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The military justice system encompasses the processes for imposing punishment on military personnel and for challenging the punishment imposed. The system operates separately from the civilian justice system under constitutional and legislative authority. The military justice system has been criticized as being inequitable because it deprives military service members of many due processes of law.

Findings/Conclusions: Many problems were found in defense and trial counsel organizations in the four military services that lead to perceptions that military justice is uneven, unfair, and of low priority. In the Army and Marine Corps, defense counsels work directly for convening authorities who are also commanding officers. In the Army, Navy, and Marine Corps, inadequate staffing criteria and personnel assignment practices have resulted in significant differences in the number of cases per counsel. Procedures to assign counsel based on experience, complexity, and current workload are the exception rather than the rule. The number of support staff is generally inadequate, and procedures for selection of witnesses generally favor the prosecution. Counsel effectiveness is frequently hampered by inadequate facilities, equipment, and courtroom and by a lack of privacy. Under current organizational modes, the costs of military justice are unknown. There should be a single defense

and trial counsel organization within the Department of Defense. Recommendations: The Secretary of Defense should: consolidate defense and trial counsel organizations at single bases and proximate bases where feasible and cost-effective, establish budgeting processes allowing for the development of total costs of military justice and for comparison of costs between services, and study and report on methods to enhance the independence of counsel. He should also: direct the services to establish uniform criteria and methods for identifying numbers of counsel and support staff needed and make assignments consistent with the counsel's experience, workload, and case complexity; propose changes to the Manual for Courts Martial; and direct the services to establish systems to fund logistical support to counsel. The Congress should revise the Uniform Code of Military Justice to remove convening authorities' responsibility for administering and funding the justice system. (RRS)

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Fundamental Changes Needed To Improve The Independence And Efficiency Of The Military Justice System

The military justice system presents obstacles to the impartial delivery of justice because commanders who approve the trial of the accused (convening authorities) are also required by law to administer the justice system.

Convening authorities

- detail key participants in court proceedings,
- control funds for witnesses, and
- budget the cost of military justice support staff and facilities.

Problems with the defense and trial counsel organizations in the services further contribute to a perception that military justice is uneven, unfair, and of low priority.

Certain changes, including diminishing the role of the convening authority in administering the system, can alleviate or correct some of the problems within existing organization structures. However, organizational changes are needed for long-range improvements to enhance judicial independence and make the system more efficient.





COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-186183

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses problems with the defense and trial counsel organizations in the services which lead to perceptions that military justice is uneven, unfair, and of low priority. Some of the problems can be alleviated or corrected within existing organizational structures. However, fundamental organizational changes are needed to bring about long-range improvements to enhance judicial independence and make the system more efficient.

On page 52, we recommend that the Congress

- amend the Uniform Code of Military Justice to diminish the commander's role in administering the military justice system and
- earmark specific amounts in defense appropriations acts for the operation and maintenance of military justice facilities and equipment.

Our authority for making this review is the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 57).

We are sending this report to the Director, Office of Management and Budget; the Attorney General of the United States; the Secretaries of Defense, Transportation, the Army, the Navy, and the Air Force; the Chairman, Civil Service Commission; and other interested parties.

A handwritten signature in black ink, appearing to read "James R. Heath".

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

FUNDAMENTAL CHANGES NEEDED
TO IMPROVE THE INDEPENDENCE
AND EFFICIENCY OF THE
MILITARY JUSTICE SYSTEM

D I G E S T

The military justice system has been criticized as being inequitable because it deprives military service members of many due processes of law.

Traditionally, the military justice system has generally operated separately from civilian justice systems, and most offenses dealt with are unique to the military and relate to discipline. The system presents obstacles to the impartial delivery of justice because the commanding officer who approves the trial of the accused (convening authority) is also required by law to administer the justice system. Within these constraints, it is important that everything possible be done to ensure the delivery of fair and evenhanded justice. (See p. 1.)

Military justice has significant impact on human lives; sentences range from pay forfeitures to death. A finding of guilty by a court-martial is a Federal conviction, and the stigma of a bad conduct or dishonorable discharge can carry over to civilian life, limiting opportunities for employment. Because of these impacts, some changes have been made to ensure more equitable treatment of the accused. In recent years, efforts have been made to improve the military justice system, but more needs to be done. (See p. 1.)

The military justice system is currently under considerable internal and external pressure to change in order to appear more equitable and fair. The all volunteer environment has added further impetus to the need for change.

Tear Sheet. Upon removal, the report cover date should be noted hereon.

Several key officials have called for revisions in the structure of the military justice system. Included in these proposals is the strong feeling that command duties should be separated from legal and judicial functions. Bills have been introduced in the Congress which would radically change many aspects of military justice. Some of these bills are still pending action. (See pp. 8 and 9.)

Convening authorities have traditionally detailed key participants in court proceedings, including defense and trial counsel. Also, they often control funds for witnesses and budget the cost of military justice support staff and facilities. In carrying out their responsibilities, convening authorities can influence the outcome of cases. (See pp. 6 and 7.) This potential for command influence is harmful to the cause of justice and damaging to military discipline and morale. (See p. 40.)

In looking at defense and trial counsel organizations in the four military services, GAO found many problems leading to perceptions that military justice is uneven, unfair, and of low priority--beliefs which damage its ability to deter offenses and rehabilitate offenders.

- In the Army and Marine Corps, defense counsel work directly for convening authorities, who are also commanding officers. (See pp. 32 and 33.)
- In the Army, Navy, and Marine Corps, inadequate staffing criteria and personnel assignment practices have resulted in significant differences in the number of cases per counsel among the services, installations, and commands. (See pp. 15 to 17.)
- Procedures to assign counsel based on experience, case complexity, and current workload are the exception rather than the rule. (See pp. 17 and 18.)

- The number of support staff is generally inadequate and in some cases, nonexistent. (See pp. 18 and 19.)
- Procedures governing the selection of witnesses favor the prosecution. (See pp. 21 to 23.)
- Counsel effectiveness is frequently hampered by inadequate facilities and equipment such as law libraries, clerical equipment, privacy for counsel and client discussion, and courtrooms. (See pp. 23 to 25.)

Also, under current organizational modes, the costs of military justice are unknown. As of March 31, 1977, the services estimated that 5,676 personnel spend at least 10 percent of their time on military justice matters. But costs of military justice personnel and logistical support items are not identified separately in service budgets. (See pp. 10, 11, and 25.)

Some of these problems can be alleviated or corrected within existing organizational structures. GAO believes, however, that fundamental organizational changes are needed to bring about long-range improvements. (See p. 38.)

To lessen the appearance of command influence, the administration of the justice system should be separated from military command functions. Removing responsibilities for administering and financing the justice system from convening authorities would allow

- more uniform development and application of trial procedures,
- improved budgeting processes, and
- a more equitable allocation of resources.

It would also facilitate cross-service consolidation of defense and trial counsel organizations. (See pp. 40 to 42.)

DEFENSE COUNSEL ORGANIZATIONS

A 1972 Department of Defense task force on military justice stated that many enlisted personnel lacked confidence in military defense counsel because they believed counsel were serving commanders rather than the accused. Since the date of this report, the Navy and Air Force have made defense counsel organizationally separate from the command bringing charges. (See p. 31.)

The Army's planned organization appears to conform to the Air Force organization. The Marine Corps is testing separate defense counsel organizations but is not prepared to implement the change servicewide. (See pp. 37 and 38.)

Over half of the 139 Army and Marine Corps military justice personnel interviewed felt that organizational changes are needed. Some of these personnel felt their handling of cases and the overall quality of defense were adversely affected by their organizational structure. (See p. 37.) GAO identified opportunities for the consolidation of defense and trial counsel organizations at locations where (1) more than one activity exists on a single base and (2) several activities or bases are located in close geographical proximity. (See pp. 44 to 48.)

Although most military justice personnel GAO talked to opposed cross-service consolidation, the problems cited can be overcome. In GAO's opinion, the benefits of consolidation far outweigh the potentially adverse effects. (See pp. 48 to 51.) Moreover, cross-service consolidation has been successfully demonstrated in a number of instances. (See pp. 43 and 44.)

BENEFITS OF CONSOLIDATION

In theory, GAO endorses the concept of a single defense and trial counsel organization in the Department of Defense. However,

more study is needed to determine the feasibility and costs of such a major change. (See p. 52.)

In enacting the Uniform Code of Military Justice, the Congress made its intent clear that the justice system should be uniformly administered within and among the services. Consolidation would be in consonance with the objective of uniform justice because it would provide greater consistency in the application of procedures and resources. Currently, military commanders have broad discretionary authority for making important decisions regarding the justice system. In most cases, they do not have formal legal training for handling such matters. Through consolidation, uniform procedures could more easily be established for administering the justice system and processing cases. (See pp. 40 and 41.)

Consolidation of military justice functions would require development of separate budgeting processes for personnel and related support costs. Budgeting these costs separately would enable both the Congress and the Department of Defense to know how much is being spent on military justice and how expenditures compare between services and for specific locations or installations. By making the resources more visible, such a system could be used to correct the inequities GAO found. (See p. 42.)

Consolidation would also enhance independence and efficiency.

--Judicial independence would be enhanced by insulating counsel and other judicial functions from the command initiating charges against the accused.

---Counsel and support staff could be used more effectively, and the number needed should decrease by evening out caseloads and assigning counsel on the basis of case complexity and experience.

--Logistical support costs should be lowered by making more efficient use of facilities and equipment, such as libraries and court-rooms. (See p. 42.)

STAFFING CRITERIA AND ASSIGNMENT PROCEDURES

GAO's evaluation of services' staffing criteria showed that the Navy's system is superior to the other services' systems because it has formal procedures based on workload. Revisions recently implemented in the Air Force should improve its system. In contrast, Army staffing is based on troop population. The Marine Corps does not have a formal system for studying lawyer and support staff needs. (See pp. 13 and 14.)

The lack of formal staffing criteria and assignment procedures has resulted in differences in the number of cases per counsel among installations in a service and commands at an installation. In the Marine Corps, 40 percent of the justice system personnel interviewed felt the number of defense counsel was inadequate. The quality of justice suffers when counsel do not have enough time to adequately prepare for cases. In contrast, counsel with lower workload may be underutilized. (See pp. 15 to 17.)

The number of support staff was inadequate at most legal offices and in some cases, nonexistent. This requires counsel to perform many functions that could be done by lower paid support personnel. (See pp. 18 and 19.)

OTHER FACTORS HAMPERING COUNSEL EFFECTIVENESS

Decisions regarding the funding for witnesses are made by convening authorities and placed in competition with other items funded out of a base operating and maintenance budget. Also, procedures for summoning witnesses favor the prosecution. In GAO's opinion, decisions concerning funding witnesses should not be made by convening authorities, and

the delivery of evenhanded justice should allow defense counsel to subpoena witnesses independently of the trial counsel.

Mechanisms are available for counsel to contest decisions regarding witnesses. However, counsel are reluctant to use these mechanisms in cases where their ratings are prepared by the convening authority's staff judge advocate. (See pp. 21 to 23.)

In 1972 the task force on military justice reported that military justice facilities and equipment in the four services needed improvements. But GAO found inadequate logistic support to still be a problem. Many personnel interviewed indicated that these problems were having adverse effects. (See pp. 23 to 25.)

RECOMMENDATION TO THE CONGRESS

GAO recommends that the Congress revise the Uniform Code of Military Justice to remove convening authorities' responsibility for administering and funding the justice system, including the detailing of judges, jurors, and defense and trial counsel; and the funding of witnesses. Convening authorities should continue to retain responsibility for referring cases to trial and exercising clemency power. (See p. 52.)

RECOMMENDATIONS TO THE SECRETARY OF DEFENSE

The Secretary should direct the services to:

- Consolidate defense and trial counsel organizations at single bases and proximate bases where it is feasible and cost effective.
- Establish budgeting processes allowing for the (1) development of total costs relating to military justice functions and (2) comparison of costs between services and among service activities and organizations. This would make military justice costs more visible and provide the Congress

a means to ensure that (1) the system as a whole is funded consistent with its importance and (2) resources are equitably allocated.

--Study and report on methods to enhance the independence of counsel, including the feasibility of establishing a single defense and trial counsel organization in the Department of Defense. (See p. 53.)

Other recommendations to the Secretary of Defense are on pages 19, 30, and 39.

AGENCY COMMENTS

The Department of Defense stated that all but one of the several recommendations to the Secretary have merit. The Department of Defense did not concur in the recommendation to study and report on the feasibility of establishing a single defense and trial counsel organization. (See p. 53.)

The Department of Defense also provided the services' extensive comments. A comparison of the Department of Defense response to this report with the comments provided by the individual services demonstrates the need for the services and the Department of Defense to coordinate work on the problems affecting the military justice system.

In general, the services agreed that perceptions of fairness are an important consideration in the administration of the military justice system. However, the services disagreed with (1) the extent that the role of the convening authorities should be diminished and (2) the establishment of consolidated counsel organizations, especially, the concept of a single defense and trial counsel organization.

The agency comments appear in their entirety in appendix VIII to this report.

C o n t e n t s

		<u>Page</u>
DIGEST		i
CHAPTER		
1	INTRODUCTION	1
2	TRIAL AND DEFENSE COUNSEL ORIGINS AND PHILOSOPHIES	3
	Origins of defense and trial functions	3
	Types of courts-martial and procedures	5
	Role of convening authorities	6
	Organizational relationship of the military justice system to DOD	7
	Proposals for change	8
3	IMPROVEMENTS NEEDED IN STAFFING CRITERIA AND ASSIGNMENT PROCEDURES FOR COUNSEL AND SUPPORT STAFF	10
	Funding and staffing	11
	Identifying counsel and support staff requirements	11
	Personnel authorized versus assigned differ	15
	Analysis of counsel workload	15
	Methods for assigning counsel to cases	17
	Inconsistent and inadequate support staffs	18
	Conclusions	19
	Recommendation to the Secretary of Defense	19
4	OTHER FACTORS WHICH HAMPER COUNSEL EFFECTIVENESS	21
	Ability to independently obtain witnesses	21
	Logistical support often inadequate	23
	Conclusions	25
	Recommendations to the Secretary of Defense	30

CHAPTER		<u>Page</u>
5	NEED TO ACHIEVE INDEPENDENT DEFENSE COUNSEL ORGANIZATIONS	31
	Organizational modes and recent revisions	31
	Views of quality defense vary according to degree of organiza- tional independence	33
	Planned changes	37
	Conclusions	38
	Recommendation to the Secretary of Defense	39
6	ORGANIZATIONAL CHANGES ARE NEEDED TO MAKE THE MILITARY JUSTICE SYSTEM MORE INDEPENDENT AND EFFICIENT	40
	Role of convening authorities in administering military justice needs to be diminished	40
	Benefits of consolidation	41
	Instructions and precedents for consolidation	43
	Military personnel views of three organizational modes	48
	Reasons opposing consolidation given by personnel interviewed and our evaluation	50
	Conclusions	51
	Recommendations to the Congress	52
	Recommendations to the Secretary of Defense	53
	Agency comments and our evaluation	53
7	SCOPE OF REVIEW	55
APPENDIX		
I	Locations visited	57
II	Military justice personnel views of three organization modes	58
III	Navy and Air Force views on organiza- tional alinements versus influence of commanders	60

APPENDIX

		<u>Page</u>
IV	Army and Marine Corps views on organizational alinements versus influence of commanders	62
V	Military justice personnel views on factors hampering performance	64
VI	1976 monthly caseload per counsel	65
VII	Military justice workload, Department of the Army	67
VIII	Agency comments	68
IX	GAO reports on the military justice system	92

ABBREVIATIONS

DOD	Department of Defense
GAO	General Accounting Office

CHAPTER 1

INTRODUCTION

The military justice system is used by commanders to enforce discipline. It encompasses the processes for (1) imposing punishment on military personnel and (2) challenging the punishment imposed. The system operates separately from the civilian justice system under constitutional and legislative authority. The concept of a separate military justice system was upheld by the U.S. Supreme Court in a 1974 decision 1/ which stated:

"This court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. * * *"

The system presents obstacles to the impartial delivery of justice because the commanding officer who approves the trial of the accused (convening authority) is also required by law to administer the justice system. Also, most offenses dealt with are unique to the military and relate to discipline. Within these constraints, it is important that everything possible be done to ensure the delivery of fair and evenhanded justice.

Military justice has significant impact on human lives; sentences range from pay forfeitures to death. A finding of guilty by a court-martial is a Federal conviction, and the stigma of a punitive discharge--bad conduct or dishonorable--can carry over to civilian life, limiting opportunities for employment. Because of these impacts, changes have been made to ensure more equitable treatment of the accused. An important ingredient in this philosophy has been the emergence of qualified military defense and trial counsel. Although in recent years efforts have been made to improve the professional independence of counsel, much more needs to be done.

Much of the information in this report was obtained through questionnaires administered to 211 military justice personnel at 19 field locations selected by service headquarters officials as representative of overall

1/Parker, Warden, et al vs. Levy, 417 U.S. 733 (1974).

organization, staffing, and caseload conditions. (See app. I.) A description of the types of justice personnel interviewed and the questions asked is in chapter 7. A summary of responses by service is in appendixes II through V.

This is one of a series of reports we have prepared on military justice matters. (See app. IX.) Various other aspects of the justice system are under review and will be the subject of future reports. The ability to look across service lines has enabled us to develop a good perspective of how the military justice system works. Thus, we are in a unique position to comment on the military justice system and highlight for the Congress and the Department of Defense (DOD) areas where change is needed to make the system more efficient and equitable.

CHAPTER 2

TRIAL AND DEFENSE COUNSEL

ORIGINS AND PHILOSOPHIES

The basic authority for the present military justice system is the Uniform Code of Military Justice. ^{1/} All the services are subject to the Code. The legislative history shows that this law was to provide a new and better system of justice by ensuring that justice would be more uniformly administered among the military services and, for the first time, the accused's right to counsel would be mandatory in serious cases. It set forth the fundamental rights of military personnel in the three main steps of criminal prosecution: the pretrial proceeding, the trial itself, and the appellate review.

The Code delegates authority to the President to establish procedural rules and maximum punishments. In exercising this authority the President, by executive order, issued the Manual for Courts-Martial.

