at 2.

[96] *See* Howell, *supra* note 74, at 15.

that provide aggressive representation to service members in all phases of courts-martial and other adverse proceedings.[97] They ensure the accountability and fairness of the system, and protect their clients' interests to an extent unimaginable at the time the UCMJ was enacted.[98] The military justice system is now mature and, like a child grown into adulthood, requires less supervision.

C. Statistical Analysis of Courts-Martial Cases on Appeal

During fiscal years 1998 through 2002, (FY 98-FY 2002), the three service courts reviewed appeals on a total of almost 17,750 cases under UCMJ Art. 66.[99] Of these, just under 5,700 were from general courts-martial, and just over 12,000 were from BCD special courts-martial.[100] Of the over 12,000 BCD special cases the service courts reviewed, the service courts took action affecting the findings or sentence in under 350 cases, or less than three per cent (3%) of cases.[101]

These numbers alone demonstrate that the trial courts are protecting the rights of the accused, and ensuring that BCD special courts-martial are fair. However, the referenced percentages include not only those cases set aside or reduced because of error at trial, but also those cases

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[97] *See* Major General Hugh R. Overholt, *TDS Tenth Anniversary Message*, ARMY LAW., Dec. 1988, at 3.

[98] *See* Weiss v. United States, 510 U.S. 163, 194 (1994); *see also Loving* v. United States, 517 U.S. 748 (1996)*;* Cooke, *supra* note 3, at 9.

[99] *See Annual Reports*, *supra* note 4; *see also* Data Compilation Courtesy of Mary Dennis, Deputy Clerk of Court, Office of the Clerk of Court, U.S. Army Judiciary (Oct. 29, 2003) (on file with author); Data Compilation Courtesy of Robert Troidl, Clerk of Court, Office of the Clerk of Court, Navy-Marine Corps Court of Criminal Appeals (Mar. 11, 2004) (on file with author); Data Compilation Courtesy of Hattie Simmons, Database Administrator, Air Force Legal Services Agency (Mar. 14, 2004) (on file with author).

[100] *See Annual Reports*, *supra* note 4. Up until 2003, a special court-martial not empowered to adjudge a BCD, commonly referred to as a "straight special," did not meet the requirements for review under Art. 66 because such a court could neither adjudge a BCD, nor adjudge confinement of one year. In 2002, The President of the United States increased the maximum confinement at a special court-martial to one year. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B). Accordingly, today it is possible for a straight special court-martial to qualify for Art. 66 review. In practice, however, it is unusual for a service member to be sentenced to the maximum amount of confinement, one year, at either a straight or BCD special court-martial.

[101] *See Annual Reports*, *supra* note 4; *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99. In two-thirds of the BCD special cases in which the service court took action affecting the findings or sentence, the accused had pled guilty. *See* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

where problems occurred during the post-trial process, including a number of cases in which the appellate courts granted relief on appeal for excessive delay in post-trial processing--commonly known as *Collazo* relief.[102] If the number of cases in which the service courts took action affecting the sentence for *Collazo* problems, is subtracted from the equation, the percentage of BCD special cases affected by the service courts for error by the trial court gets even smaller.[103] Accordingly, it would be fair to say that only on rare occasions does the trial court make an error prejudicial to the accused at a special court-martial.

Over fifty years ago, Congress enacted the automatic appeal provision of Art. 66 to protect service members from errors at trial which were, at that time, common.[104] Such errors are now rare; it stands to reason that the protections afforded by Art. 66 could be changed, in this case, scaled back, to reflect the realities of today. Nonetheless, the fairness and accuracy of courts-martial were not Congress' only concerns in mandating that the cases of service members discharged with a BCD receive an automatic appeal under Art. 66. Congress believed the BCD to be a serious punishment because of the potentially stigmatizing effect it could have on the service member.[105] However, time and developments in our society have invalidated this reason for providing

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[102] *See* United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000) (holding that appellate courts have authority to grant relief for excessive post-trial delay without any showing of actual prejudice to the appellant); *see also* United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); *see generally* Major Timothy MacDonnell, United States v. Bauerbach*: Has the Army Court of Criminal Appeals Put "*Collazo *Relief" Beyond Review?*, 169 MIL. L. REV. 154 (Sept. 2001); Major Timothy MacDonnell, *The Journey Is the Gift: Recent Developments in the Post-Trial Process*, ARMY LAW., May 2001, at 81.

[103] An on-line search revealed many published BCD Special cases, between FY 1998 and FY 2003, in which the service courts granted *Collazo* relief. *See, e.g.*, United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003); United States v. Tardif, 58 M.J. 714 (C.G. Ct. Crim. App. 2003); United States v. Harms, 58 M.J. 515 (Army Ct. Crim. App. 2003); United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Hutchison, 56 M.J. 756 (Army Ct. Crim. App. 2002); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Schell, 2001 CCA Lexis 332 (N-M. Ct. Crim. App. 2001).

[104] *See* Hearing on H.R. 2575, *supra* note 21, at 2095 (estimating that during WWII the percentage of general courts-martial where error prejudicial to the accused was fifteen or eighteen percent, and the error rate in special courts-martial was as high as twenty-five or thirty percent).

[105] *See* H.R. REP. NO. 81-491, *supra* note 3, at 2-4.

automatic appeals for service members sentenced to a BCD at a special court-martial.

IV. The Effect of a BCD on Service Members Past and Present

A. Congressional Concerns over Stigma Caused by a BCD

Congress' primary concern in creating the BCD was the negative effect such a discharge might have on service members' ability to gain civilian employment.[106] An example of that concern was clearly expressed by Judge Long, a witness before the House Subcommittee on Armed Forces, during a 1947 hearing on the bill that created the BCD for the Army. Judge Long, a distinguished member of the civilian trial judiciary, appeared before the Subcommittee in support of the bill and stated:

> There [can be] great injustice. For instance, in San Francisco a few days ago, there at the War Memorial Building I was shown a record of a bad-conduct discharge [Navy servicemember]. Here was a boy, 20 years of age given a bad-conduct discharge. Every place he goes he will be confronted with that bad-conduct discharge: "I am sorry, we don't have a job for you; there are too many boys that we can put on with honorable discharges." Now, that boy will go through life, in his search for employment as well as in his other activities, at a distinct disadvantage because he carries that bad-conduct discharge.[107]

In 1947, the concern expressed by Judge Long was well-founded. After WWII, the percentage of veterans in the U.S. population was 12.8%.[108] Of these, over 90% served on active duty during a time of declared war in which the entire nation was mobilized for the war.

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[106] *See generally id.* at 1966-2071 (numerous witnesses, both military and civilian, acknowledging before the committee that a BCD could affect a discharged service member's chances for civilian employment).

[107] *Id.* at 1967 (Judge Long testifying before the House Subcommittee on Armed Services).

[108] U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION 1145 (1975) [hereinafter HSOTUS] (providing data for 1947).

During WWII, people were expected to contribute to the war effort. Congress even passed laws that required people to work in industries essential to the war.[109] It is not surprising that Congress would believe that individuals kicked out of the military for misconduct might have a difficult time obtaining employment when thousands of veterans were returning to the workforce, and all people in the country either knew, were related to, worked in an industry related to the war effort, or were themselves in the armed forces.[110]

B. Changes in Society have Reduced Stigma Caused by a BCD

Today, the situation is vastly different than it was in the years immediately following WWII. The Department of Defense has been an all-volunteer force for almost 30 years. The size of the Armed Forces on active duty is the smallest it has been since the Spanish-American War in the 1800s.[111] Only 1/2 of 1% of the population of our country is on active duty in the military.[112] This decline in military experience and knowledge is reflected in the makeup of the U.S. Congress, where only about 25% of Congress are veterans.[113] Today, what most of our population, including leaders and employers, know of the military and the military justice system comes from movies or television shows.[114]

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[109] *See* JAMES L. ABRAHAMSON, THE AMERICAN HOME FRONT 145 (1983).

[110] *See, e.*g., ALEX KERSHAW, THE BEDFORD BOYS 223 (2003). Bedford County, Virginia, was home to a number of soldiers of the 29th Infantry Division. *See id.* The men from this county suffered tremendous casualties on D-Day in WWII. *See id.* As in many other communities around the nation, every person in Bedford county knew or was related to someone who served in the war. *See id.*; *see also* ABRAHAMSON, *supra* note 109, at 145.

[111] *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED: U.S. MILITARY PERSONNEL SERVING AND CASUALTIES, *supra* note 35 (U.S. Military Personnel Serving—Civil War Era: 2,213,000 active duty Union Army; Spanish-American War: 306,760; WWI Era: 4,734,991; WWII Era, 16,112,500; Korean War Era: 5,720,000; Vietnam Era: 8,744,000; Persian Gulf War: 2,225,000; 2002: 1,413,577).

