

SUMMARY TRIAL WORKING GROUP REPORT

VOLUME I - 1994

Chapter One - Executive Summary and Recommendations	1
1. Executive Summary	1
(a) Reasons for Reviewing	1
(i) Constitutional Challenges	1
(ii) Effect on Summary Trials	1
(iii) Goal of Report	2
(b) Principles Applied	3
(i) Effectiveness	3
(ii) Fairness	3
(iii) Legality	3
(iv) Application of ss. 7 & 11 of the Charter	4
(v) Legal Justification	5
(vi) Change, the Military and Civilian Courts	5
(c) Approach to Analysis and the Legislative Objective	6
(i) Approach to Analysis	6
(ii) Legislative Objective	6
(d) Disciplinary Exception	7
(i) Jurisdiction Over Offences	7
(ii) Restricting Jurisdiction	8
(iii) Punishments	8
(iv) Penal Consequences	9
(e) Fairness	10
(i) Independence	10
(ii) Procedural Fairness	10
(f) Appeal/Release Pending Appeal	12
(i) Appeal	12
(ii) Create a New "Appeal"	12
(iii) Release Pending Appeal	13
(g) Right to Elect Court Martial	13
(i) The Status Quo	13
(ii) Expanded Right to Elect Court Martial	14
(h) Equality	15
(i) Miscellaneous	16
(j) Conclusions	16
2. Recommendations (1-59)	17

Chapter Two - Reasons for Reviewing the Summary Trial System	27
1. Introduction	27
2. Constitutional Challenges	27
(a) Court Decisions	27
(b) Effect on Summary Trial System	32
3. Goal in Review of Summary Trials	34
(a) Legal Perspective	34
(b) Opportunity to Modernize the System	35
(c) Summary of the Goals	37
 Chapter Three - Principles Applied	 38
1. Principles	38
(a) Effectiveness	38
(b) Fairness	39
(i) Legal Perspective	40
(ii) Military Perspective	42
(c) Legality	43
(i) The Charter	43
(ii) Degree to Which ss. 7 & 11 Apply to Summary Trials	47
A. s.11 and the Disciplinary Exception	48
B. Application of s.7 to Summary Trials	52
(iii) Justifying Limits on Charter Rights	54
(d) Summary	57
2. Change, the Military and the Courts	58
(a) Military Perspective	58
(b) Civilian Judicial Perspective	60
 Chapter Four - Approach to the Analysis and Legislative Objective	 66
1. Approach to the Analysis	64
2. Objective of Limits on Individual Rights	68
(a) Disciplinary Proceedings and their Objective	68
(b) The Objective	75

Chapter Five - Disciplinary Exception	76
1. Introduction	76
2. Jurisdiction Over Offences	76
(a) Present Situation	76
(b) Foreign Jurisdictions	77
(c) Analysis	78
(d) Options	80
(i) Options for and "Internal" Disciplinary System	80
OPTION 1. Removal of Civilian Criminal Offences	80
OPTION 2. Separate Disciplinary Code	82
(ii) Limiting Present Jurisdiction	86
OPTION 3. Limiting Jurisdiction	88
(e) Recommendations (1, 2)	95
3. Punishments	96
(a) General	96
(i) Detention	99
A. Analysis	99
B. Recommendations (3-8)	107
(ii) Reduction in Rank	108
A. Analysis	108
B. Recommendation (9)	109
(iii) Confinement to Ship or Barracks	109
A. Analysis	109
B. Recommendations (10-12)	112
(iv) Fines	112
A. Analysis	112
B. Recommendation (13)	114
(v) Extra Work and Drill	114
A. Analysis	114
B. Recommendation (14)	115
(vi) Stoppage of Leave	116
A. Analysis	116
B. Recommendation (15)	117
(vii) Reprimand/Severe Reprimand	117
A. Analysis	117
B. Recommendation (16)	117
(viii) Forfeiture of Seniority	117
A. Analysis	117
B. Recommendation (17)	118

	(ix)	Caution	118
		A. Analysis	118
		B. Recommendation (18)	118
	(b)	Penal Consequences/Liberty in a Military Context	119
4.		Summary	124
Chapter Six - Fairness			127
1.		Independence and Impartiality	127
	(a)	Present Situation	127
	(b)	The Law	127
	(c)	Justifiable Limit	131
	(i)	Other Free and Democratic Societies	131
	(ii)	Rational Connection	133
	(iii)	Least Drastic Means	133
OPTION	1.	Trial by Court Martial	134
OPTION	2.	Summary Courts Martial	135
OPTION	3.	Summary Trials	136
	(iv)	Proportionality	138
	(d)	Recommendations (19-21)	139
2.		Procedural Fairness	140
	(a)	Right to Counsel	140
	(i)	Present Situation	140
	(ii)	The Law	141
	(iii)	Justifiable Limit	142
		A. Other Free and Democratic Societies	142
		B. Rational Connection	143
		C. Least Drastic Means	144
OPTION	1.	Provide Legal Counsel	144
OPTION	2.	Assisting Officers	144
OPTION	3.	Increased Availability of Legal Counsel	145
OPTION	4.	Send Accused to Court Martial Who Requests Counsel	146
		D. Proportionality	146
	(iv)	Recommendations (22-27)	147