ORIGINS OF DEFENSE AND TRIAL FUNCTIONS

The history of military justice shows increasing concern by the Congress for having professional counsel to protect the interests of the Government and the accused. When legislation creating military courts-martial was enacted in 1775, no requirement was made for legal counsel. In 1920 the Congress recognized that a court-martial should be a judicial proceeding by amending the Articles of War to provide that the authority appointing a general court-martial shall detail a lawyer as one of the members. No further changes in requirements for lawyers were made until 1950, when the Code was enacted. It represented a revolution in military law and, for the first time,

^{1/}The Code was enacted as part of the act of May 5, 1950 (64 Stat. 108), which contained 16 additional sections. It was thereafter revised, codified, and enacted into law as part of Title 10, United States Code, by the act of August 10, 1956, and has subsequently been further amended (10 U.S.C. 801-940) including the Military Justice Act of 1968, enacted as Public Law 90-632 (82 Stat. 1335) on October 24, 1968.

the right to legally qualified counsel 1/ was mandatory in serious cases.

Major changes were made when the Code was last amended by the Military Justice Act of 1968 to:

- Provide that legally qualified counsel must represent an accused before any special court-martial empowered to adjudge a bad conduct discharge, and in other special courts-martial, legally qualified counsel must be detailed to represent the accused unless unavailable because of physical conditions or military exigencies.
- Require a separate judiciary for the armed services, comprised of military judges who are organizationally independent from line commanders.
- Permit an accused to waive trial by a full court and to be tried by a military judge alone.
- Strengthen the bans against command interference.

These important changes increased the availability of legally qualified counsel to represent defendants before special courts-martial. As passed in 1950, the Code provided that in a general court-martial, the accused must be represented by legally qualified counsel, but in a special court-martial, the accused could be represented by an appointed non-lawyer if a legally qualified counsel was not reasonably available. The services, except for the Air Force, took the position that legally qualified counsel were unavailable for assignment as defense counsel in special courts-martial. As a result, most military personnel tried by special courts before the 1968 act were represented by personnel not qualified as lawyers.

1/Legally qualified counsel, as used in this report, includes personnel who are (1) accredited law school graduates or members of the bar of a Federal court or of the highest court of a State and (2) certified to practice by their judge advocate general, which includes graduation from the service's legal school.

TYPES OF COURTS-MARTIAL AND PROCEDURES

Defense and trial counsel may serve on two types of courts-martial--special and general.

--Special courts have jurisdiction to try persons accused of noncapital offenses and, under certain specified conditions, for capital offenses other than spying. The maximum sentence that can be imposed is confinement at hard labor for 6 months, forfeiture of two-thirds pay for 6 months, reduction in rank to the lowest enlisted grade, and a bad conduct discharge.

--General courts are the highest trial courts and have jurisdiction to try any case. The sentence imposed can be the maximum punishments authorized: bad conduct or dishonorable discharge, reduction to lowest enlisted grade, total forfeiture of pay, life imprisonment, and death.

Normally, field grade officers or their equivalent (major through colonel) can convene special courts, while general grade officers or their equivalent convene general courts.

In court, counsel representing the Government and the accused present facts, law, and arguments. From these presentations, the judge decides questions of law. The issue of guilt and the sentence can be decided by either a judge or a jury. When empaneled, military juries always impose sentencing even if the accused pleads guilty.

All records of courts-martial are subject to review. The higher the level of court-martial, the more substantial the review. The findings of a general court-martial may be reviewed by a court of military review and the U.S. Court of Military Appeals--the highest court in the military justice system. Both courts have the authority to set aside sentences. Determination of whether the accused's rights were prejudiced is an important element of the review process.

Military courts-martial have lost some of their jurisdiction in recent years. Some cases which in the past were tried by court-martial are being tried in State and Federal courts. In some cases, military and civilian

courts have concurrent jurisdiction to try the accused. Thus, the rights of service members may depend on whether they are tried by civil or military authorities. In foreign countries, international agreements spell out who has jurisdiction over offenses.

ROLE OF CONVENING AUTHORITIES

Convening authorities--commanding officers who approve the trial of the accused--play a dominant role in the justice system under broad authority conferred by the Code. They have responsibility for

- deciding whether to bring charges against the accused;
- referring, after due investigation, a case to the appropriate type of court-martial;
- detailing the judge and defense and trial counsel; and
- determining who will serve as jurors.

In a recent Court of Military Appeals decision, 1/ the court stated

"* * * since the Congress did not specifically provide for delegation of the duties [in the Code], we conclude * * * that only the convening authority may perform the tasks of detailing judges and counsel."

After trial, the convening authority must review the record of trial and approve a finding of guilty and the sentence imposed. He may exercise clemency in the interest of rehabilitating the accused or may order a rehearing if there is judicial error. Thus, he is intimately involved in the justice system and has important responsibilities in its operation. He is guided and governed by statutes and directives. His decisions on judicial matters are subject to review by superiors, and in some cases are reviewed by appellate courts, including the U.S. Court of Military Appeals.

1/United States vs. Newcomb, 5 M.J. 4 (1978).

In addition to his military justice administrative duties, the convening authority can act to influence courts-martial in ways not set forth in the Code because of his rank in the command structure. He or officers superior to him may wish to influence how a particular crime or person accused of an offense is dealt with. Although exercising such influence is expressly forbidden by article 37 of the Code, appellate courts have determined that abuse has occurred. ^{1/} In May 1978, a Navy district commander was relieved of his judicial authority following a military judge's ruling that he interfered in court-martial proceedings. The action was taken pending an investigation requested by the accused commander.

Although military justice matters may take one-fourth or more of a commander's time, it is not his primary duty. There is no requirement that he have formal legal training; he usually relies heavily on the advice of others, such as the staff judge advocate.

ORGANIZATIONAL RELATIONSHIP OF THE MILITARY JUSTICE SYSTEM TO DOD

The military justice system is a support function within DOD. The Navy, Air Force, and Army each have a Judge Advocate General who reports to the service Secretary. In the Marine Corps, the Director, Judge Advocate Division, reports to the Secretary of the Navy through the Commandant of the Marine Corps. The organizational relationship of the system to DOD was criticized in 1955 in the Hoover Commission study which stated:

"The lack of coordination of legal services in the several military departments through the General Counsel of the Department of Defense is a primary defect in the organization of legal services in the defense establishment."

There have been changes in the DOD legal structure since the Hoover Commission; however, the services are

^{1/}See, for example, United States vs. Hedges, 11 USCMA 642, 29 CMR 458 (1960); United States vs. McLaughlin, 18 USCMA 61, 39 CMR 61 (1968); United States, vs. Wright, 17 USCMA 110, 37 CMR 374 (1967); United States vs. Broynx, 45 CMR 911 (1972).

still individually responsible for managing their justice systems consistent with the Code.

PROPOSALS FOR CHANGE

Many reforms in the military justice system have been proposed, most of which would diminish the power of the convening authority. Several key officials have called for revisions in the structure of the system. For example, the Chief Judge of the U.S. Court of Military Appeals has suggested a change that would require an independent prosecutorial section and an independent defense section in each service. In a December 1975 speech, the Chief Judge said:

"* * * An independent court of this nature coupled with an independent prosecutorial section and an independent defense section, I believe, would provide our society with a trial forum second to none which meets the society's need for justice at the trial level. More importantly, I believe it leaves those in command with the tools needed to carry out their mission without burdening them with judicial responsibilities for which they have neither the time nor the appropriate training."

In 1975 the Judge Advocate General for the Navy, in a speech to the American Bar Association, 1/ expressed the opinion that the military justice system should not be made more like the civilian court system.

"The general public frequently criticizes what is known as 'command influence.' The remedy most frequently advanced as a solution to this question is to 'civilianize' the process of military justice. This cry for 'civilianization,' however, demonstrates a serious lack of appreciation of the nature and content of the system of military justice in this country. The problems that those who raise it seem to envision--that of an arbitrary and oppressive system of justice executed by a dictatorial power--are imagined rather than real. As those

1/Starling: "The Role of the Commander," 61 ABA Journal 305 (1975).

lawyers who have practiced within its system-- or who have observed its practice--well know, military justice is as protective of an accused's rights as the judicial proceedings in our state and federal courts--or more so. It is undeniable that the present system is often maligned.

"The criticism is based largely on illusion. The answer to it lies in modifying the military judicial process to remove that which fosters the 'appearance of evil' but to retain intact the elements essential to meeting the needs of the commander."

Bills have been introduced in the Congress to change aspects of military justice and to rewrite the Code. One bill introduced in 1975 (H.R. 866, 94th Cong.), would have removed defense counsel from the control of convening authorities and created an independent trial command to lessen the chance of command influence's adversely affecting judicial proceedings. Another bill was introduced in 1977 (H.R. 3999, 95th Cong.) to establish in the Office of the Judge Advocate General of each service an independent command to be known as the Courts-Martial Command, which would be divided into four divisions: (1) judicial, (2) prosecution, (3) defense, and (4) administration.

In May 1978, a bill drafted by the Committee on Military Justice and Military Affairs, Association of the Bar of the City of New York, was introduced (H.R. 12613, 95th Cong.). Included in its provisions is the separation of command from legal and judicial functions. As the individual responsible for the good order, discipline, and welfare of the members of his command, the commanding officer would continue to invoke the criminal process by exercising his discretion to refer charges to a court-martial. This aspect of his role would be underscored by his designation as the "referring authority" under the Code. The referring authority would continue to exercise post-trial clemency over execution of the sentence of the court-martial and be free to reduce or suspend a sentence as appropriate. But legal and judicial matters concerning the trial and appeal would become the responsibility of specially trained and qualified military lawyers and judges. Another aspect of this bill calls for (1) eliminating the requirement that a court-martial be specially convened by the commanding officer and (2) replacing it with a system of general and special courts-martial sitting in permanent session with continuing jurisdiction over military personnel within their judicial districts.

CHAPTER 3

IMPROVEMENTS NEEDED IN STAFFING

CRITERIA AND ASSIGNMENT PROCEDURES

FOR COUNSEL AND SUPPORT STAFF

Staffing criteria and assignment procedures for counsel and support staff are not adequate. Counsel and support staff authorized at a location are most often based on troop population--which does not necessarily relate to workload--and positions are normally not staffed as authorized. Most of the 25 field activities visited had inadequate or no support staff for defense and trial counsel. As a result:

- Counsel workload varied widely (from 0 to about 11 cases per month) within and among the services. At some locations, neither defense nor trial counsel had adequate time to handle large caseloads; both identified cases which may have suffered. In contrast, counsel at other locations (primarily Air Force) spent most of their time on duties other than military justice.
- Many counsel performed functions normally done by lower paid personnel, indicating inefficient use of counsel time. Some counsel indicated this had a detrimental impact on the quality of justice.

To determine the approximate numbers of direct personnel in the system, we asked each service Secretary to estimate the number of personnel involved in military justice as of March 31, 1977. The data showed that of the 8,780 personnel doing legal duties, 5,676 spend at least 10 percent of their time on military justice matters. ^{1/} These figures include court-martial and appellate court defense and trial counsel in addition to lawyers performing other functions, judges, court reporters, and other staff. Approximately 1,100 lawyers were working full- or part-time as defense and trial counsel as follows:

^{1/}Military justice matters include time spent on potential and actual pretrial confinement, nonjudicial punishments (article 15s), courts-martial, and administrative discharges in lieu of court-martial and for misconduct.

	Counsel who spend at least 75 percent of their time on military justice		Counsel who spend less than 75 percent of their time on military justice	
	<u>Defense</u>	<u>Trial</u>	<u>Defense</u>	<u>Trial</u>
Navy	72	63	0	0
Air Force	48	26	104	73
Army	201	177	59	31
Marine Corps	<u>109</u>	<u>88</u>	<u>20</u>	<u>11</u>
Total	<u>430</u>	<u>354</u>	<u>183</u>	<u>115</u>

FUNDING AND STAFFING

Even though the justice system is significant in terms of cost and the impact on human lives, it is not separately funded nor budgeted. General mechanisms for budgeting and funding in the services are as follows:

- In the Air Force, Army, and Marine Corps, base-level legal organizations are included in budgets prepared by base commanders and include administrative and logistical support items.
- In the Navy, the Judge Advocate General budgets the cost of civilian salaries, supplies, equipment, and facilities for Legal Service Offices. However, the Chief of Naval Operations provides and funds military personnel.
- Expenses of witnesses, including travel, are funded from base-level budgets and thus placed in competition with administrative and logistical support items. Convening authorities often control these budgets.

IDENTIFYING COUNSEL AND SUPPORT STAFF REQUIREMENTS

Standards used by the Army, Marine Corps, and Air Force to establish lawyer and legal support authorizations do not adequately match justice workload with counsel and support staff. 1/ The Navy has formal procedures for establishing

1/Standards are used to establish positions for all legal services assigned to the organization, not just defense and trial counsel. This review does not include other legal services.

the number of legal positions based on the workload. In contrast, the current Army and Air Force systems are based on troop population; however, the Air Force is developing a new system. The Marine Corps does not have formal procedures for assigning lawyers and support staff.

Troop population and counsel workload

Military justice workload does not necessarily relate to troop population because of unit missions, types of troops assigned, and other variables. Our calculations of the 1976 monthly caseload per counsel (see app. VI) show large differences in the number of military justice actions handled by counsel in different units and installations. In addition, the Army surveyed 13 combat and combat support units for military justice workload statistics. The survey was made as part of their study to update the staffing guide for lawyers in this type of unit.

Using fiscal years 1975 and 1976 as its base, the Army calculated the average annual number of military justice actions taken and involving counsel per 1,000 troops as

- 274.3 nonjudicial punishments,
- 5.8 summary courts-martial,
- 15.6 special courts-martial, and
- 2.8 general courts-martial.

Based on the military justice workload and other required duties, the study concludes that one lawyer can support 1,000 troops. However, the detailed statistics for military justice workload reported by the individual units varied considerably. (See app. VII.) For example, the number of special courts-martial ranged from a low of 6.2 to a high of 30.0 per 1,000 troops per year.

In its comments (see app. VIII) the Army told us that its staffing guides are to assist personnel analysts in determining appropriate staffing levels. The Army contends that all adjustments to staffing levels are the result of a local, detailed analysis of workload factors. The Army feels the flexibility of this system is vital to efficient management. The Army also states that troop population is indeed a benchmark to assist personnel analysts in their evaluations of staffing levels: "A clear correlation between troop population and military justice workload is evident from statistics * * *."

We did not evaluate the process the Army uses to determine staffing authorizations. Notwithstanding how these authorization decisions are made, both our analysis of counsel workload and the statistics prepared for the Army's study showed wide disparities in counsel workload and that troop population does not clearly correlate to military justice workload.

Current and planned systems

Navy

The Navy authorizes its counsel and support staff on the basis of a periodically updated study that considers how much time counsel spend on courts-martial, nonjudicial punishments, and other legal functions. In January 1977, the Navy began requiring a monthly report from Naval Legal Service Offices, which includes data on military cases, legal assistance, and administrative law. The reports and the study enable the Naval Legal Service Director to evaluate more accurately each legal service office workload, personnel requirements, and performance.

Air Force

Standards for lawyers and support staff are based on the population to be served. For example, six lawyers and eight clerks are authorized for a base population of from 6,024 to 7,441. No provision is made for differences in workload in different type units.

Recognizing the problem of adequately alining staff with volume of work, the Air Force Management Engineering Team made a study in March 1975 to update the base-level staff judge advocate staffing criteria. The team identified the tasks required to process each type of action and the time needed for each task. From this data, the team developed a formula to determine the hours required to process an activity's workload.

The study was approved in May 1978. Each year, an activity's workload will be calculated and converted into position authorizations for lawyers and support staff. Air Force officials expect the formula technique will result in a reduction in counsel.

Army

The Army has two sets of staffing guides: one for combat and combat support units and one for garrison units (troops that remain at base). The staffing guides were last updated in 1977 and 1972, respectively. Neither contains procedures for changing staffing levels as the workload changes.

The Army Judge Advocate General's School prepared the study that updates the guide for combat and combat support units; the recommended changes were approved in November 1977. The study states that the previous guide did

"* * * not take into account the many additional functions and duties performed by judge advocate personnel, nor [did] it take into account the additional requirements for JAGC personnel imposed since 1970 by the Supreme Court, the district courts, and the U.S. Court of Military Appeals."

In conclusion, the study says the data gathered and analyzed support the requirement for one operational Judge Advocate General's Corps officer space per 1,000 troops. However, considerable variances exist in current lawyer staffing and the study's recommended proper staffing. For example, the 1st Cavalry at Fort Hood, Texas, has 15 lawyers and, according to the study, needed 24 for all legal support requirements.

The standard for garrison units also bases authorizations for lawyers, legal clerks, and court reporters on the military population to be served. A U.S. Army Forces Command study to update the guidelines for garrisons is expected to be completed in September 1978. Revisions proposed include (1) organization changes, (2) additions to work performance sections, and (3) some criteria for assigning personnel in areas other than military justice. These revisions will not affect the number of defense and trial counsel authorized.

Marine Corps

The Marine Corps does not have staffing criteria covering lawyers and legal clerks other than a 1971 authorization which was based on unit population. When a command feels it needs additional staff, it files a request with headquarters describing why the additional personnel are needed and identifying a position of the same grade that can be deleted from the command. Based on workload, headquarters personnel will temporarily staff a command over authorized strength if necessary, until a unit willing to give up a position is located.

PERSONNEL AUTHORIZED VERSUS
ASSIGNED DIFFER

Most services' systems for establishing authorized numbers of personnel do not consider workload. We noted that more lawyers were assigned than authorized to locations with heavy workloads. There was no general trend in regard to support staff. The following are examples of differences at the time of our review:

	<u>Lawyers</u>		<u>Support staff</u>	
	<u>Author- ized</u>	<u>As- signed</u>	<u>Author- ized</u>	<u>As- signed</u>
2d Marine Division Camp Lejeune, N.C.	22	32	37	27
U.S. Army Infantry Cen- ter, Fort Benning, Ga.	14	21	8	12
Naval Legal Service Of- fice Norfolk, Va.	15	18	25	18

The Marine Corps has no formal staffing criteria. According to officials of the 2d Marine Division, the reasons for having more lawyers assigned than authorized included (1) the legal-experience level of lawyers, (2) the unit's large workload, and (3) the shortage of enlisted legal clerks.

The excess personnel assigned at Fort Benning is due to an extremely heavy workload, and officials there have requested an increase in authorizations.