[112] *See* U.S. DEP'T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL, 1940-2002 (2003), *available at* http://www.infoplease.com/ipa/A0004598.html (last visited Oct. 20, 2004).

[113] *See* William T. Bianco & Jamie Markham, Vanishing Veterans: The Decline in Military Experience in the U.S. Congress 7 (Oct. 1999) (relying on statistics from the congressional make-up in 1999) (unpublished manuscript, on file with the Center for Basic Research in the Social Sciences, Harvard University), *available at* http://www.cbrss.harvard.edu/events/ppe/papers/bian-co.pdf (last visited Oct. 20, 2004).

[114] *See* Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 57; *see also* LTC Reed Bonadonna, *News From the Front: Contemporary American Soldiers in the Culture Wars* (2001), *available at*

In 2001, veterans made up 8% of the U.S. population of over 277,000,000 people.[115] Of these, only a relatively small (and decreasing) number served in a time of declared war or full mobilization.[116] By far, the largest number of U.S. veterans living today served in the Vietnam era, a time when military service was disdained, and open protest to the actions of our government, our military, and our service members was commonplace. It was a time when the military justice system was deemed to be fundamentally unfair.[117]

Today, we do not have large numbers of soldiers returning from war to a country filled with veterans looking for work. It would be highly unlikely for the situation Judge Long discussed in Congress in 1947 to be repeated today. There is little competition among veterans for jobs in general. Most employers, while interested in a prospective employee's military service, either do not understand or are not concerned that a prospective employee might have been discharged from the service with a BCD.[118] Other factors such as the type of crime committed are more important in the hiring decision.[119]

In our country today, having been convicted of a crime at some time in the past does not carry with it the social stigma it once did. Our culture now focuses on reintegrating the offender into the community through work and rehabilitation rather than highlighting his or her past problems with the law.[120] Government activities encourage employers to

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http://www.usafa.af.mil/jscope/JSCOPE01/Bonadonna01.html; Pauline M. Kaurin, *The Seige: Facing the Military -- Civilian Culture Chasm* (2001) *available at* http://www.usafa.af.mil/jscope/JSCOPE01/Kaurin01.html (last visited Dec. 3, 2004).

115 *See* HSOTUS, *supra* note 108, at 1145.

116 *See id.*

117 *See* Lance, *supra* note 11, at 40.

118 *See id.*

119 *See id.* at 28.

120 *See, e.g.*, Dina R. Rose & Todd R. Clear, *Who Doesn't Know Someone in Jail? The Impact of Exposure to Prison on Attitudes Toward Formal and Informal Controls*, 84 PRISON L.J. 228, 236-37 (2004) (listing community integration and neighborhood quality among the factors to be considered in evaluating the potential success of an offender's reintegration into society), *available at* http://tpj.sagepub.com/cgi/content/refs/84/2/228 (last visited Dec. 3, 2004); Dina R. Rose, Todd R. Clear, & Judith R. Ryder, Drugs, Incarceration and Neighborhood Life: The Impact of Reintegrating Offenders Into the Community, Final Report 17-25 (2002) (issuing sixteen recommendations to assist criminal offenders seeking successful integration into society) (unpublished report, U.S. Dep't of Justice) (on file with the National Institute of Justice), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/195164.pdf (last visited Dec. 3, 2004).

hire ex-offenders.[121] No longer do ex-offenders face a lifetime of being under-employed and underpaid. Evidence suggests the effects of having trouble with the law (an arrest or criminal conviction) on employment and earning potential are moderate and short-lived.[122] As this Article will next discuss, statistics on the employment status and earnings of punitively discharged veterans bear this out.

C. BCD has Limited Impact on Earnings and Employment Opportunities

In January 2000, the Bureau of Justice Statistics published a study of veterans incarcerated in the United States.[123] The study examined all aspects of the social and economic lives of veterans in prison. Among the questions the veterans in prison answered was whether they had received an honorable discharge or not.[124] The study showed that the employment rates and income levels of these veterans was the same. The fact that some did not receive an honorable discharge made no difference to the rate at which they were able get a job, or to the amount of income they were receiving before being incarcerated as a civilian.[125] The report does not attempt to explain this phenomenon, but some simple reasoning may suggest an answer.

At a minimum, during their initial military training, all veterans receive training and indoctrination in values and skills that serve them well in civilian employment. Among these are training in discipline,

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[121] Among these are programs allowing state and local governments to give tax incentives to employers who hire ex-offenders, subsidized or state-sponsored negligent hiring and liability insurance, and legislative tort reform designed to limit liability for potential misconduct by working ex-offenders. *See* Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1308-09 (2002).

[122] *See* Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q.J. ECON. 51, 70 (1995).

[123] *See* CHRISTOPHER MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VETERANS IN PRISON OR JAIL 12 (2000). For this study Mr. Mumola interviewed veterans incarcerated after being discharged from the military. These inmates provided information on their military service, as well as their criminal history and personal background. *See id.* at 1.

[124] *See id.* at 13.

[125] *See id*. It should be noted that veterans in prison who had received less than honorable discharges had more serious histories of criminal misconduct and substance abuse while in civilian life than honorably discharged veterans in prison. *See id*.

following orders, preparing for tasks, and working with others.[126] These traits are valued in employees. Employers know that veterans at least know how to do what they are told. This is true even for those who leave the military with punitive discharges. Veterans are generally good employment risks.[127] While the type of discharge a person received is a factor in the hiring decision, it is not the primary one.[128]

In 1978, the M*ilitary Law Review* published a study of the impact of punitive discharges on the economic opportunities of service members.[129] The study's author sent thousands of questionnaires to businesses and other entities throughout the United States, including Fortune 500 companies, small businesses, colleges and universities, unions, physicians, attorneys, state trade licensing boards, and personnel agencies.[130] The study found that 47% of the employers surveyed believed that a court-martial conviction did not even equate to a federal or state conviction.[131] It found that only 5% of employers would automatically reject an applicant with a punitive discharge.[132] Eighty-four percent stated their opinion concerning an applicant who had been convicted at court-martial would be unaffected by the applicant's receipt of a punitive discharge[133] Only 11% stated that a court-martial conviction could result in an adverse hiring decision, however, the decision would be based on other factors as well.[134] Most indicated the major factor affecting the hiring decision was not whether a punitive discharge had been adjudged, but what type of crime the service member had committed.[135] Similarly, this is the determining factor for eligibility for Veteran's Administration (VA) benefits as well.

By statute, the VA distinguishes between service members discharged with a BCD from a special court-martial versus service members who receive a punitive discharge from a general court-

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126 *See* U.S. DEP'T OF ARMY, FIELD MANUAL 7-21.13, THE SOLDIER'S GUIDE ch. 5 (Feb. 2004).
127 *See* U.S. ARMY RECRUITING COMMAND, PAM. 601-33, INSTRUCTIONAL GUIDE FOR BATTALION LEADERS TEAMS AND GUIDANCE COUNSELORS ch. 4-2 (2002).
128 *See* Lance, *supra* note 11, at 28.
129 *See id*. at 1.
130 *See id*. at 25-26.
131 *See id*. at 28.
132 *See id.*
133 *See id.*
134 *See id.*
135 *See id.*

martial.[136] Service members discharged by action of a general court-martial are automatically barred from all VA benefits.[137] Service members discharged by action of a special court-martial may retain their rights to significant VA benefits.[138] The VA bases this distinction on the types of crimes normally tried at general courts-martial—serious "felony" type crimes, versus those usually tried at special courts-martial—"misdemeanor" type crimes.[139] While the military justice

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[136] *See* 38 U.S.C. § 5303(a) (2000) which states:

> The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces. . . shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.

Id.

[137] *See id.*; *see also* 38 C.F.R. § 3.12 (2004).

[138] *See* Lance, *supra* note 11, at 20-23. These benefits include: job counseling, employment placement, Servicemember's Group Life Insurance, home loan guarantees, service-connected death or disability compensation, various disabled veteran benefit (housing, automobile, etc.), funeral and burial expenses, vocational rehabilitation, educational assistance, veteran's preference for farm and rural housing loans, civil service preference, civil service credit for military service, and naturalization benefits. *See id*.; *see also* 38 U.S.C. § 101(2); 77 AM. JUR. 2d *Veterans and Veterans' Laws* § 34 (2003).