	(b)	Pre-Trial Disclosure	148
		(i) Present Situation	148
		(ii) The Law	149
		(iii) Justifiable Limit	150
		A. Other Free and Democratic Societies	150
		B. Rational Connection	152
		C. Least Drastic Means	152
OPTION	1.	Complete Disclosure	153
OPTION	2.	Reduced Disclosure	153
		D. Proportionality	154
	(iv)	Recommendations (28-29)	155
	(c)	Notice	155
		(i) Present Situation	155
		(ii) The Law	156
	(d)	Oral or Written Submissions	157
	(e)	Rules of Evidence	158
		(i) Present Situation	158
		(ii) The Law	159
		(iii) Justifiable Limit	160
		A. Other Free and Democratic Societies	160
		B. Rational Connection and Least Drastic Means	160
OPTION	1.	Apply the Military Rules of Evidence	161
OPTION	2.	Present System	161
OPTION	3.	The Middle Ground	164
		C. Proportionality	164
	(iv)	Recommendations (30-31)	165
	(f)	Procedures	165
		(i) Present Situation	165
		(ii) Analysis	167
		A. Particulars	167
		B. Trial Sequence	168
		C. Proof Beyond A Reasonable Doubt	170
	(iii)	Recommendations (32-35)	170
	(g)	Reasons or Record of Trial	171
		(i) Present Situation	171
		(ii) The Law	171
		(iii) Justifiable Limit	174
		(iv) Recommendation (36)	176

	(h)	Pre-Trial Custody	176
	(i)	Present Situation	176
	(ii)	The Law	178
	(iii)	Justifiable Limit	179
		A. Rational Connection	180
		B. Least Drastic Means	180
OPTION	1.	Release Determined by a Military Judge	180
OPTION	2.	Maintain the Status Quo	180
		C. Proportionality	181
	(iv)	Recommendations (37-39)	181
3.	Summary		182
Chapter Seven - Right of Appeal/Review			184
1.	Review/Appeal		184
	(a)	Present Situation	184
	(i)	Approval of Punishments	184
	(ii)	Redress of Grievance	186
	(iii)	Mandatory Review	186
	(iv)	Review by Legal Officers	187
	(v)	Alteration of Punishment	187
	(vi)	Judicial Review	187
	(b)	The Law	188
	(c)	Justifiable Limit	191
	(i)	Other Free and Democratic Societies	191
	(ii)	Rational Connection	193
	(iii)	Least Drastic Means	193
OPTION	1.	Appeal to a Review Court Martial	193
OPTION	2.	Appeal by Trial <i>De Novo</i> to a Court Martial	195
OPTION	3.	Prerogative Relief	197
OPTION	4.	Non-Judicial Review	198
	(iv)	Proportionality	201
	(d)	Recommendations (40-44)	202
2.	Release Pending Review		203
	(a)	Present Situation	203
	(b)	The Law	203
	(c)	Justifiable Limit	205
	(i)	Other Free and Democratic Societies	205
	(ii)	Rational Connection and Least Drastic Means	205

OPTION	1.	Release by Court Martial/Military Judge	206
OPTION	2.	Automatic Release Pending Appeal	206
OPTION	3.	Maintain the Status Quo	206
OPTION	4.	Release by Trying Officer	207
	(iii)	Proportionality	207
	(d)	Recommendation (45-46)	208
Chapter Eight - Right to Elect Summary Trial			209
1.		Background	209
2.		Present Situation	210
3.		Other Jurisdictions	211
4.		The Law	213
5.		Analysis	215
	(a)	Scope of the Waiver	215
	(b)	A Valid Waiver	222
6.		Recommendations (47-49)	225
Chapter Nine - Equality			227
1.		Present Situation	227
2.		The Law	228
3.		Analysis	230
	(a)	Discrimination on the Basis of Rank	230
	(b)	Discrimination on the Basis of Status	230
4.		Recommendation (50)	232
Chapter Ten - Miscellaneous			233
1.		Dismissal	233
	(a)	Dismissal Power	233
	(b)	Recommendations (51-52)	234
2.		Supervision of Summary Trial System	235
	(a)	Responsibility	235
	(b)	Recommendations (53-54)	236
3.		Training & Publications	236
	(a)	Training	236
	(b)	Publications	237
	(c)	Recommendations (55-58)	238

4. Charge Report	239
(a) Recording of Rights	239
(b) Recommendation (59)	240
Chapter Eleven - Conclusion	241