ANALYSIS OF COUNSEL WORKLOAD

Because staffing criteria are generally not based on workload, and considerable variances exist in actual versus authorized staff, we found differences in the number of cases per counsel among the services, installations in a service, and commands at an installation. A heavy workload can have a detrimental effect on quality defense or prosecution if adequate time is not available to prepare for court appearances. Conversely, low workloads can result in inefficient use of counsel time. At all Army, Navy, and Marine Corps locations reviewed, workloads were sufficient to allow counsel to work full-time in military justice. In contrast, Air Force bases reviewed had relatively small justice workloads, and counsel performed other part-time duties.

Appendix VI shows workload statistics for each location visited. The following is a summary for 1976.

	<u>Range in cases per month</u>	
	<u>Defense counsel</u>	<u>Trial counsel</u>
Navy	4.5 to 9.2	5.5 to 10.7
Air Force	0 to 2.0	0 to 1.5
Army	1.9 to 6.0	2.0 to 5.4
Marine Corps	2.9 to 10.6	2.9 to 8.3

An example of wide variance in caseload at one installation is the three commands at the Marine Corps Camp Lejeune, North Carolina. In 1976 the average number cases were:

	<u>Monthly average cases per counsel</u>	
	<u>Defense counsel</u>	<u>Trial counsel</u>
2d Marine Division	10.6	8.3
Force Troops	5.4	4.6
Marine Corps	2.9	2.9

In its comments, the Marine Corps stated that the uneven caseload distribution has been alleviated by increasing the number of lawyers assigned to the Second Marine Division.

Opinions of the military justice personnel interviewed regarding the adequacy of the number of lawyers assigned was predictable. Where the workload was heavy, they said the lawyer staffing was totally inadequate. Where the workload was light, some said they had too many lawyers. For example, at a Marine Corps installation with a heavy workload, 17 (68 percent) of the 25 people we talked to said the number of defense counsel was inadequate and 18 (72 percent) said the number of trial counsel was inadequate. In contrast, at four Air Force bases with light workloads, none of the personnel interviewed said the number of defense and trial counsel was inadequate. The overall views of the 211 justice personnel interviewed are summarized below.

	<u>Number of personnel interviewed</u>	<u>Percent that felt number of</u>	
		<u>Defense counsel inadequate</u>	<u>Trial counsel inadequate</u>
Navy	44	30	25
Air Force	28	7	7
Army	46	26	13
Marine Corps	93	40	27

To illustrate the effects of inadequate preparation time on the actual handling of cases, several counsel interviewed identified court-martial cases which they handled in 1976 where, in their opinion, the quality of defense of prosecution suffered due to a heavy workload.

--In a case involving two counts of attempted assault, a Marine Corps defense counsel told us that his heavy workload did not permit him to fully investigate the case before trial. The data he expected to uncover by investigation could have proven his client not guilty on one charge; but he did not have the time to develop this data, and he believed he lost the case for this reason.

--A Marine Corps trial counsel was given an absent without leave case to prosecute 2 days before he was scheduled for a temporary duty assignment. A request for continuance was denied. He said he did not have time to fully investigate the charges and information surrounding the incident. The trial counsel believed that because of the failure to properly investigate, the accused was acquitted.

At Camp Lejeune's 2d Marine Division, each defense counsel handles about 11 cases per month. According to the Division's head defense counsel, this large workload results in poor quality defense of 20 to 24 "absent without leave" and "disrespect" cases each month. One counsel defended, on the average, 1.1 courts-martial or administrative discharges each workday during the last 2 months of 1976. This workload did not allow adequate time to investigate charges. Therefore, according to the head defense counsel, he had a tendency to expedite cases and the best defense was not always provided.

In contrast to locations with heavy workloads, locations with light workloads, (predominately Air Force) performed many legal services in addition to military justice cases, including claims settlement, legal assistance, and classes in military justice. Nonlegal work performed included counting cash at nonappropriated fund activities, proofreading, typing, and military training.

METHODS FOR ASSIGNING COUNSEL TO CASES

To help assure quality justice and efficiency, procedures to assign counsel to court cases should consider the (1) counsel's experience, (2) case complexity, and (3)

current workload. At all Marine Corps and two Navy locations, counsel were assigned to specific court-martial cases after consideration of the factors just mentioned. But the use of these procedures was the exception rather than the rule. The following are examples of methods being used at the locations visited.

- At all Army locations, counsel were assigned to handle any type of case for specific convening authorities.
- At Air Force locations, normally only one defense and one trial counsel were available to handle all special courts-martial.
- At one Navy location, counsel were assigned to handle all types of cases convened in specific geographical areas.

INCONSISTENT AND INADEQUATE SUPPORT STAFFS

Legal support staff are needed to type legal correspondence, make investigations for defense counsel, answer telephones, and perform other administrative duties. Without adequate numbers of support staff, lawyers cannot be fully effective or deliver the best quality justice. Of the 211 personnel interviewed, 132 (63 percent) said defense counsel support staff was inadequate and 116 (55 percent) said trial counsel support staff was inadequate. The table below depicts the problem as more prevalent in the Navy, Army, and Marine Corps than in the Air Force.

	<u>Number of personnel interviewed</u>	<u>Percent that felt number of</u>	
		<u>Defense counsel support staff inadequate</u>	<u>Trial counsel support staff inadequate</u>
Navy	44	66	61
Air Force	28	7	11
Army	46	63	48
Marine Corps	93	77	69

Some counsel said the lack of support staff adversely affected their efficient delivery of quality justice. Six locations visited had no enlisted or civilian support staff directly assigned to defense or trial counsel. With support staff, counsel time might be saved and fewer counsel would be needed. In 11 locations, defense and trial counsel shared the same clerical support; therefore, counsel could not

guard the confidentiality of information unless counsel typed it themselves.

Defense counsel mentioned another dimension of the problem of inadequate support staff. Trial counsel can rely on military investigative services, such as the Naval Investigative Service and Central Investigative Divisions, to perform investigations which can and are performed by enlisted service personnel. Defense counsel can request a service investigative unit, but the investigation results will be made available to the trial counsel. Because of this, many defense counsel make their own investigations which takes them away from other legal actions. If assigned full-time to defense counsel, these same counsel said support staff could adequately perform these investigations.

CONCLUSIONS

Our evaluation of the differing staffing criteria is that the Navy's system is superior because it has formal procedures based on workload. Revisions recently implemented in the Air Force should improve its procedures. Staffing guides in the Army still consider troop population as a benchmark in evaluating staffing levels. The Marine Corps has not formally studied counsel and support staff workload.

In our opinion, procedures used to assign counsel should consider the counsel's experience, case complexity, and current workload. The procedures followed by the Army, Air Force, and one of the Navy locations we visited do not appear to follow these principles.

The lack of formal staffing procedures and assignment policies has resulted in differences in the number of cases per counsel among installations in a service and commands at one installation. The quality of justice suffers when counsel do not have enough time to adequately prepare cases because of heavy workloads. In contrast, counsel with low workloads may be underutilized.

The number of support personnel is inadequate at most legal offices, and counsel perform many functions that could be done by lower paid support personnel.

RECOMMENDATION TO THE SECRETARY OF DEFENSE

We recommend that the Secretary of Defense direct the services to establish uniform criteria and methods

for identifying the numbers of counsel and support staff needed and make assignments consistent with the counsel's experience, case complexity, and current workload. As a minimum (1) the Army should include in its staffing guides, a method for periodically updating all units and changing staffing levels as the workload changes and (2) the Marine Corps should develop and implement a system which is based on workload and provides for changing staffing levels as the workload changes.

CHAPTER 4

OTHER FACTORS WHICH

HAMPER COUNSEL EFFECTIVENESS

In discussions with justice personnel, we asked what factors, other than staffing and organization, may hamper counsel effectiveness. Factors frequently mentioned included:

- Procedures which (1) require convening authorities to approve funds for witnesses, (2) place funds for witnesses in competition with other items funded from base operating and maintenance budgets, and (3) favor the prosecution in obtaining witnesses.
- Lack of adequate facilities and equipment such as inadequate law libraries, clerical equipment, privacy for counsel-client discussions, and courtrooms. In most instances, these problems were attributed to limited base-level funds.

Some of these factors, according to the personnel interviewed, adversely affected the outcome of recent court-martial cases.

ABILITY TO INDEPENDENTLY OBTAIN WITNESSES

To properly defend and prosecute cases, counsel should have access to witnesses necessary to present material facts surrounding a case. However, defense counsel have to seek permission for witnesses from trial counsel.

The Manual for Courts-Martial dictates the procedure for securing witnesses:

"The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take that action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. The trial counsel will take similar action with respect to all witnesses requested by the defense, except that when there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a witness so requested would be necessary, the matter will be

referred for decision to the convening authority or to the military judge or the president of a special court-martial without a military judge according to whether the question arises before or after the trial begins."

Base commanders who are most often convening authorities must also fund the cost of witnesses, including travel. Thus, decisions concerning the need for witnesses can be influenced by the availability of funds in base-level budgets. If funds are not available, then witnesses cannot be obtained. Of the 18 cases mentioned to us as examples where command influence adversely affected the outcome, 5 related to convening authorities' refusing witnesses for the defense, and 2 related to refusing witnesses for the prosecution.

If a witness cannot testify at trial, counsel can contest the case either during the trial to the military judge or after the trial to courts of military review and the U.S. Court of Military Appeals. However, counsel told us they are sometimes reluctant to renew a denied request and make it a matter of record. For example, several Army and Marine Corps counsel said they did not renew requests because their efficiency ratings were prepared by the convening authority's staff judge advocate. Therefore, appellate courts have no basis for determining whether the rights of the accused were prejudiced.

Trial counsel told us that the convening authority's refusal to fund needed witnesses can affect case outcome in many ways. Charges may actually be dropped or the convening authority may enter into a plea agreement for reduced charges or a specific maximum sentence. As set forth in the Manual for Courts-Martial, the trial counsel also plays an integral role in determining the need for witnesses requested by the defense. In addition, defense counsel must tell the trial counsel what testimony the defense witness is expected to give.

The following are examples of cases where, in counsel's opinion, these procedures had a detrimental effect:

- In a June 1976 Marine Corps general court-martial involving a charge of attempted murder, the trial counsel's request for witness travel funds was denied by the convening authority. The accused was found guilty and sentenced to reduction to the lowest enlisted grade, confinement at hard labor for 2 months, and a bad conduct discharge. But the trial counsel believed that with the witness, the accused would have received a stiffer sentence.

--In a May 1976 Army general court-martial case involving alleged robbery, the accused was found guilty and sentenced to reduction to the lowest enlisted grade, confinement at hard labor, forfeiture of \$100 a month for 8 months, and a bad conduct discharge. Before the trial, the defense counsel followed established procedures and requested a witness. The convening authority denied his request for witness travel funds. With the witness, the defense counsel said he could have won the case. The case was referred to the U.S. Army Court of Military Review. The Appellate Defense found the evidence to be insufficient to sustain the conviction and asked the court to set aside the findings and sentence. The court had not made its ruling as of March 1978.

---In a 1975 attempted rape case, a Marine Corps defense counsel said he needed a witness to rebut evidence presented by the trial counsel. Following established procedures, he requested the witness through the trial counsel. The trial counsel and chief lawyer turned down his request for the witness because they did not believe the witness was needed. The accused was found guilty and sentenced to a dishonorable discharge, confinement at hard labor for 1 year, and forfeiture of all pay and allowances. According to the defense counsel, he did not bring the matter up to the military judge for decision because the chief lawyer prepares his ratings. Therefore, the denial of the witness was not made a part of the record of trial, and the U.S. Navy Court of Military Review, using information in the record of trial, affirmed the sentence.

LOGISTICAL SUPPORT OFTEN INADEQUATE

In 1972 the DOD Task Force on the Administration of Military Justice was commissioned to recommend ways to strengthen the military justice system. In its report, 1/ the Task Force reported that facilities and equipment needed improvements and recommended:

- "a. Distinctive courthouses on military installations with adequate courtroom and judge's chambers.

1/Department of Defense "Report of the Task Force on the Administration of Military Justice in the Armed Forces," November 30, 1972.

"b. Adequate legal facilities and services to military judges and military counsel, including proper office equipment, adequate legal libraries, private offices for defense counsel and trial counsel, separated so that they will not appear to be working out of the same organization, * * *."

The Office of the Secretary of Defense stated in January 1975 that these recommendations had been adopted by all services. However, our discussions with counsel indicated problems at many locations remain.

According to some counsel, quality justice and counsel effectiveness are being affected by the level of logistical support. Some felt that the poor appearance of counsel offices and courtrooms gives the system a bad image and makes it difficult to establish the proper client-lawyer relationship. Areas of logistical support identified by counsel as being inadequate are discussed below.

Inadequate law libraries

Counsel must use such publications as the United States Code, Court of Military Review Decisions, and other reference materials for research. Of the 211 personnel interviewed, 84 (40 percent) said inadequate law libraries hampered their effectiveness. Of the 20 personnel interviewed at one Marine Corps installation, 16 (80 percent) stated their research facilities were not adequate.

In some instances, counsel had to research prior court cases at public libraries and private law offices in surrounding localities. Law libraries at some locations lacked space, copies of the United States Code, indexes of court cases, and other reference material. Counsel interviewed said the lack of an adequate law library adversely affected several court-martial cases in 1976. Lack of funds was cited by some as the reason the libraries were inadequate.

Lack of clerical equipment

Of the 211 personnel interviewed, 60 (28 percent) said inadequate clerical equipment--typewriters, reproduction machines, and dictaphones--hampered their performance. The lack of dictaphones required counsel to handwrite all correspondence, so they had less time to investigate and process cases. Lack of funds was cited as the principal cause for the lack of equipment.

Inadequate facilities

Many counsel mentioned a need to upgrade counsel offices and courtrooms to improve the professional appearance of the justice system and, in particular, a need for private counsel offices which allow for confidential discussions with the accused and witnesses.

At six locations visited, counsel were sharing offices. (See photograph on p. 26.) At another location, defense and trial counsel were in offices across the hall from one another. Of the 211 personnel interviewed 30 (14 percent) identified the lack of separate rooms as adversely affecting their performance. With two counsel in the same office, counsel cannot have confidential discussions with the clients.

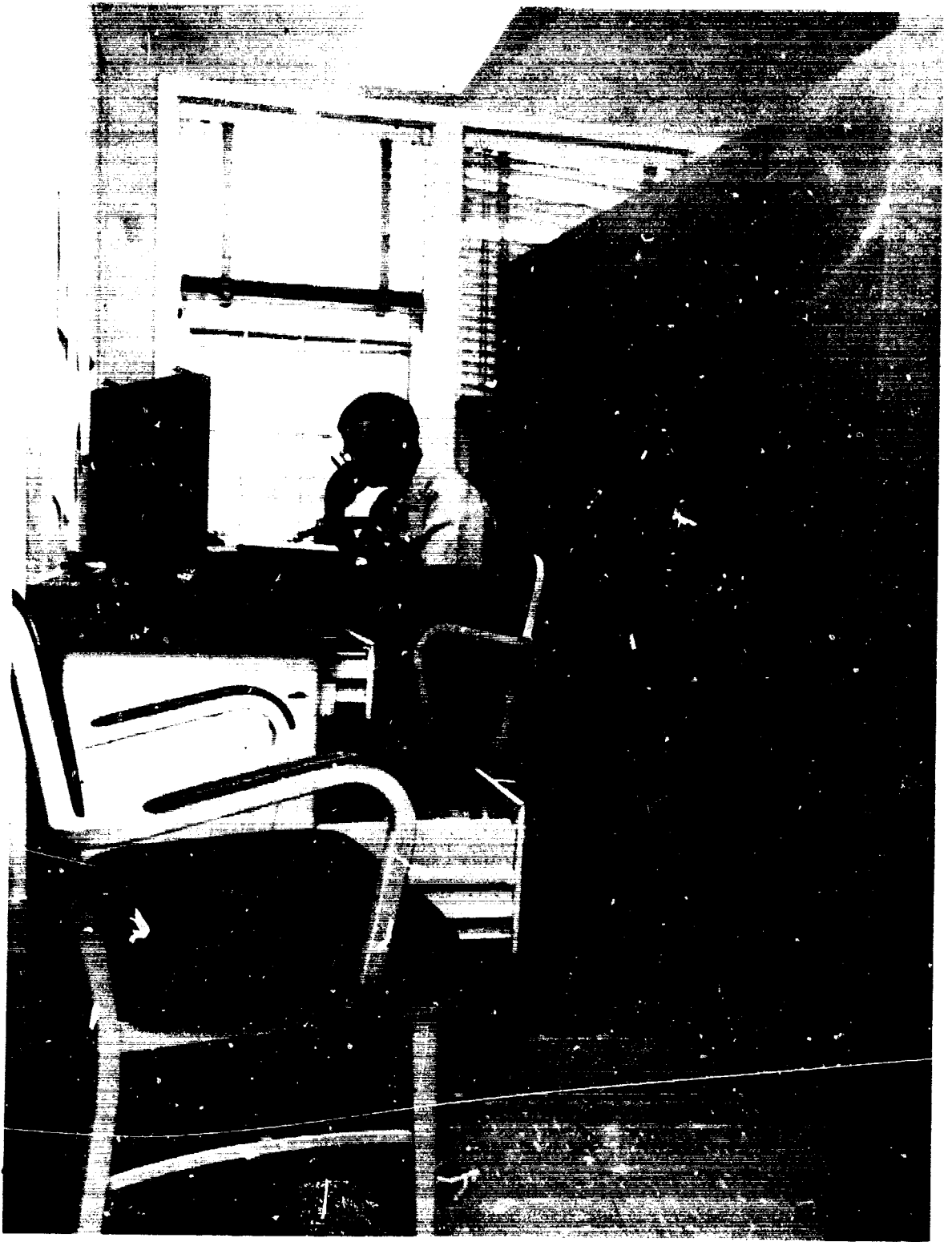
At one Naval Legal Service Office, a defense counsel said he was sure the trial counsel across the hall overheard his conversation with his client. He understood that plans were underway to move into remodeled facilities, but the Naval District Commander gave higher priority to another project, and the plan to upgrade the legal center's facilities was dropped.

At other locations, base commanders give higher priority to military justice facilities. For example, after touring the legal center at the Marine Corps Air Station, Cherry Point, North Carolina, the commanding general directed his chief lawyer to develop a plan to improve the facilities. Funds from the base operating and maintenance budget were made available. Presently, the facilities appear to be fully adequate, as indicated by the photograph on page 27 of a defense counsel's office.