[139] *See* 38 C.F.R. § 3.12. Veteran's Administration benefits are barred under the following relevant circumstances:

> (1) A punitive discharge by a general court-martial. This could either be a BCD, DD, or Dismissal.
>
> (2) An officer resigning for the good of the service. By regulations, such resignation can only be accepted by the Secretary of the Army when charges to be tried at a general court-martial have been preferred against the officer.
>
> (3) When a service member deserts the service.
>
> (4) A service member being absent without leave for 180 days.
>
> (5) Acceptance of an undesirable discharge to escape trial by general court-martial. This bar would be effective only if a soldier submitted a request for discharge in lieu of court-martial after a convening authority referred charges to a general court-martial. If the accused submitted the request for discharge before referral, this bar would not apply.

system does not use the labels "felony" and "misdemeanor" as classifications of offenses, it is generally true that more serious crimes are tried at general courts-martial, and crimes of lesser severity are tried at special courts-martial.[140] The VA regulations recognize this distinction by only applying an automatic bar to former service members whose separation documents indicate a punitive discharge adjudged by a general court-martial.[141]

D. Developments in Courts-Martial Sentencing Instructions

The military courts have also noted the distinction between a BCD from a special court-martial and a punitive discharge from a general court-martial. In 1954, Judge Brosnan, concurring in a Court of Military Appeals (COMA) opinion wrote, "[v]iewed realistically and practically, I doubt that scarcely any punishment [even confinement] is more severe than a punitive discharge."[142] This statement reflected Congress' concerns about the effects of a punitive discharge when it created the

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(6) A discharge, whether punitive or not, for mutiny or spying.

(7) A conviction of an offense of moral turpitude. The VA considers any conviction for a felony offense to involve moral turpitude.

(8) Willful and persistent misconduct. The VA often finds lengthy periods of AWOL (30-180 days) resulting in a discharge to be willful misconduct.

(9) Homosexual conduct resulting in a undesirable discharge.

See 38 C.F.R. § 3.12(c)-(d).

[140] *See, e.g.*, Hearing on H.R. 2575, *supra* note 21, at 2025 (discussing the differences between cases tried at general courts-martial and those tried at special courts-martial).

[141] In practice, cases involving what would be "felony" offenses in the civilian criminal courts are sometimes tried at special courts-martial. In such cases, the VA, under 38 CFR § 3.12(d)(3), could deny a service member benefits even though the service member's discharge did not come from a general court-martial. Denial of benefits in such cases, however, is not automatic. The VA will refer to the available punishments for the specific offense listed in the UCMJ. If the punishments available include confinement for a year or more, the VA may bar the convicted service member from benefits. *See generally* Winter v. Principi, 4 Vet. App. 29 (1993) (determining whether Mr. Winter was entitled to benefits after being discharged via Chapter 10 of *AR 635-200* "for the good of the service" in lieu of court-martial, noting that the punishment for Mr. Winter's offense, absence without leave for more than 30 days, included confinement for up to one year, and finding that under the circumstances, Mr. Winter's offense constituted serious misconduct that was willful and persistent for purposes of 38 C.F.R. § 3.12(d)(4)).

[142] United States v. Kelley, 17 C.M.R. 259, 264 (C.M.A. 1954).

BCD in 1947. For years thereafter, military courts echoed Judge Brosnan's statement about the severity of punitive discharges. For example, in 1962 Judge Ferguson stated,

> . . .[T]he ineradicable stigma of a punitive discharge is commonly recognized by our modern society, and the repugnance with which it is regarded is evidenced by the limitations which it places on employment opportunities and other advantages which are enjoyed by one whose discharge characterization indicates he has been a good and faithful servant.[143]

The Army trial judiciary adopted Judge Ferguson's statement on the stigma associated with a punitive discharge almost verbatim in its Military Judges' Guide (now called the Judges' Benchbook)[144] as a standard sentencing instruction. Over time, however, some military judges, relying on data from the 1978 Military Law Review article cited above, and on their own experiences, began to tailor the instruction by adding the words "may affect" or "may place limitations" to the instruction, or by eliminating the word "ineradicable."[145] Eventually, the ineradicable stigma instruction as it related to BCDs was dropped from the Judges' Benchbook in 1982.[146] In 1992, the instruction reappeared in the Benchbook in response to COMA decisions in *U.S. v. Cross*[147] and *U.S. v. Soriano*[148] that reinvigorated the instruction. Nonetheless, military judges continued to recognize the limited stigma attached to a BCD adjudged by a special court-martial by continuing to tailor the instruction. However, the service courts continue to encourage the use

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143 United States v. Johnson, 31 C.M.R. 226, 231 (C.M.A. 1962).

144 *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES GUIDE para. 8-4(a)(1) (May 1969).

145 *See, e.g.*, United States v. Rasnick, 58 M.J. 9, 10 (2003) (permitting the trial judge to remove "ineradicable" from instructions provided the panel was informed adequately of the severity of a punitive discharge); United States v. Soriano, 20 M.J. 337, 341 (C.M.A. 1985) (focusing on the trial court's addition of the words "may affect" to the standard instruction); United States v. Greszler, 56 M.J. 745, 746 (A.F. Ct. Crim. App. 2002) (distinguishing the Air Force trial judge's instructions from those of the Army trial judge in *Rush*); United States v. Rush, 51 M.J. 605, 609-10 (Army Ct. Crim. App. 1999) (finding the trial judge's failure to use "ineradicable" in the instruction to be an abuse of discretion).

146 *See Rush*, 51 M.J. at 607-8; *see also* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-44 (1 May 1982).

147 21 M.J. 87, 88 (C.M.A. 1985).

148 20 M.J. 337, 341 (C.M.A. 1985).

of the "ineradicable" stigma instruction even if they do not overturn cases in which trial judges give weaker consequence of discharge instructions.[149]

Today, the Judges' Benchbook does not contain an "ineradicable" stigma instruction for use in special courts-martial. The instruction used for special courts-martial reads:

> This court may adjudge a bad conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad conduct discharge that would terminate the accused's current term of service.) A bad conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)[150]

The above instruction does not mention "employment opportunities," "stigma," or a time frame for how long the adverse effects of a BCD may last. By leaving out these elements of earlier instructions on the effects of punitive discharges, the above instruction accurately reflects the limited effect of a BCD from a special court-martial, and lends support to the conclusion that time and developments in our society have eliminated the stigma of the punitive discharge about which Congress was concerned when it enacted Art. 66.

V. Proposal for Altering the Review Scheme for Special Courts-Martial

A. Introduction

The conditions in our military justice system and our society that motivated Congress to create the automatic appeal of special courts-

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[149] *See, e.g.*, *Rush*, 51 M.J. at 610.

[150] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-6-10 (15 Sept. 2002).

martial imposing a BCD are no longer present. Our justice system is now a model of fairness and accuracy.[151] Today, a soldier discharged from military service by a special court-martial is no longer likely to be hindered in obtaining employment, or be shunned by society simply because of the characterization of his discharge. Given these changed conditions, there is no longer a need to protect service members who receive a BCD from a special court-marital by providing them with an extensive review of their cases by an appellate court. Given the minimal chance of error in a special court-martial tried in our mature military justice system, and the apparently minimal impact a BCD has on a service member's employability and social status, the scheme of courts-martial review set forth in UCMJ Art. 69 could be used to provide service members a meaningful review of their convictions and sentence while using considerably fewer resources at all levels.

B. Resources Used in Art. 66 v. Art. 69 Review of Special Courts-Martial

Preparing a special court-martial case for Art. 66 review requires SJA offices, DC, and military judges to expend a great deal of time, effort, and resources. Most of this effort surrounds the preparation and duplication of a verbatim transcript of the court proceedings.[152] The court reporter must transcribe the proceedings, proof the transcript, and put it, together with all the allied papers and exhibits, into a formal record for duplication.[153] After that process is completed, the trial counsel (TC), defense counsel (DC), and military judge (MJ) must review and correct any errors in the transcript, ensure all appropriate documents are present, and return it to the court reporter for final correction and duplication.[154]

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[151] *See* Kinsella v. Krueger, 351 U.S. 470, 478 (1956) (stating that the UCMJ provided not only for the fundamentals of due process, but also for protections not required of state criminal courts, and some which would compare favorably with the most advanced criminal codes); *see also* 17 STUDENT LAW. J. 12, 15 (1972) (then Chief Justice Warren commenting favorably on the fairness and accuracy of the military justice system).

[152] *See* UCMJ art. 54 (2002); *see also* MCM, *supra* note 6, R.C.M. 1103.

[153] *See generally* MCM, *supra* note 6, R.C.M. 1103 (establishing the requirements for preparing a record of trial).

[154] *See id.* (setting the procedure for correcting errors in a record of trial); *see also* AR 27-10, *supra* note 6, at para. 5; Interview with Sergeant First Class Andria Robinson, Chief, Court Reporter Training & Senior Court Reporter, U.S. Army, at The Judge Advocate General's Legal Center and School, Charlottesville, VA (Feb. 5, 2004)

While SJA offices, DCs, and MJs do their best to prepare cases for Art. 66 review as quickly as possible, in many jurisdictions the complicated and time consuming process of preparing records of trial results in a backlog of cases waiting to be forwarded to service courts for Art. 66 review. The service courts have become frustrated with the pace of post-trial processing, and have taken direct aim at the problem by granting relief to convicted service members solely because SJA offices take too long to prepare cases for Art. 66 review.[155] The severity of this problem is reflected in the Army TJAG's response to it.

[hereinafter Robinson Interview] (providing information on undocumented practical aspects of preparing records of trial).

The process of preparing a record of trial is resource intensive. An average special court-martial in the Army consists of a judge alone guilty plea. The transcript of an average special court-martial consists of 80-90 pages of transcribed text. *See* Robinson Interview, *supra.* If the case is contested, the number of pages to be transcribed increases by 300 per cent or more. *See id.* All of these pages must either be prepared by or prepared under the close supervision of a certified court reporter. *See id.* To prepare an average special court-martial transcript requires at least two full days of transcription time. Recommended "metric" standards for the court reporters require court reporters to transcribe 40 pages of text per day. *See id*.

Much of the transcript consists of scripted material. In guilty plea cases, this scripted material consists of the description of the elements of the offense, the explanations of the accused rights, and other routine language. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, *supra* note 150, at ch. 2. In contested cases, more scripted material is added in the form of the judge's instructions, standard voir dire questions, and other routine matters. *See id.* Despite this material being virtually the same in every court-martial, court reporters, however, cannot simply cut and paste from other proceedings. They must listen to and transcribe the proceedings anew for each record.

Similarly, TCs, DCs, and the MJs must also review the transcript and record page by page for each case. *See generally* MCM, *supra* note 6, R.C.M. 1103(i). Jurisdictions vary in the amount of time it takes to complete the transcript review and correction process.

Some SJA offices require TC to review a set number of transcript pages per day. Jurisdictions having such a standard usually require TCs to review 150 pages of transcript per day. *See id.* Transcripts, however, can sit for days or weeks waiting for review while TCs are deployed to training events, or while DCs are working other cases. *See id.* at 34-38. In sum, the record of trial preparation and review process is often time consuming and repetitive.

[155] *See* United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000) (holding that appellate courts have authority to grant relief for excessive post-trial delay without any showing of actual prejudice to the appellant); *see also* United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); *see generally* MacDonnell, "Collazo *Relief," supra* note 102, at 154; MacDonnell, *The Journey Is the Gift, supra* note 102, at 81.

In 2002, the Army undertook a service-wide study of post-trial problems.[156] The Army TJAG approved sixteen recommendations, which were enacted in December 2002.[157] After reviewing the study's recommendations, it is apparent the process of preparing records of trial for review under Art. 66 is the main culprit in post-trial delay. Ten of the study's recommendations dealt directly with court reporting, including a recommendation to develop "metric" standards for all phases of the post-trial process, including preparation of records of trial.[158] While the leadership of "the Army's Judge Advocate General's Corps [now] takes post-trial processing seriously and will no longer tolerate unreasonable post-trial delay,"[159] only time will tell whether these initiatives solve post-trial delay.

Once the record of trial for a special court-martial requiring review under Art. 66 is finally prepared, the SJA office forwards it to the office of the clerk of a service court to begin the appellate review process. The process of preparing a case for review by a service court is also time-consuming and resource intensive.[160] Once a case arrives at the clerk of

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[156] *See* Major Jan E. Aldykiewicz, *Recent Developments in Post-Trial Processing:* Collazo *Relief Is Here to Stay!*, ARMY LAW., Apr./May 2003, at 83, 99.

[157] *See id.*

[158] *See id.*

[159] *See id.*

[160] The Army Court of Criminal Appeals (ACCA) internal rules can be found on its website at http://www.jagcnet.army.mil/ACCA. The Navy/Marine Corps Court of Criminal Appeals internal rules can be found on its website at http://www.jag.navy.mil/documents/NMCCARules%20Draft%2002-14-2002.doc. The Air Force Court of Criminal Appeals internal rules can be found on its website at https://afcca.law.af.mil/. The procedures described below are set forth in those rules.

Once the record of trial arrives at the clerk of court's office, the case is logged in and then sent to an Appellate Defense Counsel (ADC). The rules for processing cases on appeal are set forth in *AR 27-13* and each service courts' internal rules of court. The rules published in *AR 27-13* are standard for all the services. The rules require ADCs to file a brief detailing assignments of error no later than thirty days after the clerk of court received the record of trial. *See* AR 27-13, *supra* note 6, at 3 (R. 15). However, ADCs rarely file this brief within thirty days. *See* UNITED STATES ARMY COURT OF CRIMINAL APPEALS, APPEALS PROCESSING TIME FISCAL YEAR: 2003 UNITED STATES ARMY-WIDE 1 (Feb. 4, 2004) [hereinafter ACCA FY 03 Processing Time Chart] (on file with the author).

All the service courts' internal rules allow for multiple continuances. For example, the ACCA's internal rules allow the Chief of the Defense Appellate Division to file two (2) motions for ninety-day extensions of the time to file the initial brief. All the Chief needs to state in these motions is that the extension is "necessary in the interests of justice due to the volume of appellate workload then pending in the division." *See* ACCA Rules of Court, *supra*, at 28-9. The clerk of court usually grants these motions automatically. *See id.* (R. 24.1(c)(4)); *see also* ACCA FY03 Processing Time Chart (an average of 211

court, another period of delay occurs before the case is ready for review by a service court panel. During this period of time, both appellate defense counsel (ADC) and government appellate counsel (GAC) prepare the case for review by the service court. In FY 2003 the average delay between a special court-martial case arriving at the clerk of court and the case being ready for review by the ACCA was 211 days; for general courts-martial the average delay was 311 days.[161] The service courts have no set time in which they must decide a case. There is no screening process. The service courts review every case, even those in which there is no apparent error, and render a decision in each one.[162] Many cases are decided on briefs, but a significant number are scheduled for argument.[163] The ACCA takes an average of 60 days to issue an opinion on special courts-martial cases once the court receives the briefs or hears oral argument.[164]

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days elapsed between the arrival of a special court-martial case at the clerk of court's office, and the case being ready for review by the court.).

Thereafter, the assigned ADC may request additional motions for extension of time to file the initial brief for thirty days at a time. The court will grant these motions for good cause, such as engagement in other litigation, or hardship to counsel. *See* ACCA Rules of Court, *supra*, at R. 24.1(b). The net effect is often months pass before an ADC even begins to review a case for error. *See* ACCA FY03 Processing Time Chart *supra*.

Once the ADC files the initial defense brief or memorandum, the case is sent to a Government Appellate Counsel (GAC) for a response, and the process begins again. *See* ACCA Rules of Court *supra* at 28-9. Eventually, often many months after the case arrived at the clerk of court, both sides will have filed some sort of brief, putting the case "at issue," and a panel of the service court will consider the case. *See also* ACCA FY03 processing time chart, *supra*. During FY2003 for general courts-martial cases, an average of 311 days passed from the time a case arrived at the ACCA clerk of court's office until it was "at issue" and ready for review by the ACCA. *See id.* For special courts-martial cases the average was 211 days. From July through September 2003, the average was 241 days. *See id.* The ACCA takes an average of sixty days to issue an opinion. *See id.*

[161] *See* ACCA FY03 Processing Time Chart, *supra* note 160. The Court of Appeals for the Armed Forces has, on infrequent occasions, entertained petitions for extraordinary relief based on unreasonable delay in the appellate process. *See, e.g.*, Diaz v. The Judge Advocate General of the Navy, 59 M.J. 34, 40 (2003) (making a fact-based decision that eleven periods of enlargement in the accused's appellate processing did not protect the rights of the accused).

[162] *See* AR 27-13, *supra* note 6 at 3. Rule 18 of the service court rules of practice and procedure requires the service courts to give notice of decisions and orders in accordance with RCM 1203. Rule for Court-Martial 1203 requires the service courts to issue decisions in all cases referred to them under Article 66 and RCM 1201. *See* MCM, *supra* note 6, R.C.M. 1203.

[163] *See id.*

[164] *See* ACCA FY03 Processing Time Chart, *supra* note 160.