At four locations, personnel interviewed considered their courtrooms were inadequate. (See photograph on p. 28.) At the other locations visited, the courtrooms appeared adequate. (See photograph on p. 29.)

CONCLUSIONS

Decisions regarding funding witnesses should not be made by base commanders, who often are the individuals approving the trial of the accused, and the need for these funds should not be placed in competition with other items funded from base operating and maintenance budgets.



**COUNSEL OFFICE NAVAL LEGAL SERVICE OFFICE, NORFOLK, VIRGINIA.
NOTE: ANOTHER COUNSEL IS LOCATED BEHIND THE TEMPORARY PARTITION.**



DEFENSE COUNSEL OFFICE
MARINE CORPS AIR STATION
CHERRY POINT, NORTH CAROLINA



COURTRCOM
SECOND MARINE DIVISION
CAMP LEJEUNE, NORTH CAROLINA



COURTROOM
U.S. ARMY
FORT BRAGG, NORTH CAROLINA

In our opinion, the delivery of evenhanded justice should allow defense counsel to subpoena witnesses independently of trial counsel and the convening authority. Mechanisms are available to contest a decision that witnesses are unavailable, including appeal to the military judge. However, counsel are sometimes reluctant to use the mechanisms when their performance efficiency ratings are prepared by the convening authority's staff judge advocate.

From our viewpoint, the inadequate logistical support identified in the 1972 Task Force report continues to be a problem. Many personnel we interviewed indicated that these problems were having adverse impacts on both efficiency and appearance of fair and evenhanded justice.

RECOMMENDATIONS TO THE SECRETARY OF DEFENSE

We recommend that the Secretary of Defense:

- Propose to the President changes to the Manual for Courts-Martial, allowing defense counsel to subpoena witnesses independently of trial counsel and the convening authority. The materiality and necessity of the requested witnesses should be determined by a military judge.
- Direct the services to establish systems which will provide improved visibility and funding of logistical support to counsel in such areas as law libraries, clerical equipment, and privacy and appearance of facilities.

CHAPTER 5

NEED TO ACHIEVE INDEPENDENT DEFENSE

COUNSEL ORGANIZATIONS

Traditionally, each service has operated its own justice system. Personnel management and support costs are largely controlled by base commanders, who most often are convening authorities.

The 1972 DOD Task Force reported that many enlisted personnel lacked confidence in military defense counsel; they believed that defense counsel were serving commanders rather than the accused. According to the report, it is essential that clients perceive their counsel as professionals. The report recommended that:

"All judge advocate defense counsel be placed under the direction of the appropriate Judge Advocate General or, in the case of the Marine Corps, the Director, Judge Advocate Division, Headquarters, United States Marine Corps."

On the basis of this report, the Secretary of Defense, in January 1973, directed all military departments to submit plans to revise the structure of their counsel organizations. Since that time, the Navy and Air Force have placed defense counsel under the appropriate Judge Advocate General--organizationally independent of the command bringing charges. The Army is testing a plan with similar goals and expects to make the organization effective servicewide within a year. The Marine Corps is also testing a separate defense organization, but has no firm plans for extending it servicewide.

ORGANIZATIONAL MODES AND RECENT REVISIONS

Navy

As early as 1968, the Navy had its defense and trial counsel in law centers. Directors of the law centers were staff judge advocates for the Naval District Commanders. To separate the defense function from the command bringing charges, the Navy placed the centers under the Navy Judge Advocate General in 1974. This change also made trial

counsel organizationally independent of convening authorities and placed legal services under a single manager. Once charges are brought against an individual, the case is referred to the nearest law center.

Air Force

Before 1974, both defense and trial counsel for special courts worked for staff judge advocates who reported to base commanders. In 1974 the Air Force established the Area Defense Counsel at the base-level under the Appellate Defense Division, Office of the Judge Advocate General, to handle special court cases. This change made defense counsel organizationally independent of convening authorities. We also noted they are often physically separate from trial counsel, which enhances the perception of independence.

Also in 1974, defense and trial counsel were assigned to each of seven circuits to handle general court-martial cases. Circuit defense counsel report directly to the Defense Service Division of the Air Force. Circuit trial counsel report to the Government Trial and Appellate Counsel Division of the Judge Advocate General.

As of August 1977, the Air Force had 106 bases with Area Defense Counsel organizations and 141 base staff judge advocate organizations with trial counsel and other lawyers assigned.

An Air Force evaluation in 1975 concluded that the program to establish Area Defense Counsel had met its goal of increasing the overall stature of defense counsel and judicial functions. However, the evaluation reported that timeliness of justice had deteriorated and defense counsel were often underutilized. Since the program was viewed as enhancing the image, stature, and product of legal services, Air Force headquarters agreed to continue the program. Actions have since been taken to improve the program's efficiency by requiring the defense counsel to perform non-conflicting duties for staff judge advocates.

Army

Army defense and trial counsel currently work for staff judge advocates at the base or division level who, in turn, report to base or division commanders. Both defense and trial counsel, therefore, work for convening

authorities. At 183 Army locations with lawyers assigned, 76 have defense and trial counsel. In some cases, more than one defense and trial counsel organization are on the same base.

In 1973 the Army reported that a separate defense command was not feasible in view of the lawyer shortage. It was pointed out, however, that a successful paralegal program would likely make future implementation feasible.

Marine Corps

Organizationally, the Marine Corps is the same as the Army, with both defense and trial counsel directly working for convening authorities and in some cases, more than one defense and trial counsel organization being located on the same base. At 68 Marine Corps locations with lawyers assigned, 20 have both defense and trial counsel.

Current defense and trial counsel structures in the services are depicted in the following organization chart.

VIEWS OF QUALITY DEFENSE VARY ACCORDING TO DEGREE OF ORGANIZATIONAL INDEPENDENCE

Military personnel we interviewed confirmed that the defense counsel in the Navy and Air Force organizations appear to operate more independently of the command structure than those in the Army and Marine Corps.

Navy and Air Force personnel view organizational changes as beneficial

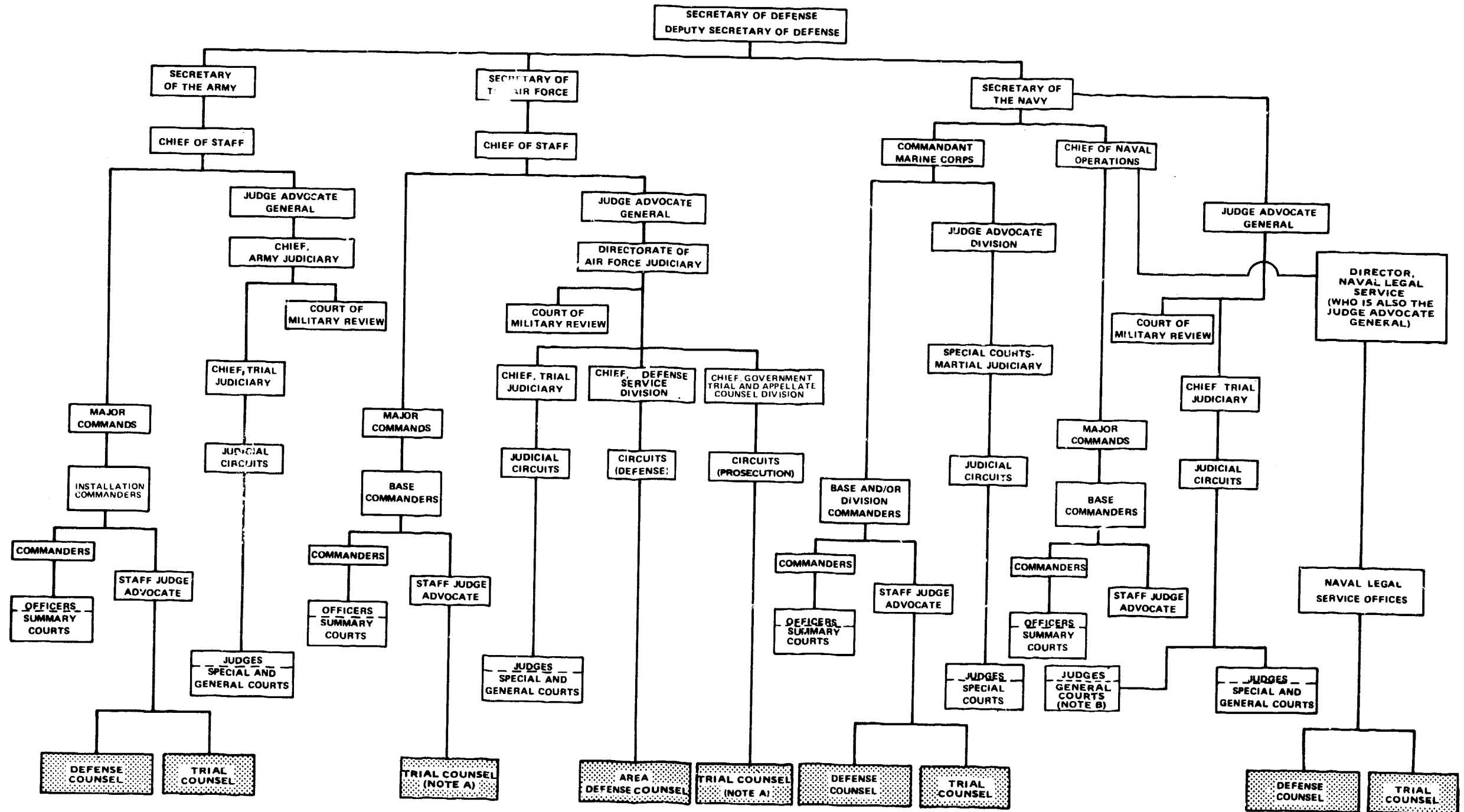
Many Navy and Air Force personnel interviewed had positive remarks regarding their organizational structures:

--Thirty-eight of the 44 Navy personnel (86 percent) and 26 of the 28 Air Force personnel (93 percent) said the recent organizational change had a beneficial effect on defense counsel's handling of cases.

--Twenty-four of the 44 Navy personnel (55 percent) and 24 of the 28 Air Force personnel (86 percent) said the quality of defense has improved.

Both services, however, mentioned a few cases involving convening authorities' control over the funding of witnesses, which they felt hampered the handling of cases.

ORGANIZATIONAL PLACEMENT OF MILITARY DEFENSE COUNSEL AND TRIAL COUNSEL



A THE TRIAL COUNSEL IN THE AIR FORCE MAY BE FROM THE OFFICE OF THE STAFF JUDGE ADVOCATE OR THE CIRCUIT.

B MARINE CORPS GENERAL COURTS ARE HELD BY THE NAVY.

Army and Marine Corps personnel believe changes are needed to make defense counsel organizationally independent

Organization of Army and Marine Corps legal activities are basically similar. Each base and division commander has a staff judge advocate organization which processes claims and provides legal assistance in addition to handling military justice cases. Defense counsel work for commanders, and their performance is rated by a command representative. Thus, the command initiating charges has an authoritative position which can influence court-martial proceedings.

Over half (54 percent) of the 139 Army and Marine Corps personnel interviewed felt that organizational changes were needed. Some felt the actual handling of cases and overall quality of defense were adversely affected by the organizational structure. Army and Marine Corps counsel identified six and eight court cases, respectively, where they believed command influence affected the outcome.

PLANNED CHANGES

The Army and the Marine Corps are testing organizational changes involving counsel. In April 1977, the Army Judge Advocate General proposed the establishment of a separate defense command, including separate office and support facilities for defense counsel. Defense organizations reporting to him would be established at base levels to handle base- and division-level cases. This new concept was estimated to cost \$65,000 a year in travel for the defense command director, assistant director, and regional directors and \$135,000 a year in salaries for additional civilian employees.

In March 1978, the Army Chief of Staff approved a 1-year test to evaluate the desirability of the Judge Advocate General's plan. The test is being conducted at the U.S. Army Training and Doctrine Command, Fort Monroe, Virginia.

The Marine Corps is also testing the separation of defense from trial counsel at Marine Corps Air Stations in El Toro, California, and Okinawa. At El Toro, defense and trial counsel report to the Director for the Law Center, who is also the staff judge advocate. The Director normally either rates or reviews the ratings of defense

counsel. In turn, he is rated by the commanding officer of the Air Station. Thus, defense counsel are still in the chain of command which initiates charges.

In 1978 a pilot program of broader scale was begun by the Director of the Marine Corps Law Center in Okinawa. Under this system, defense counsel appear to have a greater degree of organizational independence because the Law Center Director is not in the direct chain of command, and the staff judge advocate does not prepare or review ratings of defense counsel. We were told that the lessons learned from these pilot programs are being evaluated at Headquarters, Marine Corps, with a view toward determining the desirability and feasibility of implementing similar or even more far-reaching programs.

CONCLUSIONS

Differences in mission requirements and the physical diversity of installations and activities within and among the services do not, without fundamental changes, allow the services to adopt uniform defense or trial counsel organizational modes. However, we believe that more can be done within existing constraints to achieve greater counsel independence and ensure the impartial delivery of justice.

1. Conceptually, the Navy and Air Force organizational structures come closest to allowing both defense and trial counsel to act independently in the prosecution of military personnel accused of criminal offenses. However, the Navy defense and trial counsel are in some cases not physically separated, and the command bringing charges controls counsel funding. In the Air Force, the trial counsel work indirectly for convening authorities in special court cases, which may detract from their ability to independently prosecute cases.
2. The Army's planned defense counsel organization seems to conform to the Air Force organization. However, we believe the 1-year pilot program is delaying implementation of a concept which does not need further testing.
3. The Marine Corps is left with the least desirable concept. Although it is testing an independent

defense counsel organization, the Marine Corps has no plans for establishing a separate defense organization service-wide.

RECOMMENDATION TO THE SECRETARY OF DEFENSE

We recommend that

- the Secretary of Defense direct the Army to implement its plan to establish defense counsel organizations which are not under the chain of command initiating charges and
- the Marine Corps complete development and implement such a plan.

Further testing of the independent defense counsel concept is not necessary. Implementing the concept in each service differs and, understandably, causes specific problems that have to be overcome. The Secretary of Defense, in implementing our recommendation, should consider directing the Army and Marine Corps to authorize the staff and other resources necessary to establish independent defense counsel organizations without additional delay.

CHAPTER 6

ORGANIZATIONAL CHANGES ARE NEEDED

TO MAKE THE MILITARY JUSTICE

SYSTEM MORE INDEPENDENT AND EFFICIENT

While steps can be taken to improve the independence and efficiency of the military justice system within the services' existing organizational structures, we believe that consolidating justice functions within and among the services is necessary for substantive long-range improvements. A number of organizational modes may bring about the desired improvements.

A primary principle in a defense and trial counsel organization should be the separation of military justice duties and responsibilities from command functions. The fact that the individual responsible for initiating charges is intimately involved in administering the justice system conflicts with the concept of independent counsel. Although we believe that commanders should continue to bring charges against alleged offenders and retain their responsibility for discipline and the welfare of those under their command, they should be relieved of the authority for, and burden of, administering the justice system.

ROLE OF CONVENING AUTHORITIES IN ADMINISTERING MILITARY JUSTICE NEEDS TO BE DIMINISHED

Even though the Uniform Code of Military Justice expressly prohibits attempts to influence the decisions of those involved in court-martial proceedings, convening authorities, in carrying out their military justice responsibilities, are clearly in a position to influence the outcome of trials. As discussed in chapter 2, convening authorities must detail key participants in court proceedings-- judge, jurors, and defense and trial counsel. They often control funds for witnesses, support staff, and facilities. They have been given broad discretion in handling military justice matters, even though they are not required to have formal legal training.

This potential command influence contributes to the perception that military justice is unfair and uneven--a perception harmful to the cause of justice and damaging to military discipline and morale.

We believe the perception of justice could be substantially improved by separating judicial and command functions. Bills already introduced in the Congress would make defense counsel independent of convening authorities by placing them in a command separate from the one initiating charges. A bill recently introduced (H.R. 12613, 95th Cong.) would shift a large part of the responsibility for military justice from commanders to specially trained lawyers and judges. Commanders would retain their traditional responsibilities over discipline and troop welfare and their authority to refer charges and grant clemency.

Removing responsibility for administering and funding the justice system from convening authorities would also remove an obstacle to consolidation--a step we view as important in delivering quality justice at the least cost. As a practical matter, consolidation of judicial functions within a service and between services would require that responsibility for administering the system be turned over to someone other than the individual bringing the charges.

BENEFITS OF CONSOLIDATION

In enacting the Code, the Congress clearly intended that justice should be uniformly administered within and between the services. Consolidation of justice functions would allow more consistent application of procedures and resources. Current organizational and funding concepts have resulted in procedures and resources varying widely within and between the services, which inevitably leads to the nonuniform treatment of individuals accused of crimes.

Uniform procedures

Consolidation between services holds the promise of establishing uniform procedures for administering the justice system and processing cases. For example, uniform procedures do not currently exist for determining how to align the talents of counsel with the complexity of cases or whether a case should be sent to trial or handled under nonjudicial punishment or administratively. Responsibility for these important decisions rests with military commanders who in most cases lack the formal legal training for handling such matters.

Congressional oversight of expenditures

Funds for military justice are not budgeted separately but usually come from each base commander's operating budget. Thus, the costs of military justice are not known, and it is not possible to ensure that funding is at a level commensurate with the military justice system's importance. Consolidation of military justice functions would require development of separate budgeting processes for personnel and related support costs. This would enable both the Congress and DOD to know how much is being spent on military justice. It would also provide a mechanism for comparing expenditures between services and among specific locations or installations within a service. These comparisons could be used to correct the inequities we found in the resources applied to the handling of cases.

More efficient use of resources

Consolidation presents opportunities for making military justice more efficient. Consolidating separately maintained and funded military justice activities in proximate locations would make more effective use of resources. The potential savings should be substantial. Specifically, consolidation should enhance efficiency and effectiveness by:

- Using counsel more effectively. Improved personnel management would help even-out caseloads and align counsel with clients on the basis of case complexity and counsel experience.
- Decreasing the number of personnel required, including lawyers and support staff.
- Improving logistical support services. Facilities and equipment, such as libraries and courtrooms, could be pooled. More efficient use of resources could improve the quality of justice without increasing costs.