C. Article 66 Appellate Process Not Cost-effective for Special Courts-Martial

In most instances, providing the full post-trial and appellate process to special court-martial cases is an inefficient use of resources. The vast majority of special courts-martial require Art. 66 review because the service member received a BCD.[165] A large percentage of these cases are guilty pleas.[166] In a significant percentage of special courts-martial, especially in cases from the Marine Corps, service members request a BCD in lieu of confinement.[167] While there is some possibility of error prejudicial to the accused at a guilty plea, the potential for error is relatively low.[168] For contested special courts-martial, statistics show the rate of reversible error is even lower than that for guilty pleas.[169]

It makes little sense to continue to expend the large amount of time, effort, money, and other resources required to provide a full judicial review for special courts-martial cases knowing that (1) in the vast majority of cases the trials were fair, and there is little chance that the trial court committed reversible error; (2) the most severe part of the sentence, a BCD, has no long-term effect on the service member; and (3) in many cases, the accused actually requested the part of the sentence that made the automatic appeal necessary—a BCD.

It is ironic that in many cases all of the work by ADCs, GACs, and the service courts on Art. 66 reviews of special courts-martial cases is done well after the convicted service member has been released from

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[165] *See Annual Reports*, *supra* note 4; *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

[166] *See* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

[167] *See id.* (ACCA reported that in 14.3% of BCD special courts-martial in FYs 1998-2002, the accused requested a BCD as part of the defense sentencing case). Anecdotal evidence from the Marine Corps suggests that 55-60% of Marines at special courts-martial request a BCD as part of the defense sentencing case. Marine Corps judge advocates and military judges even have a name for these individuals. They call them "BCD Strikers." Most of these Marines are being court-martialed for drug use. They are ordinarily sentenced to less than 6 months confinement and a BCD. This practice is prevalent throughout the Marine Corps. Interview with MAJ Tracy Daly, former Associate Judge, Navy-Marine Corps Trial Judiciary, Piedmont Judicial Circuit, Headquartered at Camp Lejeune, NC (Feb. 3, 2004). This phenomena is important because the Navy-Marine Corps Court of Criminal Appeals reviews approximately six times as many special courts-martial under Art. 66 than the Army and Air Force Courts of Criminal Appeals combined. *See Annual Reports*, *supra* note 4.

[168] *See id.*; *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

[169] *See id.*

confinement.[170] As a result, the service member often never participates or assists in the appeal in any meaningful way. Reviewing all special courts-martial under Art. 69 would significantly reduce the amount of time, effort, and resources expended in reviewing these cases, and might even improve the evaluation of the issues in each case.

Many state judicial systems, faced with an explosion of criminal appeals, have taken steps to streamline the appellate process. The procedures many state supreme courts have implemented seek to speed up the process in the same way Art. 69 review would—by eliminating the need for verbatim records of trial and extensive processing and briefing by appellate counsel. These efforts are discussed below.

D. Expedited Appellate Procedures in State Judicial Systems

Article 66 provides an appeal as of right to service members sentenced to a punitive discharge or confinement for one year or more. This appeal is automatic, and the federal government pays all costs. All other courts-martial are reviewed upon application of the convicted service member in the office of the service members' Judge Advocate General under Art. 69.[171] Thus, every service member facing judicial action for criminal misconduct receives a no cost review of his or her case by a tribunal above the trial level no matter what the sentence or the potential issues in the case. Most states and the federal judicial system are not so liberal in granting full judicial appeals in every case, and virtually none pay all the costs of the appeal.[172]

The U.S. and almost every state allow appeals as of right to either the highest court (in states that do not have intermediate appellate courts) or an intermediate court for criminal convictions from the trial court of

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[170] Assuming (1) a service member receives the maximum confinement that could be adjudged at a special court-martial, one year, (2) it takes the SJA office ninety days (an unusually short amount of time) to get the record of trial to the service court clerk of court, (3) ninety days each for both the ADC and GAC to brief the case, and 4) the service court takes sixty days to issue its decision, the service member, receiving five days per month good conduct time credit (the minimum amount), will be released from confinement after 305 days, fifty-five days before the service court issued a decision. *See* U.S. DEP'T OF ARMY, REG. 633-30, MILITARY SENTENCES TO CONFINEMENT para. 13(a) (Feb. 28, 1989) (providing calculations for good time credit).

[171] *See* UCMJ art. 66 (2002); *see also id.* art. 69.

[172] *See* STERN, *supra* note 5, at 13-181.

general jurisdiction.[173] Most states do not allow appeals from courts of limited jurisdiction, although these courts often have power to sentence offenders for misdemeanor offenses—those punishable by incarceration up to one year.[174] In every state appellate court and the federal appeals courts, most of the costs associated with a criminal appeal are borne by the appellant.[175]

These costs can be substantial. They include filing fees, cost bond fees, and costs of transcribing and duplicating the record or specified parts of the record.[176] The other substantial cost is fees for appellate representation. To avoid these costs, the appellant must be indigent.[177] Indigent appellants are prevalent in the civilian criminal system, and are the primary reason for the explosion of criminal appeals.[178] Most states and federal courts have taken direct aim at the proliferation of appeals by enacting measures to encourage individuals to forego appeal, or to track hopeless cases for expedited disposition.[179]

The primary method for expediting cases on appeal is to screen them for merit before full records of trial are prepared. Several states, including New Hampshire, West Virginia, Michigan, Virginia, Nevada, and New Mexico, follow this procedure. In these states and a growing number of others, criminal appellants must file a request to appeal containing a memorandum outlining the merits of the appeal. The appellate court reviews the request, but may summarily reject the request without passing on the merits of the appeal. Court staff, not judges, handle the majority of the screening process.[180]

The only state expedited appellate scheme that has been invalidated is the one formerly used by New Hampshire. The 1st Circuit Court of Appeals struck down New Hampshire's summary disposition scheme in

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[173] *See id.* at 13.
[174] *See id.*
[175] *See id.*
[176] *See id.* at 111-18.
[177] *See id.* at 111.
[178] *See* CARRINGTON, *supra* note 5, at 60.
[179] *See id.* at 91-96.
[180] *See* STERN, *supra* note 5, at 13-15; CARRINGTON, *supra* note 5, at 48-50; *see also* Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86 (1991); Charles G. Douglas III, *Innovative Appellate Court Processing: New Hampshire's Experience with Summary Affirmance*, 69 JUDICATURE 147 (1985).

Bundy v. Wilson[181] because the state did not allow appellants access to an adequate record of trial before the appellate court ruled on requests for appeal.[182] New Hampshire later changed its scheme to provide appellants with partial records to satisfy this due process requirement.[183]

Most states with summary or expedited appeals processes use a system similar to that of the Nevada Supreme Court.[184] Nevada provides criminal defendants desiring to appeal convictions, with a "computer-generated" transcript, rough draft transcript, or other substitute for a full, certified transcript.[185] The appellant files a written statement of the alleged issues in the case with the "computer-generated" transcript attached.[186] The court reviews the submitted material before deciding to either grant a conference to explore the issues, summarily reject the appeal, or grant an appeal.[187] Nevada reports the expedited review procedures reduced the number of cases requiring full transcripts and briefing by 65%. The court averages between 90 and 120 days to issue a decision on expedited review cases.[188] Review of courts-martial under Art. 69 would provide many of the same advantages as the expedited appellate procedures now used in many states.

E. Discussion of UCMJ Art. 69 Review

1. Introduction

Under UCMJ Art. 69 and R.C.M. 1201(b), the Office of TJAG reviews all courts-martial resulting in a conviction not reviewed under Art. 66.[189] The Judge Advocate General may grant relief on grounds of:

(1) Newly discovered evidence,

(2) Fraud on the court,

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[181] 815 F.2d 125 (1st Cir. 1987).
[182] *See id.* at 130-31.
[183] *See* Marvell, *supra* note 180, at 187.
[184] *See* Paul Taggert, *Criminal Appeals at the Nevada Supreme Court*, 4 NEV. LAW. 24, 26 (1996).
[185] *See id.*
[186] *See id.*
[187] *See id.*
[188] *See id.*
[189] *See* UCMJ art. 69 (2002); *see also* MCM, *supra* note 6, R.C.M. 1201(b)(3); AR 27-10, *supra* note 6, para. 14-1.