Judicial independence

Consolidation would provide the opportunity for organizational changes to more fully insulate counsel and other judicial functions from the command initiating charges against the accused, thus enhancing the appearance of an independent justice system.

INSTRUCTIONS AND PRECEDENTS
FOR CONSOLIDATION

There are approximately 190 locations in the continental United States where cases are tried, some of which are located close to another. DOD instructions encourage cross-service support, and the Manual for Courts-Martial permits interservice trying of cases.

DOD Directive 4000.19M states that each DOD component should request support from another component when the capabilities are available and when such support is to DOD's overall advantage. Components are to provide support to the extent that military requirements permit, and interservice and interdepartmental agreements are to be made.

Also, our examination of the Code and the Manual for Courts-Martial indicated no legal constraints to cross-service consolidation. In fact, the manual gives direct authority for combinations as shown below.

" * * * The convening authority may, with the concurrence of the appropriate commanding officer, detail as counsel or as assistant counsel of general and special courts-martial any qualified officer regardless of the armed force of which that officer is a member. * * *"

* * * * *

" * * * A convening authority may detail a military judge from among qualified officers under his command or made available to him regardless of the armed force of which the military judge is a member. Members of courts-martial ordinarily are members of the same armed forces as the accused." [Underscoring added.]

In some instances, military justice functions have been consolidated across service lines because of the dominance of one service or the lack of legal personnel in another. We were provided several illustrations of cases where the services cooperated in the delivery of military justice which illustrate the feasibility of the concept. For example:

--The Marine Corps occasionally handles Air Force and Navy cases on Okinawa since the Marine Corps has a larger legal staff there. According to service representatives, this crossing of service lines does not adversely affect the quality of defense or prosecution.

- The Naval Legal Service Office in Norfolk, Virginia, processes the court-martial cases for the Fleet Marine Forces Atlantic Unit in Norfolk. Marine Corps enlisted legal personnel are assigned to the Naval Legal Service Office to help handle the cases.
- The Coast Guard convened a special court-martial with a judge from the Army, defense counsel from the Navy, trial counsel from the Air Force, and a jury from the Coast Guard. The Coast Guard requested the other services' assistance because it had no judges or counsel available.

Army and Marine Corps installations with more than one onbase activity

The Army and Marine Corps installations with more than one legal organization are listed below.

	<u>Legal organizations</u>
U.S. Army:	
Fort Bragg, North Carolina	3
Fort Hood, Texas	2
U.S. Marine Corps:	
Camp Lejeune, North Carolina	3
Camp Pendleton, California	2

The Marine Corps has consolidated legal organizations at both El Toro, California, and Cherry Point, North Carolina, and has been able to distribute workload more evenly among counsel. The Director of the Law Center at Cherry Point anticipates a reduction of one or two counsel, based on a current study of lawyer authorizations.

The views of officials interviewed at two of the four installations are shown on the following page.

Camp Pendleton

Camp Pendleton, California, has legal offices for the 1st Marine Division and the Marine Corps Base. These two legal offices had 36 defense and trial counsel, who processed 1,308 court-martial cases in 1976. The number of cases each counsel handled per month ranged from a low of 5.3 to a high of 7.5 cases.

Views of the 40 personnel interviewed regarding base-level consolidation are shown below.

	<u>Percent giving a positive response</u>
Would such an organization:	
--Better utilize counsel?	90
--Result in better quality justice?	60
--Decrease or retain the same number of personnel?	98
--Decrease or retain the same costs for equipment, facilities, or other items?	90

Overall, 22 (50 percent) of the 40 personnel interviewed from the two legal organizations at Camp Pendleton preferred the combined base-level organization to any other organizational mode. Only five of these personnel (13 percent) preferred their current organization.

Marine Corps headquarters officials believed consolidation at Camp Pendleton was feasible and would result in a saving of lawyers, particularly at the top grades. A major problem to be solved, according to these officials, is how to staff the function in case of deployment. At Cherry Point, however, certain lawyers have been designated to deploy with the division, an arrangement which appears feasible also for Camp Pendleton.

Fort Bragg

Fort Bragg, North Carolina, has legal offices for (1) the XVIII Airborne Corps and Fort Bragg, (2) the 82d Airborne Division, and (3) the John F. Kennedy Center for Military Assistance. These three legal offices had 17 trial and defense counsel who processed 502 court-martial cases in 1976. The number of cases each counsel handled per month ranged from a low of two to a high of six cases.

Views of the 27 personnel interviewed regarding base-level consolidation are shown on the following page.

Percent giving a positive response

Would such an organization:

--Better utilize counsel?	52
--Result in better quality justice?	41
--Decrease or retain the same number of personnel?	93
--Decrease or retain the same costs for equipment, facilities, or other items?	96

Overall, 11 (41 percent) of the 27 personnel from the three legal organizations at Fort Bragg preferred the base-level organization concept to any other organizational mode. Nine (33 percent) preferred their current organization.

Activities in proximate locations may warrant consolidation

In many areas of the country, there are activities which, in our opinion, are sufficiently close to warrant consolidation of military justice functions. Discussed below are two examples.

San Antonio, Texas

Located within 25 miles of each other and adjacent to San Antonio, Texas, are five military bases--four Air Force and one Army. Defense counsel are assigned to three bases and trial counsel are assigned to all five. The following table shows the number of counsel assigned to these bases and the 1976 caseload processed.

<u>Base</u>	Court-martial <u>cases</u>	Number of counsel assigned	
		<u>Defense</u>	<u>Trial</u>
Fort Sam Houston	27	3	2
Lackland Air Force Base	46	4	6
Randolph Air Force Base	5	1	1
Kelly Air Force Base	0	0	1
Brooks Air Force Base	<u>1</u>	<u>0</u>	<u>1</u>
	<u>79</u>	<u>8</u>	<u>11</u>

The Air Force Trial Judiciary, Third Circuit, processes general court cases for the Air Force bases. Also, the Area Defense Counsel at Lackland Air Force Base provides defense counsel for cases at Kelly and Brooks Air Force Bases.

Fort Bragg Army Base/Pope Air Force Base

Fort Bragg, a large Army Base in North Carolina, adjoins Pope Air Force Base. During 1976, 502 court-martial cases were handled by 17 full-time defense and trial counsel from Fort Bragg's three legal organizations. ^{1/} At Pope, five court-martial cases were handled by two counsel who spent about 80 percent of their time on military justice.

We noted wide disparities in the number of cases per counsel between the bases. The monthly number of cases per counsel at Pope averaged 0.4; one organization at Fort Bragg averaged six; and another handled only three cases.

It seemed that Pope's caseload could be merged with that of Fort Bragg's, and support such as clerical functions, libraries, and courtrooms could be consolidated or eliminated. We were told that there had been no interaction between the two bases on consolidating military justice activities.

Many of the 27 Fort Bragg personnel believed it would be cost effective to consolidate. For example, 12 (or 44 percent) stated that consolidation would result in personnel decreases and 15 (or 56 percent) believed that not as many facilities or as much equipment would be needed. The Air Force personnel interviewed at Pope felt only limited benefits would accrue from consolidation.

Other possible consolidations

A brief scan of proximate service locations handling court-martial cases revealed other activities with counsel assigned that might be consolidated. For example:

--The Naval Legal Service Office in Norfolk, Fort Eustis, and Langley Air Force Base in southeastern Virginia.

^{1/}See p. 45 for discussion of potential for Fort Bragg to consolidate its three organizations.

- The Naval Legal Service Office and the Presidio Army Post in San Francisco, California.
- The Naval Legal Service Office and the Charleston Air Force Base in Charleston, South Carolina.
- The Naval Legal Service Office and Bolling Air Force Base in Washington, D.C., and the Marine Corps Base in Quantico, Virginia.
- Fort Carson and the U.S. Air Force Academy in Colorado Springs, Colorado.
- The Naval Legal Service Office at the Great Lakes Naval Training Center and Fort Sheridan near Chicago, Illinois.

An in-depth look at other service locations may reveal additional opportunities for consolidating activities within and outside the continental United States.

MILITARY PERSONNEL VIEWS OF THREE ORGANIZATIONAL MODES

In our interviews with military justice personnel, we asked their views on the merits of (1) consolidating functions where more than one exists on a single base, (2) consolidating functions where large concentrations of different service populations exist in particular geographical areas, and (3) consolidating all military justice functions into a single DOD defense and trial counsel organization.

Most personnel interviewed perceived potential benefits from consolidation on a single base and with bases nearby, but generally opposed a single counsel organization. The views of the 211 personnel interviewed are summarized on the following page. 1/

1/Details of responses by service are in app. II.

One organization for
a large installation

Percent giving a
positive response

Would such an organization:

- | | |
|--|----|
| --Better utilize counsel? | 84 |
| --Result in better quality justice? | 59 |
| --Decrease or retain the same number of personnel? | 90 |
| --Decrease or retain the same costs for equipment, facilities, or other items? | 87 |

Localized combined organization

Would such an organization:

- | | |
|--|----|
| --Better utilize counsel? | 43 |
| --Result in better quality justice? | 22 |
| --Decrease or retain the same number of personnel? | 78 |
| --Decrease or retain the same costs for equipment, facilities, or other items? | 74 |

Single DOD defense and trial
counsel organizations

Would such an organization:

- | | |
|--|----|
| --Better utilize counsel? | 33 |
| --Result in better quality justice? | 22 |
| --Decrease or retain the same number of personnel? | 53 |
| --Decrease or retain the same costs for equipment, facilities, or other items? | 51 |

REASONS OPPOSING CONSOLIDATION GIVEN BY
PERSONNEL INTERVIEWED AND OUR EVALUATION

The reasons predominantly mentioned by the personnel we interviewed opposing consolidation were: (1) counsel would have to become familiar with many more regulations; (2) different standards of conduct and service mission exist among the services; (3) savings expected from consolidation would not be realized and some costs, such as for travel and administration, would increase; and (4) counsel not assigned to a specific combat unit could not be deployed quickly.

In our opinion, the arguments against consolidation do not offset the potential benefits discussed earlier. In some respects, these arguments tend to support the need for consolidation.

Familiarity with more regulations

Consolidation might well require some counsel to learn more regulations. One way to overcome this problem would be to match the experience and expertise of the lawyer with the nature and complexity of the case which would be easier to do with a larger pool of lawyers such as would result through consolidation. In the civilian sector, cases requiring special knowledge are often handled by experts in the field. Also, private and Government attorneys routinely deal with intricate regulations of a multitude of different agencies involving cases which are tried in a single Federal court system.

Differences in the services' military justice system regulations may be of a magnitude that could result in disparities in the way similar cases are handled, which is contrary to congressional intent.

Differences in standards of conduct
and service mission

It is not apparent to us why different standards of conduct and service mission should prevent successful consolidation. If different standards and mission are relevant to a case, they can be brought up by counsel in court if he has reason to think the judge is not already aware of the situation. Because uniformity in the administration of justice is intended by the Code, we question why substantial differences in prosecuting criminal offenses should be permitted. Moreover, if a crime, such as absence without official leave, is a particular problem in one service as opposed to the others, the sentence can reflect that fact.

Savings expected would not be realized

We agree that consolidation could cause some immediate increase in travel and administrative costs. However, we believe that such costs would be quite small as demonstrated by the change the Army is proposing in its organization, which is discussed in chapter 5. Also, in our interviews with 211 military justice personnel, over 50 percent said the single DOD defense and trial counsel organizational mode would decrease or retain the same number of personnel and costs for equipment, facilities, and other items. In our opinion, if the initial costs of consolidation are more than the present systems, they are more than justified to improve the perception of fair and evenhanded justice. In the long run, consolidation holds the promise of substantial savings through improved management of lawyers, support staff, and other resources, such as libraries and courtrooms.

Counsel in a consolidated organization could not be deployed with combat units quickly and efficiently

The Department of the Army and the Marine Corps, particularly, are concerned that a consolidated counsel organization would prevent the fast deployment of combat forces. This concern stems from the belief that (1) commanders and troops should get to know and develop confidence in their judge advocate personnel and (2) judge advocate support is maximized with direct assignment to combat units. In our opinion, the services' chief concern should be whether the counsel is best qualified to handle the case based on his skill and experience. To require organic judge advocate support implies a general lack of trust in the independence of military counsel unless they are known by commanders and troops.

In instances of deployment, counsel could be designated to deploy with the unit. The Marine Corps has implemented such a procedure at its Cherry Point Law Center, and the arrangement appears feasible for other situations. In contrast, the Air Force does not assign its counsel to combat units. Counsel are assigned to Air Force bases and handle all legal duties for that base. If deployment to a new area is required, counsel are assigned with the administrative unit.

CONCLUSIONS

The appearance of an independently administered justice system requires that command functions be separate from legal

and judicial functions. This means removing responsibilities for administering and funding the justice system convening authorities. It would allow more uniform development and application of trial procedures, improved budgeting processes, and a more equitable allocation of resources applied to judicial proceedings between services and among service organizations. It would also facilitate the cross-service consolidation of defense and trial counsel organizations.

Consolidation of defense and trial counsel organizations, particularly on one base or on proximate bases, offers many potential benefits. Major benefits include enhancing the perception of military justice and introducing efficiency and economy. While most military justice personnel we interviewed opposed cross-service consolidation, we believe the problems cited can be overcome, and the benefits of consolidation far outweigh the potential adverse effects. Moreover, cross-service use of justice personnel has been used successfully in a number of cases.

In theory, we endorse the concept of a single DOD defense and trial organization which could carry the benefits of consolidation to their logical conclusion. However, we believe more study is needed to determine the feasibility and costs of such a major change.

RECOMMENDATIONS TO THE CONGRESS

To help ensure the greatest possible degree of independence, efficiency, and uniformity in the administration of the military justice system, we recommend that the Congress:

- Revise the Uniform Code of Military Justice to remove any possibility that convening authorities will have power to (1) detail the military judge, defense and trial counsel, and jurors; (2) act as the rating or reviewing official on the efficiency ratings of any person detailed to participate in a court-martial convened by him; or (3) control funds for witnesses required to attend the trial. However, convening authorities should retain responsibility for referring cases to trial and exercising clemency power.
- In future defense appropriation acts, provide separately for the operation of the military justice system by earmarking specific amounts to be used for construction; furnishing and maintenance of courtrooms, law offices, law libraries, and rehabilitation facilities; and official travel incident to judicial proceedings.

RECOMMENDATIONS TO THE SECRETARY OF DEFENSE

We recommend that the Secretary of Defense direct the services to:

- Consolidate defense and trial counsel organizations at a single base and in all other situations, when feasible and cost effective.
- Establish budgeting processes allowing for the (1) development of total costs relating to judicial functions and (2) comparison of costs between services and among service activities and organizations. This would provide the Congress a means for ensuring that the system, as a whole, is funded consistent with its importance and that resources are equitably allocated.
- Study and report on methods to enhance the independence of counsel, including the feasibility of establishing a single DOD defense and trial counsel organization.

Other recommendations to the Secretary of Defense are on pages 19, 30, and 39.

AGENCY COMMENTS AND OUR EVALUATION

Agency comments

The Department of Defense found merit with all but one of our recommendations to the Secretary of Defense. DOD did not concur in our recommendation to study and report on establishing a single defense and trial counsel organization. While asserting that such an organization may have potential merit in achieving more uniformity in the application of military justice, DOD stated that the scheme would concentrate the limited number of judge advocates in military justice functions at a time when their role is rapidly expanding into many diverse and equally essential areas. DOD suggests we substitute a recommendation to study and report on ways and means of enhancing judge advocate utilization by improving existing cross-servicing arrangements.

DOD also provided the services' extensive comments. In general, the services agreed that perceptions of fairness are an important consideration in the administration of the military justice system. However, the services disagreed with us over (1) the extent the role of the convening authority should be diminished and (2) the establishment of

consolidated counsel organizations, especially, the concept of a single defense and trial counsel organization.

DOD's and the services' comments appear in their entirety in appendix VIII to this report.

Our evaluation

We consider the establishment of a single defense and trial counsel a viable alternative to existing systems. However, we agree with DOD that not enough is known about the effects of installing such a system, but do not feel that the possible deficiencies warrant rejecting the concept without detailed consideration of benefits (discussed in this chapter). Therefore, we still consider studying the feasibility of a single counsel organization as well as other methods to enhance the independence of counsel (including increased cross-servicing, which DOD suggested in its comments) important and necessary.

Diminishing the role of the convening authority in administering the military justice system is being acted on. The Joint Service Committee on Military Justice ^{1/} has proposed a concept which would establish courts-martial in continuous existence. Under it, convening authorities would no longer detail counsel or military judges for courts-martial as they now do. The Judge Advocate Generals have tentatively approved the concept, and the Air Force will draft legislation. We urge the Committee to consider our recommendation to the Congress (see p. 52) and act to reduce the role of the convening authority in performing military justice administrative duties.

^{1/}This Committee is the working group for the Code Committee established by article 67(g) of the Code. The Code Committee is composed of the Judge Advocate Generals, the General Counsel of the Department of Transportation (Coast Guard), and the judges of the U.S. Court of Military Appeals. The Code Committee and its working group meet regularly to discuss proposals to amend the Manual for Courts-Martial and legislative changes to the Code.

CHAPTER 7

SCOPE OF REVIEW

The principal objective of this review was to evaluate the independence and effectiveness of the defense and trial counsel function. Between January and June 1977, we visited the headquarters of each military service and 19 field locations having a total of 25 defense and trial counsel organizations. (See app. I.) Service officials selected these locations as representative of the overall organization with average staffing and caseloads.

At service headquarters, we examined each service's criteria for assigning counsel and support staff, analyzed studies made to update these criteria, and evaluated plans for establishing separate defense commands to comply with the 1972 DOD Task Force on Military Justice recommendation.

At each of the field locations, we (1) examined the criteria used to establish counsel and support staff authorizations, (2) compared workloads of both counsel and support staff, and (3) interviewed personnel to determine their views of the organization modes, concepts, and problems.

As shown below, we interviewed 211 military justice officials at the 19 field locations visited.