> (3) Lack of jurisdiction over the accused or the offense,
>
> (4) Error prejudicial to the substantial rights of the accused, or
>
> (5) Appropriateness of the sentence.[190]

The Judge Advocate General may vacate or modify the findings or sentence in whole or in part or, in certain circumstances, order a rehearing or a new trial.[191] Clemency under Art. 74[192] is not precluded by any action by TJAG under Art. 69.[193] Service regulations govern the submission and review of applications for relief under Art. 69, but such reviews are generally done only on the application of the accused either pro se or with the assistance of defense counsel. They are not automatic, and can be waived.[194]

The Judge Advocate General's powers of review and relief under Art. 69 are strikingly similar to those of the service courts under Art. 66.[195] Both TJAG and the service courts may set aside findings and sentence, order a rehearing, and dismiss charges. While Art. 66 gives the service courts the specific power to weigh the evidence, judge the credibility of the witnesses, and determine controverted questions of fact, Art. 69 does not give TJAG the power to go outside the record of trial to find new facts. Most other appellate tribunals in the United States share this limitation.[196]

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[190] *See* AR 27-10, *supra* note 6, para. 14-1*a*.
[191] *See id.* para. 14-1*c*.
[192] UCMJ art. 74.
[193] *See* AR 27-10, *supra* note 6, para. 14-1*c*.
[194] *See id.* para. 14-2 – 14-4. Reviewing special courts-martial under Art. 69 is similar to the expedited review or summary disposition schemes used by many state appellate courts. Some common features include, the use of partial transcripts, staff attorneys (the equivalent of Art. 69 case reviewers) evaluating merits of cases, and provision for full judicial review if such appeal is warranted. *See generally* pt. __, sec. D, *infra*.**Please direct the reader to the correct part and section.**
[195] *Compare* UCMJ art. 69 and MCM, *supra* note 6, R.C.M. 1201(b), *with* UCMJ art. 66(b).
[196] *See* STERN, *supra* note 5, at 175.

2. Art. 69 Review Process

The Criminal Law Division of the Office of TJAG for the Army, Programs Branch, Victim Witness & Examinations and New Trials (E & NT) section reviews Army cases appealed under Art. 69. Every case E & NT reviews undergoes a thorough examination. An attorney reviews every aspect of pre-trial and post-trial processing in detail, from ensuring the court-martial had jurisdiction to ensuring the form of the action taken by the convening authority is correct.[197] The attorney reviewing the case notes any legal errors or irregularities.[198] Those errors that do not affect the legal sufficiency of the case are remedied through correspondence to the convening authority concerned.[199] Cases which are either legally insufficient or which contain a substantial question of law affecting the legality of the findings or sentence, or which is novel are considered for referral to the ACCA. The attorney reviewing such a case researches both the facts and legal issues pertinent to the case, and prepares a memorandum for review by the TJAG.[200] The TJAG may either take remedial action, or refer the case to the ACCA.[201] If referred to the ACCA, a verbatim record of trial may be prepared.[202]

A convicted service member usually has no further appeal if TJAG finds his or her case to be legally sufficient after Art. 69 review.[203] However, the ACCA has entertained petitions under the All Writs Act in cases TJAG found legally sufficient.[204] In addition, the ACCA has asserted that it has power under Art. 69(d) to hear appeals of cases TJAG reviewed under Art. 69 when those cases present matters that were inconsistent with the guilty plea and those matters implicated a public

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[197] *See* OFFICE OF THE JUDGE ADVOCATE GENERAL UNITED STATES ARMY, CRIMINAL LAW DIVISION, STANDARD OPERATING PROCEDURES FOR EXAMINATION AND NEW TRIALS DIVISION 5-11 (2003) (on file with the author).
[198] *See id.* at 6.
[199] *See id.* at 9.
[200] *See id.* at 9-11.
[201] *See id.* at 9.
[202] *See id.* at 11.
[203] *See* Dew v. United States, 48 M.J. 639 (Army Ct. Crim. App. 1998). Without expressly stating that there was no UCMJ provision that would allow it to entertain an appeal of a case previously reviewed under Art. 69, the court considered the appeal as a collateral attack on the finality of the proceedings under the All Writs Act. *See id.* at 644-45.
[204] *See id.*

policy that precludes enforcement in the military justice system.[205] Such cases are rare.[206]

Logically, the UCMJ does not provide for an automatic or "as of right" appeal to a service court after a case has been reviewed under Art. 69. Article 69 review was designed to be an expedited procedure for cases involving minor sentences in which review by the service courts is unnecessary and would overload the courts.[207] Giving service members a broad right to appeal a TJAG's decision under Art. 69 would defeat the purpose of having an expedited appeal procedure.

There are two significant differences between Art. 66 and Art. 69 reviews of courts- martial. First, an Art. 66 review requires the TC to prepare a verbatim record for the review.[208] Second, in the Art. 66 review process, a dedicated defense counsel represents the convicted service member.[209] Article 69 review requires neither.[210] Despite not requiring either of these resource intensive benefits, review under Art. 69 would still adequately protect the rights of the service members convicted at special courts-martial.

3. Summarized Record is Adequate for Special Courts-Martial Review

While summarized records do not capture every nuance of the action in the courtroom, they meet the requirements of due process in affording

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[205] *See id.* at 663 (Johnston, J., concurring).
[206] *See id.* at 662 (stating that in the six years prior to the *Dew* case, the ACCA reviewed only three cases under Art. 69(d)).
[207] *See id.* at 660.
[208] *See* MCM, *supra* note 6, R.C.M. 1103(b)(2)(B).
[209] *See* UCMJ art. 70(c) (2002) which states:

> Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court—(1) when requested by the accused; (2) when the United States is represented by counsel; or (3) when the Judge Advocate General has sent the case to the Court of Appeals for the Armed Forces.

Id.
[210] *See* UCMJ art. 69; MCM, *supra* note 6, R.C.M. 1103(b)(2)(B); *see also* AR 27-10, *supra* note 6, para. 14-1.

the convicted service member the opportunity to determine the areas for possible appeal.[211] In guilty plea cases a large part of the case is contained in documents including the charge sheet, pre-trial agreement, quantum, post-trial and appellate rights form, and other similar forms.[212] The majority of the case is essentially scripted. The colloquy between the accused and the judge in a guilty plea case is routine, and if it is not, a summarized recitation of the colloquy should provide a reviewer with enough information to appreciate any legal or factual issues that may arise.[213]

In contested cases, the need for a verbatim transcript may be more apparent, but generally a summarized record would suffice for review.[214] So long as court reporters, counsel, and the military judge are attuned to potential problem areas during the trial, such as voir dire, objections, and instructions (which are usually written), a trained reviewer should be able to find areas where potential error may have occurred.

A certified court reporter is not needed to produce a summarized record.[215] Paralegals, or just about anyone else that can hear and type,

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[211] *See* Draper v. Washington, 372 U.S. 487, 495 (1963) (holding that due process does not require that the government provide the accused with a verbatim record of trial to prepare for an appeal).

[212] *See* AR 27-10, *supra* note 6, para. 5-40; *see also* MCM, *supra* note 6, R.C.M. 1103.

[213] Some courts have found that a verbatim transcript is not necessary in most cases to permit meaningful appellate review. *See* Taggert, *supra* note 184, at 26; *see also* Jeantete v. Jeantete, 806 P.2d 66, 68 (N.M. Ct. App. 1990) (reviewing the trial court's decision with only nine of eleven audio tapes and finding such tapes to be an "adequate record sufficient to review the issues raised on appeal").

[214] *See Draper*, 372 U.S. at 495. The court stated:

> [A] State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances.

Id. at 495.

[215] *See* AR 27-10, *supra* note 6, para. 5-40(d).

can produce summarized transcripts. Additionally, summarized records do not require word-by-word review and extensive errata. While trial and defense counsel, and the military judge should still review summarized records, the time required to complete that part of the process would be significantly reduced.

4. Defense Counsel Participation in Art. 69 Review

The ADC plays the most critical role in the Art. 66 review process. It is the ADC that reviews the case for error, briefs it, and presents it to the appellate court. Without someone looking at the record on behalf of the convicted service member, no meaningful review of a courts-martial can take place. In cases reviewed under Art. 69, the attorney reviewing a case takes on the function of the ADC. He or she scours the record looking for error prejudicial to service member.[216] While the service regulations implementing Art. 69 do not require the case reviewer to establish an attorney-client relationship with the convicted service member, case reviewers are encouraged to be diligent in ensuring the trial court upheld the rights of the service member.[217] Having the trial defense counsel assist the convicted service member in presenting the case for appeal under Art. 69 makes up for the absence of a dedicated ADC in the Art. 69 review process.