	<u>Navy</u>	<u>Air Force</u>	<u>Army</u>	<u>Marine Corps</u>	<u>Total</u>
Officers in charge, Naval Legal Service Office	3	-	-	-	3
Deputy officers in charge, Naval Legal Service Office	3	-	-	-	3
Staff judge advocates	-	5	5	5	15
Deputy staff judge advocates	-	3	5	5	13
Military justice officers	2	-	3	4	9
Defense counsel	19	10	19	37	85
Trial counsel	<u>17</u>	<u>10</u>	<u>14</u>	<u>42</u>	<u>83</u>
Total	<u>44</u>	<u>28</u>	<u>46</u>	<u>93</u>	<u>211</u>

Each person interviewed was asked for opinions on (1) whether the organizational alinement of defense and trial counsel allowed him to function without adverse influence from his superiors, (2) the most efficient and effective organizational mode for defense and trial counsel, and (3) the adequacy of the number of defense and trial counsel and support staff assigned. Each was also asked to describe situations or provide examples to support his opinions.

LOCATIONS VISITED

OFFICE OF THE SECRETARY OF DEFENSE:

Office of Assistant Secretary of Defense (Manpower,
Reserve Affairs, and Logistics), Washington, D.C.

AIR FORCE:

Headquarters, Washington, D.C.
Holloman AFB, New Mexico
Lowry AFB, Colorado
McCellan AFB, California
Pope AFB, North Carolina
U.S. Air Force Judiciary, Fourth Circuit
Williams AFB, Arizona

ARMY:

Headquarters, Washington, D.C.
XVIII Airborne Corps and Fort Bragg, North Carolina
82d Airborne Division, Fort Bragg, North Carolina
John F. Kennedy Center for Military Assistance,
Fort Bragg, North Carolina
U.S. Army Quartermaster Center, Fort Lee, Virginia
Headquarters, Forces Command, Fort McPherson, Georgia
U.S. Army Infantry Center, Fort Benning, Georgia
Headquarters, Training and Doctrine Command,
Fort Monroe, Virginia
The Judge Advocate General's School, Charlottesville,
Virginia

MARINE CORPS:

Headquarters, Washington, D.C.
Marine Corps Base, Camp Lejeune, North Carolina
2d Marine Division, Camp Lejeune, North Carolina
Force Troops, Camp Lejeune, North Carolina
1st Marine Division, Camp Pendleton, California
Marine Corps Base, Camp Pendleton, California
Joint Law Center, Marine Corps Air Station,
Cherry Point, North Carolina
Joint Law Center, Marine Corps Air Station, El Toro,
California

NAVY:

Headquarters, Washington, D.C.
Naval Legal Service Office, Norfolk, Virginia
Naval Legal Service Office, Pensacola, Florida
Naval Legal Service Office, San Francisco, California

COAST GUARD:

Fifth Coast Guard District Legal Center, Portsmouth,
Virginia

MILITARY JUSTICE PERSONNELVIEWS OF THREE ORGANIZATION MODES

In our structured interviews with 211 military justice personnel, we asked their views on the merits of (1) consolidating functions where more than one exists on a single base, (2) consolidating functions where large concentrations of different service populations exist in particular geographical areas, and (3) consolidating all military justice functions into a single DOD defense and trial counsel organization. We interviewed 44 Navy, 28 Air Force, 46 Army, and 93 Marine Corps personnel. Their views by service are summarized in the following schedules.

<u>Preferred organizational mode</u>	<u>Navy</u>	<u>Air Force</u>	<u>Army</u>	<u>Marine Corps</u>	<u>Total</u>
	—(Percent "positive" responses)—				
One organization for a large installation	(a)	21	37	66	40
Localized combined organization	27	7	6	6	11
Single DOD defense and trial counsel organization	11	14	20	11	13
Present organization	<u>a/57</u>	54	30	9	30
Other	5	4	7	8	6

a/The Navy uses one organization for large installations.

	<u>Navy</u>	<u>Air Force</u>	<u>Army</u>	<u>Marine Corps</u>	<u>Total</u>
	----- (Percent "positive" responses) -----				
<u>One organization for a large installation</u>					
Would such an organization:					
--Better utilize counsel?	95	75	65	91	84
--Result in better quality justice?	77	32	50	62	59
--Decrease or retain the same number of personnel?	100	99	91	95	90
--Decrease or retain the same costs for equipment, facilities, or other items?	95	89	91	80	87
<u>Localized combined organizations</u>					
Would such an organization:					
--Better utilize counsel?	41	39	43	45	43
--Result in better quality justice?	23	11	20	26	22
--Decrease or retain the same number of personnel?	75	75	85	76	78
--Decrease or retain the same costs for equipment, facilities, or other items?	86	71	76	68	74
<u>Single DOD defense and trial counsel organization</u>					
Would such an organization:					
--Better utilize counsel?	27	36	35	34	33
--Result in better quality justice?	23	7	24	25	22
--Decrease or retain the same number of personnel?	52	54	43	58	53
--Decrease or retain the same costs for equipment, facilities, or other items?	61	57	39	51	51

NAVY AND AIR FORCE VIEWS ON
ORGANIZATIONAL ALINEMENTS
VERSUS INFLUENCE OF COMMANDERS

The Navy and Air Force defense and trial counsel organizations were separated from direct control of convening authorities in 1974. We asked 44 Navy and 28 Air Force military justice personnel to give us their views on their current organizations.

<u>Specific questions</u>	<u>Percent of "yes" responses</u>	
	<u>Navy</u>	<u>Air Force</u>
Has the organizational change had any beneficial effect on the trial counsel's handling of cases?	77	54
Has the organizational change had any adverse effect on the trial counsel's handling of cases?	7	4
Has the organizational change had any beneficial effect on the defense counsel's handling of cases?	86	93
Has the organizational change had any adverse effect on the defense counsel's handling of cases?	0	11
Can counsel refer to cases where the present organizational structure has had an adverse effect?	2	4

We also asked the following questions of eight Navy and eight Air Force rating officials.

<u>Specific questions</u>	<u>Percent of "yes" responses</u>	
	<u>Navy</u>	<u>Air Force</u>
Does the rating official's placement in the organization appear to have the potential for adversely affecting trial counsel's ability to independently prosecute cases?	63	50
Does the rating official's placement in the organization appear to have the potential for adversely affecting defense counsel's ability to independently defend cases?	75	25

ARMY AND MARINE CORPS VIEWS
ON ORGANIZATIONAL ALINEMENTS
VERSUS INFLUENCE OF COMMANDERS

The Army and Marine Corps defense and trial counsel organizations are not separated from direct control of convening authorities. We asked 46 Army and 93 Marine Corps military justice personnel to give us their views on their current organizations.

<u>Specific questions</u>	<u>Percent of "yes" responses</u>	
	<u>Army</u>	<u>Marine Corps</u>
Is the current organizational structure adequate to ensure the adversary relationship intended?	83	72
Is the trial counsel's preparation for and handling of cases adversely affected by the organizational structure?	15	19
Is the defense counsel's preparation for and handling of cases adversely affected by the organizational structure?	20	18
Does the organizational structure have any adverse effect on the quality of defense?	9	29
Does the organizational structure have any adverse effect on the quality of prosecution?	17	25
Does the counsel believe the current organization should be changed?	59	53
Can counsel refer to cases where the organizational structure had an adverse effect?	13	10

We also asked the following questions of 13 Army and 14 Marine Corps rating officials.

<u>Specific questions</u>	<u>Percent of "yes" responses</u>	
	<u>Army</u>	<u>Marine Corps</u>
Does the rating official's placement in the organization appear to have the potential for adversely affecting trial counsel's ability to independently prosecute cases?	38	50
Does the rating official's placement in the organization appear to have the potential for adversely affecting defense counsel's ability to independently defend cases?	46	50

MILITARY JUSTICE PERSONNELVIEWS ON FACTORS HAMPERING PERFORMANCE

In our structured interviews with 211 military justice personnel (44 Navy, 28 Air Force, 46 Army, and 93 Marine Corps personnel), we were given the following factors as hampering their performance.

	<u>Navy</u>	<u>Air Force</u>	<u>Army</u>	<u>Marine Corps</u>	<u>Total</u>
	—————(Percent responding)—————				
Inadequate law library	39	14	43	46	40
Lack of clerical equipment	41	11	30	28	29
Lack of individual counsel rooms	34	0	2	15	14
Lack of adequate training	9	7	7	6	7
Lack of investigators for defense counsel	2	0	9	2	3
Lack of adequate court- rooms	5	0	2	4	3
Percent of counsel that referred to cases where the above items had an adverse effect	5	0	2	9	5

1976 MONTHLY CASELOAD PER COUNSEL

Organization	Trial counsel							Defense counsel							
	Court martial				Article 32	Advice to commanders on article 15	Advice to commanders on administrative discharges	Court martial				Article 32	Advice to accused on article 15	Advice to accused on administrative discharge proceedings	
	General	Special	Summary	Total				General	Special	Summary	Total				
Marine Corps:															
2d Marine Div.	0.2	8.1	0.0	8.3	0.7	0.0	0.0	0.2	8.0	2.4	10.6	0.7	20.4	22.9	
1st Marine Div.	.3	5.7	0	6.0	.4	0	.2	.4	7.1	0	7.5	.5	0	.2	
Force Troops/2d Force Service Support Group	.4	4.2	0	4.6	.8	0	2.4	.3	3.3	1.8	5.4	.6	13.0	10.5	
Marine Corps Base, Camp Pendleton	.7	4.6	0	5.3	7.5	0	2.4	.7	4.6	0	5.3	7.5	0	14.8	
Marine Corps Base, Camp Lejeune	.3	2.6	0	2.9	3.2	0	0	.3	2.6	0	2.9	3.2	9.0	8.4	
Navy:															
NLSO Norfolk	.7	6.0	0	6.7	.5	0	0	.5	4.5	4.2	9.2	.4	0	7.5	
NLSO Pensacola	.4	10.3	0	10.7	.2	0	0	.1	3.6	4.5	8.2	.1	5.5	7.4	
NLSO San Francisco	.2	5.3	0	5.5	.4	0	0	.1	4.0	.4	4.5	.3	0	.4	
Army:															
XVIII Airborne Corps and Fort Bragg	1.1	4.3	0	5.4	1.1	25.6	.8	1.2	4.8	0	6.0	1.3	36.0	26.0	
32d Airborne Div.	1.5	3.9	0	5.4	1.5	107.6	0	1.5	3.9	0	5.4	1.5	50.7	22.0	
JFK Center for Military Assistance	.9	1.1	0	2.0	.2	15.2	2.1	1.3	1.5	0	2.8	1.8	21.3	13.1	
USA Infantry Center and Ft. Benning	.2	2.5	0	2.7	.4	0	1.5	.2	2.2	0	2.4	.4	17.5	7.5	
US Army Quartermaster Center and Ft. Lee	.8	2.0	1.1	3.9	.8	19.9	0	.4	1.0	.5	1.9	.4	32.0	20.0	
Air Force:															
Lowry AFB	.2	.8	.1	1.1	.1	0	0	.4	1.5	.1	2.0	.3	8.6	9.2	
USAF Trial Judiciary, Fourth Circuit	1.5	0	0	1.5	0	0	0	1.0	0	0	1.0	0	0	0	
Heiloman AFB	0	.2	0	.2	.1	0	.3	0	.8	0	.8	.3	29.5	12.0	
McClellan AFB	0	.4	0	.4	0	0	.3	0	.4	0	.4	.2	7.3	4.3	
Pope AFB	0	.4	0	.4	0	22.7	2.9	0	.4	0	.4	0	22.1	2.3	
Williams AFB	0	0	0	0	0	0	.1	0	0	0	0	0	4.7	.2	

MILITARY JUSTICE WORKLOAD,DEPARTMENT OF THE ARMY

As part of updating the Manpower Authorization Criteria for Army lawyers, the Army surveyed 13 combat and combat support units for workload statistics covering military justice and other legal duties. The military justice statistics, as presented in the approved study, are summarized here to dramatize the variances in military justice workload between units. In our opinion, military justice workload does not closely correlate to troop population, and staffing guides should not be based on troop population. All the following statistics were calculated by the Army and have not been independently verified by us.

<u>Army unit</u>	Workload per 1,000 troops average for fiscal years 1975 and 1976			
	<u>Article 15 (note a)</u>	<u>Courts-martial</u>		
		<u>Summary</u>	<u>Special</u>	<u>General</u>
2d Infantry Division, Korea	334.0	0.7	14.0	1.8
V Corps, USAREUR	143.3	2.9	6.2	1.2
1st Cavalry Division, Fort Hood	402.0	23.1	21.3	2.6
82d Airborne Division, Fort Bragg	271.0	0	13.2	2.1
1st Armored Division, USAREUR	364.0	7.6	19.8	3.7
3d Infantry Division, USAREUR	272.2	4.1	9.7	5.9
8th Infantry Division, USAREUR	228.9	9.5	15.5	3.7
101st Airborne Division, Fort Campbell	273.0	9.9	30.0	3.2
VII Corps, USAREUR	129.5	0.3	6.3	2.0
18th Airborne Corps, Fort Bragg	238.0	0	17.0	2.1
9th Infantry Division, Fort Lewis	264.0	2.3	18.5	2.7
5th Infantry Division, Fort Polk	435.0	15.1	13.0	2.9
4th Infantry Division, Fort Carson	211.0	0.1	18.6	3.0
Survey total averages	274.3	5.8	15.6	2.8

a/Nonjudicial punishment authorized by article 15 of the Code.

AGENCY COMMENTS

At our request, DOD provided formal comments on a draft of this report. Its overall comments generally agreed with our recommendations. DOD found merit with all but one of our recommendations to the Secretary of Defense and stated that it would consider our recommendations further upon receipt of the final report. DOD did not concur with our recommendation to study the costs and feasibility of establishing a single defense and trial counsel organization in the Department of Defense. While we considered DOD's views on this recommendation, we did not see any reason to change our position on the matter.

In addition, DOD forwarded to us the services' comments. Close reading of the services' comments reveal that they also generally agreed with our conclusions and recommendations. Differences among the services' comments demonstrate the need for the services and DOD to coordinate their work on the problems affecting the military justice system.

In general, the services agreed that perceptions of fairness are an important consideration in the administration of military justice. However, the services disagreed with (1) the extent that the role of the convening authority should be diminished and (2) the establishment of consolidated counsel organizations, especially, the concept of a single defense and trial counsel organization.

After considering the comments, we have not significantly modified the positions taken in the report. As a guide, we have indexed the written comments to refer to report pages where specific matters are discussed.



MANPOWER,
RESERVE AFFAIRS
AND LOGISTICS

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

8 AUG 1978

Mr. H. L. Krieger
Director, Federal Personnel
and Compensation Division
U.S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Krieger:

BACKGROUND

This is in reply to your letter to the Secretary of Defense regarding your draft report dated May 22, 1978, on "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System," OSD Case #4909, FPCD-76-16.

Your draft report examines various aspects of defense and trial counsel organizations in the Services which you conclude lead to a perception that military justice is uneven, unfair, and has low priority. Attached are the Military Departments' extensive comments regarding both the accuracy and substance of your observations, which should prove useful in formulation of your final report.

PP. 53-54 2nd CONCLUSION.

Your draft report includes several recommendations for action by the Secretary of Defense. All but one appear to have some merit and will be appropriately addressed upon receipt of your final report. The Department of Defense does not concur in your draft recommendation to study and report on the feasibility of establishing a single DoD defense and trial counsel organization. Aside from any potential merit of such consolidation in terms of achieving more uniformity in the application of military justice, such a scheme would concentrate our limited number of judge advocates in military justice functions at a time when the judge advocates' role is rapidly expanding into many diverse and equally essential areas. I suggest that you delete that recommendation and substitute a recommendation to study and report on ways and means of enhancing judge advocate utilization by improvement in existing cross-Servicing arrangements.

Thank you for the opportunity to respond to your draft report.

Sincerely,

ROBERT B. PIRIE, JR.
Principal Deputy Assistant Secretary
of Defense (MRA&L)

Attachments



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

REPLY TO
ATTENTION OF:

DAJA-CL 1978/5714

23 JUN 1978

27 JUN 1978

Clayton N. Gompf

MEMORANDUM THRU ASSISTANT SECRETARY OF THE ARMY (MRA&L) for
Military Personnel Policy & Programs
FOR ASSISTANT SECRETARY OF DEFENSE (MRA&L)

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental
Changes Needed to Improve the Independence and
Efficiency of the Military Justice System" (OSD
Case #4909) -- INFORMATION MEMORANDUM

BACKGROUND

NOTE A

1. The principal objective of the subject study was to "evaluate the independence and effectiveness of the defense and trial counsel function." As a result of its evaluation, GAO determined that there is ". . . a perception that military justice is uneven, unfair, and has low priority." The GAO report concludes that the basic causes of the perception are the present organization of the defense and trial counsel function and the role of the convening authority in administering and funding the military justice system. It determined that this perception could be improved with four organizational changes. The first (discussed in paragraph 2 below) is improvement in staffing criteria and assignment procedures for counsel and support staff. The second (paragraph 3 below) is elimination of factors which hamper counsel effectiveness, specifically the inability of counsel to obtain witnesses independently of the convening authority and inadequate logistical support. The third (paragraph 4 below) is independent defense counsel organizations. The fourth (paragraph 5 below) is a two-fold change: diminishing the role of the convening authority in the military justice system, and consolidating certain justice functions within and among the services. According to the report, these changes would separate command functions from legal and judicial functions, hereby accomplishing the desired objective of an independently administered judicial system. To accomplish these changes, GAO recommends that "the Congress revise the Uniform Code of Military Justice to remove from convening authorities responsibility for

NOTE A - Two of the four items listed do not require nor do we suggest organizational changes--(1) staffing and assignment procedures, and (2) procedures for obtaining witnesses and funding' judicial support.



DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4900) -- INFORMATION MEMORANDUM

BACKGROUND

administering and funding the justice system including control over the selection of defense and trial counsel and the funding of witnesses." It also recommends that the Secretary of Defense direct the services to: (1) consolidate defense and trial counsel functions where practicable, (2) establish budgeting processes that would allow for developing total costs relating to the judicial functions, and a comparison of costs within and between the services, to enable the Congress to ensure that the system as a whole is funded in accordance with its importance and that resources are equitably allocated, and (3) study and report on the feasibility of establishing a single DoD defense and trial counsel organization.

PP. 19-20.