The logical person to assist a service member with an Art. 69 review of a special court-martial conviction is the defense counsel who represented the convicted service member at trial. The trial defense counsel is in the best position to appreciate any potential trial error. He or she would have been present to hear all the evidence, and probably made all the motions and objections in the case. In reviewing the summarized record of trial prepared for the Art. 69 review, the defense counsel would have the opportunity to point out any areas in the summarized transcript in need of more detail. The trial defense counsel could also request preparation of a verbatim transcript for specific portions of a record. Appropriate attention to detail by the defense counsel at this stage of the process would eliminate any potential quality

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[216] *See* OFFICE OF THE JUDGE ADVOCATE GENERAL UNITED STATES ARMY, CRIMINAL LAW DIVISION, STANDARD OPERATING PROCEDURES FOR EXAMINATION AND NEW TRIALS DIVISION, *supra* note 197, at 5-11.

[217] *See id.*; *see also* AR 27-10, *supra* note 6, para. 14-4*b* (encouraging the assistance of counsel in preparation of Art. 69 reviews).

deficit between a summarized record of trial and a verbatim record of trial. Moreover, there is no reason to believe that SJAs would refuse to grant reasonable requests by defense counsel for verbatim records of parts of trials that defense counsel asserted were particularly important for clemency or the Art. 69 review.

Having the trial defense counsel assist with the case for the Art. 69 review will not add a significant amount of work to the defense counsel's workload. At the same time that he or she is preparing clemency matters under R.C.M. 1105, the trial defense counsel will be able to note the allegations of error required for the Art. 69 appeal. This is nothing new. Trial defense counsel do this routinely in preparation for Art. 66 review. Accordingly, preparing such allegations would not be adding to the trial defense counsel's post-trial burden. Appropriate involvement on behalf of their clients by the trial defense counsel at this point in the process would reduce or eliminate any potential deficit in the protections afforded the convicted service member in an Art. 69 review versus those protections currently afforded by an Art. 66 review. In fact, increased involvement of the trial defense counsel at this point in the process, would, in all likelihood, enhance the review process by ensuring that the potential issues in the case were identified soon after the trial, at a time when the convicted service member is available to assist in the process.

5. Benefits of Art. 69 Review

Standing alone, Art. 69 provides significant additional protections for an accused. Under Art. 69(d), TJAG may refer cases to the service courts for further review under Art. 66.[218] This provision gives TJAG a choice to either reduce or set aside cases that have errors at his or her level, or forward such cases to the service court for full appellate review and action. In cases revealing minor error, TJAG may simply adjust the sentence or take other action in favor of the convicted service member. In cases where the trial defense counsel's memo to the Art. 69 case review officer contains credible allegations of serious error, TJAG can forward the case to the service court for a full appellate review.[219] This

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[218] *See* UCMJ art. 69(d) (2002).

[219] Under the proposed scheme of review for special courts-marital, TC would usually not prepare a verbatim transcript. It would be a simple matter to change the *AR 27-10*, para. 5-42(a), and the equivalent regulations for the other Services, to require the court reporter's notes and recordings to be retained until final action or the completion of appellate review. *Compare* AR 27-10, *supra* note 3, para. 5-42(a), *with* AR 27-10, *supra*

provision provides a screening process not unlike those employed by state appeals courts in which appeals appearing to lack merit are tracked for expedited disposition, and those appearing to have real issues are given greater attention by the appellate court.[220]

The tool for protecting the rights of service members given to each TJAG under Art. 69 is just as powerful as that of the service courts under Art. 66. Applied appropriately, the Art. 69 review would be as effective as the Art. 66 review in protecting the rights of service members convicted at special courts-martial. Any deficits in the quality of the review of courts-martial proceedings caused by the absence of a verbatim transcript, and dedicated appellate defense counsel, would be countered by an appropriate level of involvement by the individual who probably knows more about the case than anyone else involved in the process: the trial defense counsel.

The benefits of using Art. 69 review for special courts-martial in place of Art. 66 review are many. SJA offices, defense counsel, and military judges would spend much less time preparing, correcting, and processing verbatim records of trial. This would lead to fewer instances of unreasonable post-trial delay, and fewer cases of *Collazo* relief. Appellate Defense Counsel and GAC would be able to spend more time reviewing other Art. 66 cases,[221] enhancing the quality of appellate practice in cases where full appellate review is necessary. Service members would no longer wait years in limbo for final disposition of their cases on appeal, allowing them to move on in civilian life if their convictions or sentences are upheld, or to receive the benefits due them if their conviction or sentence is set aside or reduced. Finally, the workload of the service courts would be significantly reduced.[222] The implications of reducing the service courts' workload to such an extent

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note 6, para. 5-42(b). This would allow for a partial or complete verbatim transcript to be prepared should either the reviewer at the office of TJAG require it, or in the event TJAG forwarded the case to the Service Court for a full appellate hearing.

[220] *See* STERN, *supra* note 6, at 131-181.

[221] These would include general courts-martial cases and cases forwarded to the service court by TJAGs. *See* UCMJ art. 66.

[222] On average between FY 1998 and FY 2002, special courts-martial reviews accounted for approximately 24% of the ACCA's workload, 28% of the AFCCA's workload, and 80% of the NMCCCA's workload. *See* Data Compilation Courtesy of Mary Dennis, *supra* note 99; *see also Annual Reports*, *supra* note 4. These percentages are likely to increase now that the President increased the maximum confinement that can be adjudged at special courts-martial to one year. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B).

are apparent—the size of each court could be decreased, and the remaining judges could give more attention to truly important issues.[223]

Using Art. 69 as the sole review mechanism for special courts-martial would garner all of these benefits, and still protect the rights of convicted service members. Accomplishing such a change would require only minor adjustments to the UCMJ, the RCM, service regulations, and personnel allocations in each of the services. The time has come to seriously consider making this change.

VI. Changes to Effectuate Art. 69 Review of Special Court-Martial

A. Changes to UCMJ

1. Article 66

To remove review of special courts-martial from the purview of the service courts to the offices of the TJAGs, UCMJ Art. 66(b) should be changed to read as follows (bold typeface indicates changed language):

> The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge **adjudged by a general court-martial**, or confinement **for more than** one year[.]

The first change limits the number of cases reviewed under Art. 66 by specifying that only cases with a punitive discharge adjudged by a general court-martial are eligible for Art. 66 review. This eliminates Art. 66 review for special court-martial cases that adjudge a BCD with confinement of less than a year. The second change completely eliminates automatic Art. 66 review for special courts-martial by raising the confinement time necessary for an Art. 66 review to more than one

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[223] Such a change would answer some criticisms the service courts have received from civilian legal commentators. *See, e.g.*, Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1230 (1997) (criticizing the military judiciary in that they are for the most part anonymous, do not produce enough opinions, and give too much deference to trial judges).

year.[224] Because the maximum punishment that can be adjudged at a special court-martial is only one year, no special court-martial would qualify for an automatic Art. 66 review using this language.

Article 66 (b) currently provides for review of cases where the sentence includes one year or more of confinement.[225] The proposed change in the language of Art. 66 would add one day to the minimum amount of confinement required for an Art. 66 review. For example, if a service member at a general court-martial were sentenced to one-year confinement and no BCD, his or her case would not be eligible for an Art. 66 review. However, a case with a sentence of confinement over one year, i.e. 366 days, would be eligible. As noted above, it is unusual for a service member to be sentenced to the maximum confinement allowed at a special court-martial (one year). Currently, the vast majority of special courts-martial reviewed under Art. 66 involve cases in which the court sentenced the service member to a BCD.[226] Thus, this proposed change would have little practical effect in special courts-martial cases, but would make a bright-line rule that no special courts-martial qualify for an automatic review under Art. 66.

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[224] Some special courts-martial could still be reviewed under Art. 66 after being referred to the service courts by a TJAG under Art. 69. *See* UCMJ art. 69.

[225] *See* UCMJ art. 66(b). Congress based its selection of one-year as the amount of confinement to which a service member must be sentenced to qualify for an Art. 66 review on the distinction most civilian criminal justice systems made between what constituted a felony versus a misdemeanor crime. Most jurisdictions defined as felonies those crimes for which a person could be incarcerated in a state prison or penitentiary, as opposed to a local jail. A convict would only be sent to a prison if his or her sentence was in excess of one year. Convicts serving less than a year of confinement were incarcerated in local jails. *See* Hearing on H.R. 2575, *supra* note 21, at 2025 (testimony of MG Hoover, The Judge Advocate General of the Army). The UCMJ does not distinguish between felony and misdemeanor crimes, thus, the selection of one-year of confinement as the cut-off for eligibility for an Art. 66 review is essentially arbitrary. Because so few special courts-martial actually adjudge confinement of one-year, it would make little difference in practical terms to leave the cut-off at one year. It would be more efficient, and more importantly, more clear, however, to raise the cut-off by one day, and, thereby eliminate all special courts-martial from eligibility for automatic review under Art. 66.

[226] *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B); *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

2. Article 54

To eliminate the requirement for verbatim transcripts of special courts-martial proceedings, Art. 54 (c)(1)(B) should be eliminated. This section requires that a verbatim transcript be made for special courts-martial in which the sentence includes a BCD, confinement for more than six months, or forfeiture of pay for more than six months.[227] If special courts-martial are ineligible for Art. 66 review, it makes little sense to produce a verbatim transcript of special courts-martial proceedings. While such a transcript would be helpful to an Art. 69 reviewing officer, the whole point of changing Art. 66 to make special courts-martial ineligible for Art. 66 review is to speed up the post-trial process in part by eliminating the need for verbatim transcripts.

Additionally, Art. 54 is somewhat inconsistent with the current Art. 66 in that Art. 66 review is triggered by a sentence to confinement of one-year, not six months. Art. 66 does not even mention forfeitures of pay. When it enacted Art. 66, Congress was concerned that service members sentenced to felony-length terms of confinement, and service members receiving BCDs had an appellate safety net. The addition of the requirement for a verbatim transcript for sentences to confinement over six months was a result of later changes to the UCMJ which allowed for confinement of up to one year at a special courts-martial. When that change went into effect, inconsistencies arose as to when a verbatim transcript was required between general and special courts-martial.[228] Under this proposed change to Art. 54, TC would only have to prepare verbatim transcripts for general courts-martial cases in which the sentence included over one year confinement, or a punitive discharge.

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[227] *See* UCMJ, art. 54(c)(1)(B).

[228] *See* MCM, *supra* note 6, app. 21, R.C.M. 1103(b), analysis at A21-81; *see also* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE—1983 220-1. Article 54 changed with each major amendment to the UCMJ. The goal of each change, however, was to limit the amount of verbatim transcripts that needed to be prepared. *See generally* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE: 50TH ANNIVERSARY EDITION, *supra* note 61, at 1084-87; THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 19.

3. Article 19

This article prescribes the jurisdiction of special courts-martial. One of Art. 19's provisions is that a special court-marital may only adjudge a BCD or confinement for more than six months, or forfeitures for more than six months, if a verbatim record of the proceedings is made.[229] This provision of Art. 19 should be eliminated for the same reasons Art. 54(c)(1)(B) should be eliminated. If there is no automatic Art. 66 review of special courts-martial, there is no need for a verbatim transcript of special court-martial proceedings.

B. Changes to the Rule for Courts-Martial 1103

Similar to Arts. 19 and 54 above, the provisions of R.C.M. 1103(b)(2)(B) require verbatim transcripts for special courts-martial adjudging a BCD, and for all courts-martial that adjudge confinement or forfeitures in excess of six months. This rule should be changed to read as follows:

> Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim written transcript of all sessions except sessions closed for deliberations and voting when the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge adjudged by a general court-martial, or confinement for more than one year.

This language is consistent with the language proposed above for Art. 66, and simplifies the code.

C. Changes to Service Regulations[230]

1. *AR 27-10*, para. 5-27(a)(3) should be eliminated.[231] It is based on the requirement in RCM 1103(b)(2)(B) for a verbatim transcript in

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[229] *See* UCMJ art. 19.

[230] Army regulations on military justice administration are similar to those of the other services. For the sake of brevity, this paper discusses only the relevant Army regulations.

[231] This provision states: "A bad-conduct discharge (BCD), confinement for more than 6 months, or forfeiture of pay for more than 6 months, may not be adjudged at special courts-martial unless— . . . [a] verbatim record of the proceedings and testimony was made." *See* AR 27-10, *supra* note 6, para. 5-27.

special courts-martial that adjudge a BCD. If Art. 66 review of special courts-martial is eliminated there is no need for this regulatory provision.

2. *AR 27-10*, para. 5-42[232] should be changed to ensure that recordings of the proceedings of special courts-martial are retained until the Art. 69 review process is completed. *AR 27-10*, para. 5-42(a) should be changed to read as follows:

> For cases in which a summarized record of trial is authorized, the notes or recordings of the original proceedings will be retained until completion of final action, review under UCMJ Art. 69, or further appellate review, whichever is later. The notes or recordings may be kept by the trial counsel, an assistant, court reporter, or a clerk or stenographer acting under the trial counsel's direction. On order of The Judge Advocate General, the trial counsel shall prepare verbatim transcripts of such proceedings, or specified portions of such proceedings, and shall forward them to the Office of The Judge Advocate General, New Trials and Examinations section, within 30 days of receipt of the order to prepare such verbatim transcripts.

Such a provision in the regulation ensures that the notes and recordings of special courts-martial are available if needed by case reviewing officers, or appellate counsel if TJAG refers the case to a service court.[233]

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[232] AR 27-10, para. 5-42, states:

> *a*. For cases in which a summarized record of trial is authorized, the notes or recordings of the original proceedings will be retained until the record is authenticated.
> *b*. For cases in which a verbatim transcript is required, the verbatim notes or recordings of the original proceedings will be retained until completion of final action or appellate review, whichever is later.
> *c*. The verbatim notes or recordings may be kept by the trial counsel, an assistant, court reporter, or a clerk or stenographer acting under the trial counsel's direction.

AR 27-10, *supra* note 6, para. 5-42.

[233] Recordings of courts-martial proceedings can now be stored in digital format making them both more secure from the elements and easier to retrieve after long periods of time.

It would be advisable to continue the practice of having certified court-reporters use stenographic techniques to record special courts-martial proceedings. While this would require effort on the part of court reporters, it is not the recording process that causes delays in preparing records of trial. Rather, it is the transcription process that is time-consuming and tedious.[234] Having a high quality stenographic recording of special courts-martial cases ensures that if verbatim transcripts are required, a court reporter has a recording that can be used to produce a quality transcript.

D. Changes in Personnel Allocations

If Congress eliminated automatic Art. 66 review of special courts-martial, and replaced it with review under Art. 69, the number of cases reviewed at the services' offices of TJAG would increase significantly. This is particularly true for the Department of the Navy which has the largest number of special courts-martial that impose BCDs.[235] The number of cases currently reviewed under Art. 69 is relatively small, thus, relatively few personnel are assigned to review cases under Art. 69. For example, in recent years, only one attorney was assigned to the Army's Examination and New Trials Division which has responsibility for reviewing cases under Art. 69.[236]

With the influx of new cases requiring Art. 69 review this paper's proposed change would bring about, it would be necessary to increase the number of judge advocate case examiners. There would, of course, be a commensurate drop in the number of cases requiring dedicated appellate counsel. To account for these changes, a simple shift of human resources could take place. For example, because there would be approximately 25% fewer cases for ACCA to review under Art. 66,[237] TJAG could shift a commensurate number of ADCs and GACs out of the

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[234] *See id.*

[235] *See Annual Reports*, *supra* note 4.

[236] *See* U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY 11 (2003-4) [hereinafter U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY]; U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY 10 (2004-5).

[237] Special courts-martial make up about 25% of the Army cases reviewed under Art. 66. *See Annual Reports*, *supra* note 4. Now that the amount of punishment special courts-martial may adjudge has increased to one year, the percentage of special courts-martial is likely to increase.

appellate divisions to New Trials and Examinations. At the time this article was written, there were approximately 40 attorneys working as Army appellate counsel. [238] Moving ten (10) attorneys to Examinations and New Trials would provide the manpower to handle the less labor-intensive courts-martial reviews required under Art. 69. A similar adjustment of the staffing levels at the service courts could also be considered.

VII. Conclusion

Steady increases in the protections afforded accused and convicted service members characterized the first 50 years of military justice under the UCMJ. Since 1987, service members have lived and worked under a mature military justice system that has emphasized due process and fairness. Under the current system, the rights of the accused and convicted are protected at least as well and, in many cases, better than in its civilian counterparts.[239] Changing Art. 66 to eliminate the automatic appeal for all special courts-martial will not reduce the due process rights of convicted service members. By increasing the speed of the post-trial process, and by encouraging more involvement by defense counsel with the case review process, a change to Art. 66 may increase the protections the UCMJ affords service members. At the same time, this change would significantly reduce the workload of SJA offices, military judges, appellate counsel, and most importantly, the service courts. Now is the time to make that change.

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[238] *See* U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1 (2003-4), *supra* note 236, at 17-8.

[239] *See* Cooke, *supra* note 3, at 18-19; Major George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 41 (2000).