2. Improvements Needed in Staffing Criteria and Assignment Procedures for Counsel and Support Staff. a. Staffing criteria for counsel and support staff. GAO has concluded that current Army studies into staffing methods for legal offices do not consider ". . . procedures for changing staffing as workload changes or . . . workload statistics for garrison units." It recommends that the Secretary of Defense "direct the establishment of uniform criteria and methodologies among the services for identifying the numbers of counsel and support staff needed" The report states that "[a]s a minimum . . . the Army should include in its current study workload for garrison units, a methodology for periodic updates for all units, and changing staffing levels as workload changes"

BACKGROUND

(1) In order to understand the manning level of lawyers in the Army, it is necessary to understand how manpower authorizations are determined in the Army generally and how staffing guides are used to meet desirable manning goals.

(a) The following is a simplified explanation of a complicated process. Through the budget process, a ceiling is placed upon the number of officers authorized for the whole Army. Officer spaces are then allocated throughout the Army on

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

BACKGROUND { the basis of on-the-ground manpower surveys that examine workload and mission. Manpower surveys are conducted at installations and major command levels under the general staff supervision of The Inspector General and the Deputy Chief of Staff for Personnel, Headquarters, Department of the Army (HQDA). The total number of officers in the Army, including lawyers, is subject to continual review for reduction of spaces by the Department of Defense and the Department of the Army. Local commands are under the same review by various manpower survey elements. These elements conduct periodic manpower surveys under instructions to approve only the number of officers necessary to perform the mission. The burden is always on each element of a command, including the Staff Judge Advocate (SJA), to prove that the number of officers assigned are actually required. The decision as to the number of lawyers in the Army results from a process of "manpower engineering," accomplished by non-lawyers utilizing objective measures of workload standards. In the determination of its "mix" of officers, line and support, each command has a ceiling placed upon it as to the number of officers allowed, so the SJA competes with other elements of the command for his portion of finite authorizations. He must periodically prove to his local command, as well as the supervising major command and the Department of the Army, that his workload justifies the number of lawyers assigned. Failure results in the loss of spaces or the conversion of spaces to other elements of the command that are able to prove a greater need. Conversely, as has happened in recent years because of increasing legal workloads imposed by treaty, statute, regulation, and court decisions, a decision to increase the number of lawyers in a command results in conversion of non-lawyer officer spaces to lawyer spaces.

(b) Staffing guides provide guidelines to assist personnel staffing analysts in determining the appropriate manning level. All adjustments to manning levels are the result of a local, detailed analysis of workload factors. A staffing guide is a tool for personnel staffing analysts who do not possess detailed day-to-day familiarity with local functions peculiar to each organization's mission and functions. Provided this guide, workload figures, and other documentation and guidance, they can

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

BACKGROUND

determine appropriate personnel requirements to satisfy specific needs. The flexibility of this system, both for the Army and the local SJA or other resource manager, is vital to efficient management. In a manpower survey, an SJA must support his proposed staffing by hard figures and other documentation regardless of staff guide generalities. For example, regardless of local troop population, an installation which has little disciplinary or military justice activity would not be staffed at the level provided in the staffing guide for criminal law functions.

pp. 11-13, and App. VII.

(2) GAO's premise that "[l]awyers and support staff are most often authorized based on troop population--which does not necessarily relate to workload--. . ." is misleading. Both the Manpower Authorization Criteria (MACRIT) used for the development of staffing criteria for combat and combat support units (TOE), and the analysis leading to revisions of the staffing guide for garrison units (TDA), considered workload factors as the bases for the final numbers of personnel provided in the TOE and recommended for the TDA units. "Troop population" is indeed a benchmark to assist manpower personnel analysts in their evaluations of manning levels. A clear correlation between troop population and military justice workload is evident from statistics published annually in the report of the US Court of Military Appeals and The Judge Advocates General of the Armed Forces, as well as by those maintained by United States Army Legal Services Agency and published periodically in The Army Lawyer. Periodic adjustments are made in MACRITS and staffing guides because of increase or decrease in the rates of military justice actions. Moreover, the new staffing guide will specifically provide that workload data will be considered in evaluating staffing requirements. The proposed revision reads: "Note 1. Workload data in terms of number of cases tried/reviewed should be recorded separately in Schedule X for the following: general courts-martial, BCD special courts-martial, special courts-martial, summary courts-martial, Article 15 proceedings, and cases presented to US Magistrates," -- the essential gamut of military criminal law functions -- and

DAJA-GL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

SAME AS - VE

"Note 2. Increase over yardstick may be necessary at garrisons with apprehendee center functions, or when the workload warrants, as determined by local appraisal" (emphasis added). A comprehensive survey conducted by The Judge Advocate General's School during the MACRIT study adequately supports the current TOE manning level and provides additional corroboration for a "troop population" standard as a starting point for determining staffing.

p. 16.

(3) Assignments of military lawyers are made to legal offices based on authorized spaces and coordination with the Staff Judge Advocate. The overriding factor in all assignments is personnel availability. Workload conditions or new mission requirements are other factors. It should be noted that no judge advocate offices in the field are manned at a level higher than their authorizations. The report's example of Fort Benning (page 15) is misleading. Not counting spaces designated for the lawyer instructor at the Infantry School and military judges, there are 19 legal spaces authorized (14 for the garrison, and 5 from the combat and combat support units) and 18 lawyers assigned.

pp. 17-18.

NOTE A

b. Methods for assigning counsel to cases. The assignment of counsel within a legal office is a function of the Staff Judge Advocate. He is responsible to ensure that only qualified individuals are appointed as counsel. Army judge advocates may not be detailed as defense counsel in general courts-martial until they have been certified by The Judge Advocate General as eligible to perform such duties. This certification can normally be requested only after a judge advocate has completed 4 months of criminal justice duties and must be supported by a recommendation from his or her Staff Judge Advocate and a local military judge. The assignment of cases by the supervising judge advocate to subordinate counsel remains the best method of assigning counsel. Establishing a continuing relationship between particular counsel and particular elements of a command may result in temporary disparities in numbers of assigned cases, but these tend to even out. There are other values achieved, such as establishing trust and confidence and the efficiency of working with acquaintances.

NOTE A - The assignment policy outlined here was not observed. At all Army locations visited, counsel were assigned to specific convening authorities rather than case by case.

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

pp. 18-19. c. Inadequate number of support staff. The competition for spaces is discussed in paragraph (1), above. In 1973 a Legal Paraprofessional Plan was prepared in the Office of The Judge Advocate General of the Army recommending that paralegal spaces be added to the Army force. However, the HQDA staff agency responsible for monitoring manpower authorizations concluded that the designation of spaces for "lawyers' assistants" would have to be at the cost of converting presently authorized lawyer spaces. For that reason, the plan was not pursued. Still, because the value of paralegals has been demonstrated in Army judge advocate offices in Europe, where various commands have given up some of their non-lawyer spaces to be used for paralegals, this area warrants further evaluation.

CHAPTER 4

BACKGROUND 3. Other Factors Which Hamper Counsel Effectiveness. a. Ability independently to obtain witnesses. GAO recommends Congress revise the UCMJ so defense counsel are not required to obtain trial counsel approval for summoning witnesses. It also suggests eliminating the requirement that the defense provide trial counsel with a synopsis of the witness's expected testimony. Further, it recommends a centralized (open allotment) system for the costs of obtaining witnesses.

p. 30. NOTE A (1) Congressional action to change existing procedures for obtaining witnesses is unnecessary because specific procedures are not prescribed by the UCMJ. Article 46, UCMJ, the only article pertaining to witness acquisition, provides that trial counsel, defense counsel and courts-martial will have "equal opportunity to obtain witnesses" in accordance with regulations prescribed by the President. Detailed procedures for obtaining court-martial witnesses are in para 115, MCM, 1969 (Rev.).

pp. 21-23 and 30. (2) Any change to the military justice system permitting an uncontrolled defense summoning of witnesses would be unacceptable. This would go far beyond what is permitted in Federal criminal practice. It is doubtful that any State gives the defense an unrestricted right of free compulsory process. Paragraph 115, MCM, 1969 (Rev.) parallels Rule 17(b), Federal Rules of Criminal Procedure, which requires

NOTE A - Based on this comment and other informal comments we received, we have revised the recommendation so that the Secretary of Defense should recommend changes to the Manual for Courts-Martial. However, the sense of the recommendation remains unchanged.

DAJA-UL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

defendants to show that witnesses requested at Government expense are "necessary to an adequate defense" before a subpoena will issue. As the armed services bear the expense of all defense witnesses appearing at trial without regard to a defendant's financial status, requiring the defense to justify witness requests is a reasonable procedure and should be retained. The alternative is fiscally irresponsible.

(3) GAO, apparently based upon its discussions with a select number of trial and defense counsel, characterizes the procedures governing the acquisition of witnesses as biased in favor of the prosecution. Although trial counsel are not required to justify their requests for witnesses as are defense counsel, the distinction is not arbitrary. The prosecution's case is open to the defense from the outset. The defense is automatically furnished the names of all witnesses for the prosecution and a list of the documentary and real evidence to be introduced. It is given an opportunity to inspect the entire case file, to include pretrial statements of witnesses and, in the event an Article 32 investigation is held, the report of investigation. Unlike Federal Criminal practice, which on the whole provides more open discovery than that of most States, in the military the defense does not subject itself to reciprocal discovery by accepting this information. Thus, any prosecution witness who is subpoenaed is known to the defense; but if the defense were able to summon witnesses without going to the trial counsel, the services would in effect be funding a series of surprise witnesses. The result would be prolonged, costly trials because of motions for Government continuances every time the defense introduced a witness whose testimony was unknown to the prosecution. As a requisite for paying for a witness's time and travel, the services must be provided with sufficient information by the defense to allow an informed decision on the question of necessity. Otherwise, rather than the serious proceedings they should be, military trials would become a game.

(4) Para 2-32, Army Regulation 27-10, makes the American Bar Association's Code of Professional Responsibility applicable to all lawyers trying Army courts-martial. Ethical Consideration 7-13 of the ABA's Code states that the responsibility of a public prosecutor is "to seek justice, not merely to convict." With

pp. 21-23 and 30.

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 12 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

respect to evidence and witnesses, it states that "a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused." Thus, Army trial counsel have an ethical duty to summon any witness requested by the defense whom they agree is material and reasonably necessary. In the event they failed to perform this duty in good faith, their conduct would be subject to review by The Judge Advocate General of the Army's Professional Responsibility Advisory Committee. Although a change to para 115, MCM, 1969 (Rev.), eliminating trial counsel's nominal preliminary "veto" over defense requests for witnesses is unobjectionable, the essence of that paragraph should be retained. The procedure could be revised so that defense witness requests are initially submitted to the convening authority through the trial counsel, with the latter's role limited to comments and a recommendation. A practice whereby every defense request for witnesses would have to be ruled on by a military judge is too costly and inefficient. If trial and defense counsel agree on the need for the witnesses requested, which frequently happens, the witnesses should be obtained without further delay. Just as trial counsel have an ethical duty to seek justice, defense counsel have one to represent their clients "zealously within the bounds of the law" (Canon 7, ABA's Code of Professional Responsibility), which includes seeking material and necessary defense witnesses by every legally permissible means available.

(5) Mechanisms for defense counsel to contest a decision that a witness is unavailable are adequate. The perception that counsel are reluctant to use those mechanisms because the SJA rates their performances is not wide-spread in Army defense circles. In any event, if the US Army Trial Defense Service (USATDS) is approved and established world-wide, it will erase such perceptions. The convening authority and the Staff Judge Advocate will no longer be in the rating chain of defense counsel. Additionally, recent decisions extending defendants' rights to have witnesses present at trial and Article 32 investigations have significantly affected convening authorities' responses to requests for defense witnesses. See United States v. Carpenter, 1 MJ 384 (CMA 1976), United States v. Ledbetter, 2 MJ 37 (CMA 1976), and United States v. Willis, 3 MJ 94 (CMA 1977). As a result of these

pp. 21-23 and 30.

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

cases, the alternatives usually are either to produce the witness or abate the proceeding.

pp. 21-23 and 30.

(6) In light of increases in witness fund expenditures at some Army installations, the Army presently is examining various suggestions to eliminate competition of witness funding with other items in the installation budget. Any Army decision on the best method of funding costs of witnesses, and courts-martial generally, should be held in abeyance until data, comments, and recommendations are collected from various Army commands and staff offices.

pp. 30 and CONCLUSION.

b. Inadequate logistical support. GAO specifically recommends that the "Secretary of Defense direct the services to establish systems which will provide improved visibility and funding of logistical support to counsel in such areas as law libraries, clerical equipment, and privacy and appearance of facilities." As noted by GAO in its report, the Task Force on the Administration of Military Justice in the Armed Forces, in its 1972 report to the Secretary of Defense, found that similar improvements were needed. Since that report, substantial effort and improvements have been made. For example, a HQDA command letter (Tab A) was issued on 31 October 1974 requesting general court-martial convening authorities to ensure that such deficiencies were remedied. Consequently, much progress has been noted by general officers of the Judge Advocate General's Corps during periodic visits to the field. Further improvements are necessary. However, the present deficiencies are not due to recalcitrant convening authorities, but rather to Army-wide competition for available funds. GAO failed to describe the "system" it recommends to the Secretary of Defense for providing these improvements, other than to imply that a single DoD defense and trial counsel organization would enhance efficiency. As the level of funds appears to be the principal reason for the level of legal support, a separate system that is inadequately funded still would not resolve the problem. Although there is merit to GAO's conclusion that additional logistical support is needed, there is no justification for establishing a separate system to remedy this problem.

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

CHAPTER 5

4. Need to Achieve Independent Defense Counsel Organizations.

a. Organizational modes and the USATDS. GAO expresses "that more can be done within existing constraints to achieve greater command independence and insure the impartial delivery of justice." In GAO's opinion, the Air Force and Navy organizational structures come closest to allowing both defense and trial counsel to act independently in the trial of military personnel accused of criminal offenses. The report concluded that the 1-year test program under which the limited US Army Trial Defense Service (USATDS) is being observed delays a concept that does not require further testing. USATDS was organized on 15 May 1978 and has been in operation approximately one month. To date, no serious problems have been encountered. The test has been, and will continue to be, of value in developing policies and procedures to enhance the efficiency and effectiveness of the defense function. The Office of The Judge Advocate General is continuously monitoring this program. If USATDS is found to be organizationally sound and less than a year of testing is needed, a recommendation for accelerated implementation will follow and there is no necessity for DoD action. Presently, the monitoring indicates that most if not all of the benefits of the test will be achieved in a period of six months, and the Office of The Judge Advocate General could be prepared to implement an Army-wide program before May 1979.

pp. 37-38.

CHAPTER 6

b. Single DoD defense and trial counsel organization. GAO's recommendation concerning a study and report on the feasibility of a single DoD defense and trial counsel organization is confusing. Although GAO stated that a uniform organizational mode for all services is not practicable (page 42),^{1/} it also stated that a single DoD organization may be (pages 58,59).^{2/} The logistical and administrative burdens of supporting the latter organization, particularly during periods of mobilization, are heavy. Prior to a DoD evaluation of such a concept, it would be premature to comment on its desirability or feasibility.

pp. 38 and 51-53.

^{1/} Report page 38.

^{2/} Report page 52.

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

CHAPTER 6

5. Organizational Changes are Needed to Make the Military Justice System More Independent and Efficient. a. Diminishing the role of convening authorities in the administration of military justice. GAO recommends that the Congress revise the UCMJ to remove responsibility for administering the justice system from convening authorities, including control over the selection of defense and trial counsel. They would allow convening authorities to "retain responsibility for referring cases to trial and exercising post-trial clemency power including the freedom to reduce or suspend sentence."

(1) Commanders are responsible for the maintenance of discipline within their commands. This is basic to their duty to maintain a fighting force capable of responding should the occasion arise. The command function should not be separated from the justice system any more than is necessary for commanders to fulfill their main obligation to field a force. For example, as noted by GAO, commanders must retain the freedom to suspend the sentence imposed by the sentencing authority. This is necessary so the convening authority can retain the adjudged violator in the unit if he needs him. In addition, the convening authority must maintain other controls. For example, he must retain control of personnel utilized by the military justice system, such as the power to excuse court members. Commanders do not have unfettered control over the military justice system. For example, the convening authority is restricted as to the members he should detail to a court-martial (Article 25(d)(2), UCMJ). Further, commanders have judge advocates available to advise them in their actions, and those actions generally are subject to review. Such controls and aids to commanders are supportive so that their actions will be correct.

(2) The roles of the convening authority are already being evaluated by the services. The Joint Service Committee on Military Justice (JSC) already has proposed a concept which would establish courts-martial in continuous existence. Under it, convening authorities would no longer detail counsel or military judges for courts-martial as they now do. The Judge Advocates General have tentatively approved the concept and the Air Force will draft legislation. The JSC is the existing vehicle to originate change in the UCMJ, or the Manual for Courts-Martial, depending on the nature of the problem. This procedure remains the best method of evaluating change.

pp. 6, 7, 40, 41, 51, and 52 and CONCLUSION.

pp. 54 and BACKGROUND.

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System" (OSD Case #4909) -- INFORMATION MEMORANDUM

b. Consolidation. GAO recommends that the Secretary of Defense direct the services to "[c]onsolidate defense and trial counsel organizations where they exist on a single base and in other situations when feasible and cost effective." The consolidation of legal services available at installations has been and is being studied. Consolidation has been accomplished at certain installations. However, consolidation merely to save spaces may not always be the best approach. The total situation must be taken into consideration. Consolidation may be inappropriate because of the units present. Organic judge advocate support affords maximum direct, responsive support to a unit. Both commanders and troops get to know and develop confidence in judge advocate personnel and the military legal system. Further, consolidation should not take place if there is the slightest chance that the good legal service that is being provided will deteriorate. In the final analysis, this is the greatest consideration. An important factor the report overlooks or underplays is the requirement that combat forces be ready for fast deployment with all necessary support elements present.

pp.53 and CONCLUSION.

6. Generally, the Army is aware of and has been studying and working in all the areas reviewed by GAO. The GAO effort duplicates controls, both internal and external, already in existence. Internal controls on military justice include supervision of the system by The Judge Advocates General; automatic review of serious cases by the Courts of Military Review; disposition of complaints against commanders under Article 138, UCMJ; inspection of judge advocate operations by The Inspector General's Office; and continual examination of the UCMJ and MCM, 1969 (Rev.) by the Joint Service Committee on Military Justice. External controls include review by the United States Court of Military Appeals (USCMA); review in collateral attack cases in the federal court system; an annual report to Congress by USCMA judges and TJAG's required by Article 67(g), UCMJ; and a continuing intense interest in the system's operation by the organized bar and veteran's organizations. The rough state of organization of the draft report makes it difficult to respond to. Consequently, I recommend against making changes to the present military justice


BACKGROUND

DAJA-CL 1978/5714

SUBJECT: GAO Draft Report, dated 22 May 1978 "Fundamental
Changes Needed to Improve the Independence and
Efficiency of the Military Justice System" (OSD
Case #4909) -- INFORMATION MEMORANDUM

BACKGROUND { system solely in response to the draft report. The final report
should be evaluated to determine if deficiencies noted above
have been remedied before changes are made based solely on that
report. Further, in light of the extensive controls which now
exist and the questionable value of the several GAO military
justice studies, I recommend that DoD in its response request
GAO to terminate them.

1 Incl
as


WILTON B. PERSONS, JR.,
Major General, USA
The Judge Advocate General

CF:
OGC, DA



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER, RESERVE AFFAIRS AND LOGISTICS)
WASHINGTON, D. C. 20360

June 28, 1978

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE (M,RA&L)

BACKGROUND

Subj: GAO draft report on the fundamental changes needed to improve the independence and efficiency of the Military Justice System (OSD Case #490@)

Ref: (a) OSD Memo of 24 May 1978, same subject

Encl: (1) Department of the Navy response to GAO draft report of 22 May 1978 on fundamental changes needed to improve the independence and efficiency of the Military Justice System

As requested by reference (a), enclosure (1) is hereby submitted.

Mary M. Snavely

Mary M. Snavely
Principal Deputy Assistant Secretary
of the Navy
(Manpower and Reserve Affairs)
(Acting)

Department of the Navy Response
to
GAO Draft Report of 22 May 1978
on
the Fundamental Changes Needed to
Improve Independence and Efficiency
of the
Military Justice System

Summary of GAO Findings and Recommendations

A. The Marine Corps should develop and implement a system which is based on workload and provides for changing staffing levels as workload changes.

The GAO report concluded that the Marine Corps had not studied lawyer and support staff needs, and had no plans to do so.

B. Remove from convening authorities responsibility for administering and funding the justice system.

The GAO report concluded that the present procedures lead to a perception that military justice is uneven, unfair, and has low priority and enabled the convening authorities to control the outcome of cases. This finding was based upon the convening authority's "selection" of trial and defense counsel and military judges, and his control of funds for witnesses and military justice support staff and facilities.

C. The Marine Corps should be directed to develop and implement a plan to establish a defense command structure which is not under the chain of command which initiates charges.

The GAO report found that the Marine Corps had the least desirable concept for assigning defense counsel and had made no plans for even taking the first step toward improving defense counsel independence free from the perception of command influence.

D. DoD study and report on the feasibility of establishing a single DoD defense and trial organization.

The GAO report concluded that consolidation of the Armed Services' trial and defense counsel on a number of bases in close proximity would offer many potential benefits, among which would be enhancement of the perception of military justice and the introduction of greater efficiency and economy into the military justice system.

BACKGROUND

Department of the Navy Position

CHAPTER 3

A. Marine Corps developing a system based on workload and providing for changing staffing level as workload changes.

This conclusion is erroneous, due in all likelihood to a misunderstanding arising out of discussions between GAO officials and representa-

pp. 12 and 14.

p. 14. tives of the Judge Advocate Division (JAD), Headquarters Marine Corps, during the course of the instant survey. What was explained to these officials is that the Marine Corps does not have separate and distinct formal staffing and assignment procedures for lawyers and legal services personnel. Unlike Navy judge advocates, for example, Marine Corps lawyers are not part of a separate corps. As a result, staffing and assignment policies for these military occupational specialties (MOS) are an integral part of the overall personnel management policies of the Manpower Department of Headquarters Marine Corps, and are embodied in applicable Marine Corps directives. Under these directives, Table of Organization (TO) authorizations for subordinate commands are generally based on the overall populations of these commands. As a general rule, an increase in the number of personnel with a particular MOS authorized for a given command requires a compensatory reduction somewhere else within that command, although not necessarily in the same MOS. Notwithstanding the personnel allocations authorized by TO (i.e. on paper), the assignment of lawyers and clerks to field commands, in recent years, has been predicated on workload. The uneven caseload distribution among trial and defense counsel at Camp Lejeune in 1976, for example, has been alleviated by increasing the number of lawyers assigned to the 2d Marine Division. As a result, during the first five months of calendar year 1978, the average number of cases tried by counsel per month was as follows:

p. 16.

<u>COMMAND</u>	<u>DEFENSE COUNSEL</u>	<u>TRIAL COUNSEL</u>
2d Marine Division	5.8	6.1
Force Troops	4.2	5.6
Marine Corps Base	6.2	7.4

CHAPTER 5
pp. 33 and 37-38.

Thus, the suggestion that the Marine Corps has no staffing criteria and assignment procedures for legal personnel is inaccurate. Similarly, the statement that the Marine Corps has no plans to study lawyer or support staff needs is misleading. Legal personnel requirements in the field are the subject of continuing study by the Director, Judge Advocate Division, Headquarters Marine Corps, and his staff. At this writing, JAD and Manpower Department representatives are reassessing the personnel requirements for the joint law center at the Marine Corps Air Station, Cherry Point, North Carolina, in light of a recent Manpower Management Team Survey conducted by Headquarters Marine Corps. So, too, JAD is currently reviewing the legal personnel allocations among the four Marine Corps general courts-martial (GCM) commands on Okinawa, Japan, as a result of the recent move toward total consolidation of all legal assets into a combined law center.

BACKGROUND

In connection with assignment policies, the Marine Corps has not neglected the continuing legal education of judge advocates in order to better

BACKGROUND { prepare them for present and future assignments. During fiscal year 1978, 3,648 man-days are being utilized to further the education of Marine Corps judge advocates. This includes three judge advocates in a one-year masters program in varied disciplines (criminal, environmental, labor, etc), four in a nine-month advanced course conducted by the U.S. Army, and in excess of 20 in military judge courses in military and civilian educational institutions. All in all, the Marine Corps sends over 100 judge advocates annually to advanced legal education courses.

CONCLUSION { For these reasons, it is submitted that the report's conclusion on this point is in error and should be revised accordingly. Additionally, there appears to be no need for the establishment of uniform criteria and methodologies among the services for identification of counsel/support staffing requirements as the report recommends. These matters are best left to the individual armed forces for determination as their requirements change.

CONCLUSION { B. Convening authorities' responsibility for administering and funding the military justice system.

In general, the GAO report exhibits a lack of appreciation for the manner in which military justice is administered in the Navy and Marine Corps. Specific comments regarding the GAO's findings and recommendations follow.

1. GAO finding - the present system enables the convening authority to control the outcome of cases - comment:

NOTE A { This finding was based, in part, upon the erroneous assumption that because the convening authority appoints the judge, trial, and defense counsel, he selects them. Under present procedures within the Navy and Marine Corps, the judge is selected by the various circuit military judges and made available to the convening authority. The circuit military judge is completely independent of the convening authority and answers only to Chief, Navy-Marine Corps Trial Judiciary, in Washington, DC. In the Navy, the trial and defense counsel are selected by the various officers-in-charge of Naval Legal Service Offices and made available to the convening authority. These OIC's answer directly to the Director, Naval Legal Service, in Washington. In the Marine Corps, the trial and defense counsel are selected by the staff judge advocate or, when applicable, the director of the law center. While the convening authority may deny funding for defense witnesses, the ultimate decision on witnesses rests with the military judge. Should the convening authority decide not to bring a witness that the judge has ordered produced, a dismissal of the charges will result. Under present procedures in both the Navy and the Marine Corps, the convening authority does not have the control over the outcome of cases as envisioned by the report.

NOTE A - The word "select" connotes a different meaning than "detail" or "appoint." The report language has been changed, where appropriate, to use "detail." However, the conclusions and recommendations are not affected.

pp. 6, 7, 40, 41, 51, and 52.
NAVY pp. 31-32. MARINE CORPS pp. 33 and 37-39.

CHAPTER 4

2. GAO recommendation - remove from convening authorities responsibility for administering and funding the justice system -

The Department of the Navy strongly opposes this recommendation. While convening authorities for all practical purposes have been taken out of the procedures of selecting judges and counsel, the need for retention of convening authorities in authorizing and funding witnesses for both the government and defense still exists. The report in calling for independence for the defense in summoning witnesses ignores such practical questions as who administers funds for these witnesses and makes the decisions as to whether or not witnesses should be summoned. The basis for this recommendation is the erroneous premise that control of funds equates to control of the outcome of cases. With the military judge having the power to overrule the convening authority concerning whether or not a witness will be summoned, the present system of authorizing the calling and funding of defense witnesses is considered fair and does not give the convening authorities the ability to control the outcome of cases. It does, however, give to the official most cognizant of the importance of the particular case the option of funding the defense witnesses or dismissing the prosecution.

pp. 22, 25, 26, and 51.

CHAPTER 5

- C. Marine Corps plans for developing and implementing a plan to establish a defense command structure.

NOTE A

1. GAO finding - the Marine Corps has no plans for even taking the first step toward improving counsel independence - comment.

The Marine Corps decision to defer the establishment of an independent defense counsel organization has been grounded more on practical considerations than on principle. Recognizing the role of "perceptions" in the military justice system, the Marine Corps has never disputed that an organizational structure which "insulates" defense counsel from command will do much to eliminate the so called "appearance of evil." Nor has the Marine Corps been unmindful of the fact that, as the GAO report points out, unhealthy perceptions concerning the posture of defense counsel are occasionally shared by persons within as well as without the system. Balanced against these considerations, however, has been very genuine concern in two areas; first, the availability of sufficient assets to support an independent defense counsel organization; and secondly, the viability of such an organization in the fast-paced Marine Corps operational environment. The experience of recent years has answered some of the questions raised by these two areas of concern. The increased number of company grade lawyer accessions, moreover, has made the concept appear all the more feasible from a strict manpower point of view. In this connection, it is noted that the Marine Corps is not presently basing its evaluation of the concept on the February 1973 study cited in the GAO report. The Marine Corps has been of the opinion that certain issues require additional analysis prior to making a final decision. For this reason, pilot programs

NOTE A - As a result of an informal meeting with the Marine Corps and the discussion here, we have deleted the phrase "the Marine Corps has no plans for even taking the first step toward improving counsel independence." throughout the report.

SAME AS ABOVE

have been instituted at selected locations. In 1977, for example, such a program was undertaken at the Marine Corps Air Station, El Toro, California. It is true, as the GAO report points out, that under this program defense counsel were not completely insulated from the command initiating charges. The organizational structure employed, however, did provide a significant measure of independence, both in appearance and fact. During the current year, a pilot program of broader scale has been operated by the Director of the Marine Corps Law Center, Okinawa. Under this system, defense counsel have an even greater degree of independence and, at the same time, are participating in courts-martial that are being tried in a very fast-paced operational environment. The lessons learned from these pilot program are currently being evaluated at Headquarters Marine Corps with a view towards determining the desirability and feasibility of implementing similar or even more far reaching programs at other Marine Corps commands. For reasons that are inextricably related to force missions, service traditions, and available resources, the Marine Corps has approached the concept of an independent defense counsel organization with understandable caution. The suggestion, contained in the GAO report, that the Marine Corps "has no plans for even taking the first step toward improving counsel independence", is simply unsupportable. The Marine Corps should be given the additional time necessary to study and implement a plan for improving independence of counsel which will serve both the ends of justice and the Marine Corps mission.

D. Establishing a single DoD defense and trial counsel organization.

In the area of consolidation of Marine Corps legal assets at specific locations, considerable study and debate has already occurred. Found feasible and in the best interest of the mission of the organizations involved, consolidation has occurred at Cherry Point, North Carolina; El Toro, California; and in Okinawa. At other locations, such consolidation has been rejected at this time. The question of consolidation of Marine Corps legal assets has been left in the hands of field commanders; the matter is, however, under constant review and if additional locations are recommended for consolidation, full evaluation will be given to such recommended consolidation.

The GAO draft report claims establishing a single DoD defense and trial counsel organization would improve the perception of military justice and, in the long-run, promise substantial savings. The report further concludes, however, that additional study in this area is dictated. The differences in procurement and training of the judge advocates of the various services, together with the assigned missions of their organizations, make such an organization impractical. The Department of the Navy favors continued interservice cooperation in the providing of military justice services -- such as those examples pointed out in the report -- but further study of the concept of consolidation of judge advocates does not appear to be justified.

pp. 44-46 and CONCLUSION.

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330



OFFICE OF THE GENERAL COUNSEL

July 10, 1974

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE
(MANPOWER, RESERVE AFFAIRS, AND
LOGISTICS)

SUBJECT: General Accounting Office Draft Report,
"Fundamental Changes Needed to Improve
the Independence and Efficiency of the
Military Justice System" (OSD Case
#4909) (FPCD 74-16) - ACTION MEMORANDUM

The Air Force has been requested to provide comments to your office on the subject report.

CONCLUSION

The GAO Report fails to recognize the dual purpose of military justice: to dispense justice for common crimes within the military and to serve as a mechanism to enforce military discipline, when this must be done by punitive action. We have previously agreed with a proposal to eliminate convening authorities' responsibilities for reviewing legal aspects of trials, but military justice must continue to be available to assist a commander to maintain a disciplined and combat ready force. Additionally, the report reflects an entirely unwarranted image of commanders as unfair, unjust, and oppressive.

BACKGROUND

We have comments and objections relating only to the proposals on the assignment of counsel (page 22)^{1/}, witnesses for the defense (page 33)^{2/}, separate funding for witnesses (page 58)^{3/}, and a single DOD trial and defense counsel organization (page 58)^{4/}, these appear in the Attachment. In other respects we have considered all of the recommendations and find no basis for exception or useful comment.

^{1/} Report pages 19-20.

^{3/} Report page 52.

^{2/} Report page 30.

^{4/} Report page 53.

Stuart R. Reichart
Deputy General Counsel

Atch:
Comments on GAO
Draft Report

**AIR FORCE COMMENTS ON GAO DRAFT REPORT,
"FUNDAMENTAL CHANGES NEEDED TO IMPROVE THE
INDEPENDENCE AND EFFICIENCY OF THE MILITARY JUSTICE SYSTEM"
(OSD CASE #4909) (FPCD 78-16)**

1. The Department of the Air Force opposes establishment of external criteria to require assignment of counsel to cases in accordance with "experience and case complexity." (page 22)^{1/}

p. 19 and 20.

In unusual cases, steps are legitimately taken to provide selected counsel because of obvious importance and complexity. However, in the Air Force, where most of our counsel are assigned on a one-per-base basis, any effort to do this routinely would result in wasteful shuffling of counsel. Further, there is a serious risk of charges of discrimination and of appellate reversal if a given accused is relegated as a matter of policy to less competent counsel because of a preconception that he has a less serious case.

2. We believe that the question of witnesses for the defense (page 33)^{2/} should be referred to the Military Justice Working Group for development of a solution to this problem by change to the Manual for Courts-Martial, rather than be made a matter of legislation.

NOTE A

The provision in question is language of the Manual for Courts-Martial rather than statute. GAO overstates the difficulty faced by defense counsel in obtaining a witness if trial counsel disagrees; he has recourse to and including the military judge. In any case, some showing that the witness will be relevant and non-cumulative should be required before defense counsel is given unlimited access to witnesses at Government expense.

p. 30.

3. In principle we have no objection to separate funding for witnesses (page 58)^{3/}, but Air Force staff consideration of this when earlier proposed indicated that it would be uneconomical.

p. 52.

4. We oppose pursuing the concept of a single DOD trial and defense counsel organization (page 58)^{4/} and favor increased use of cross-servicing where economical and feasible.

p. 53.

Within the Air Force we assign members of the Defense organization to bases where their services are needed but, since

NOTE A - The recommendation has been revised. See note on page 75.

^{1/} Report pages 19-20. ^{3/} Report page 52.
^{2/} Report page 30. ^{4/} Report page 53.

F. 53.

our case-load does not result in all of their working time being used on defense, we use them also for other non-conflicting legal duties. If the defense function is served by personnel dedicated to that work alone, many of our bases which now have resident defense counsel could not be so provided. Further, in only a few locations can counsel economically serve more than one service; at other places no purpose is served in removing a judge advocate from his own service. If this is done, it interferes with career training and progression and the opportunity to gain that general experience within their own service which both they and their service will need for their advancement to senior positions.

CONCLUSION

In lieu of this proposal, we would favor examination of the possibility of greater use of cross-servicing among counsel of the several services, such as now exists. If necessary, this may be actively encouraged by LOD and responsibility for coordination may be assigned to designated offices in certain localities.

GAO REPORTS ON THE MILITARYJUSTICE SYSTEM

<u>Addressee</u>	<u>Report title, number, and issue date</u>
The Congress	"Eliminate Administrative Discharges in Lieu of Court-Martial: Guidance for Plea Agreements in Military Courts is Needed" (FPCD-77-47, Apr. 28, 1978).
The Congress	"Military Jury System Needs Safeguards Found in Civilian Federal Courts" (FPCD-76-48, June 6, 1977).
Secretary of Defense	"Millions Being Spent to Apprehend Military Deserters Most of Whom Are Discharged As Unqualified for Retention" (FPCD-77-16, Jan. 31, 1977).
The Congress	"The Clemency Program of 1974" (FPCD-76-64, Jan. 7, 1977).
Secretary of Defense	"People Get Different Discharges in Apparently Similar Circumstances" (FPCD-76-46, Apr. 1, 1976).
Secretary of Defense	"More Effective Criteria and Procedures Needed for Pretrial Confinement" (FPCD-76-3, July 30, 1975).
The Congress	"Uniform Treatment of Prisoners Under the Military Correctional Facilities Act Currently Not Being Achieved" (FPCD-75-125, May 30, 1975).
Secretary of Defense	"Urgent Need for a Department of Defense Marginal Performer Discharge Program" (FPCD-75-152, Apr. 23, 1975).
Senate Committee on Armed Services	"Need for and Uses of Data Recorded on DD Form 214 Report of Separation From Active Duty" (FPCD-75-126, Jan. 23, 1975).
The Congress	"Improving Outreach and Effectiveness of DOD Reviews of Discharges Given Service Members Because of Drug Involvement" (B-173688, Nov. 30, 1973).

(964105)