

3 (6)

STATEMENT OF ASSISTANT SECRETARY GRAY TO THE COMMITTEE ON A UNIFORM CODE OF
MILITARY JUSTICE

I should like to make the following statement for the records of this committee, particularly in reference to the meeting of 28 October 1948, and I have undertaken to prepare it in manuscript form for several reasons.

In the first place, I should like to have my thoughts recorded in a little more orderly form than as reported when I spoke extemporaneously.

In the second place, in view of the fact that the other members of the committee reached an agreement after full discussion on an occasion when I was detained by illness, I should like to present my observations in this manner, rather than have them recorded as a part of a subsequent, supplemental discussion.

My position is that regretfully but firmly I must cast a dissenting vote to the arrangement the other members of the committee agreed upon. I will try to give you some reasons to which, of course, you are entitled, and then will make a further statement about a possible alternative procedure which I am prepared to recommend for such consideration as the committee may care to give it.

In a consideration of the Morgan Plan for an appellate systems, as amended, I think that we must first take a look at the National Security Act of 1947 which provides that "the Department of the Army, the Department of the Navy, and the Department of the Air Force shall be administered as individual executive departments by their respective Secretaries" (underscoring supplied).

Until such time as Congress may merge the Army, Navy and Air Force into a single Department, I believe that the Secretary of the Army has and must have independent responsibility as to all matters pertaining to the Army, including courts-martial, and that this responsibility cannot be met without commensurate review authority as to all such matters. Otherwise he cannot be held responsible for results.

I favor a uniform military code, but sincerely believe that such a code can and should be administered independently by the three respective Secretaries.

I strongly object to the plan proposed by Professor Morgan, as modified by the committee, because it violates the foregoing principle by depriving the Secretary of the Army of judicial authority, and lodges ultimate judicial authority in a tribunal composed of members without military experience and without responsibility for results. This would constitute a radical change in Army procedure which has operated satisfactorily for many years when no necessity for such a change has been demonstrated.

I also object because the plan deprives the Army Judge Advocate General, who is the Department's senior and most experienced legal officer, of judicial authority.

Under this plan the Judicial Council created must consider all cases forwarded to it by the three Judge Advocates General of the respective Departments, and it may consider, upon good cause shown, any case arising in any of the three Departments when so requested by the accused.

I am convinced that the discharge of these duties will require more than one judicial council plus a very large organization of assistants, substantially equal to the entire number of officers and civilians now engaged on court-martial work in each of the three Departments. If more than one judicial council is required, which I consider inevitable, proper coordination of their work, and ultimate disposition of cases in which the decisions of two of the councils are in conflict, will call for the creation of an additional super-council not yet proposed.

It is not to be supposed that a person convicted by a court-martial will be content with an unfavorable decision by less than the highest authority. For this reason it may be anticipated, especially since such an application will involve no expense, that applications for review will be made in the overwhelming majority of such cases.

Although the Judicial Council may refuse any such application, it can do so intelligently and fairly only after a careful examination of the contentions presented, and this will require a very large staff, as well as the time of one or more Council members.

I very much fear that there will develop a bottleneck in this agency which may have very serious adverse consequences.

I should like also to point out that the amendment to the Morgan Plan suggested by Mr. Kenney, which would set up the Judicial Council not in the Office of the Secretary of Defense but as an agency whose members would be appointed by the service Secretaries, has some questionable aspects. I do not see the value of having the appointments made by the three Secretaries for service at the will of the three Secretaries other than as an effort to have some sort of control exercised by the appointing authorities. That, in my opinion, would be dangerous because of the implications of lack of independence on the part of the members of the Judicial Council. Furthermore, it seems to me that it might invite political pressures upon the three Secretaries.

I have just one other fear I should like to express about this appellate system which the other members of the committee have agreed to.

272
One of the outstanding virtues of the Army court-martial procedure is its freedom from the technicalities which encumber and often defeat justice in the civil courts. I greatly fear that the creation of one or more judicial councils composed entirely of civilians will result in a body of technical rules and decisions upon technical grounds which will encumber the system from the trial level up. If, from the beginning of a court-martial case, everyone knew that a judicial council composed of civilian lawyers would ultimately review it on the basis of questions of law, we are likely to develop a situation similar to that which seems to me to obtain in the civil courts in criminal cases. I sincerely believe that our concern ought to be with justice rather than legal niceties.

The proposal also contemplates the creation of a group of legal officers in each Department who will act as counsel on appellate review, for the government at the instance of a Department Judge Advocate General, and for the accused in all cases before the Judicial Council and in certain cases before Boards of Review. This will require a substantial number of additional legal officers not otherwise required.

Now I take it that the Judicial Council seeks to serve two purposes -- uniformity of application and civilian participation in review of cases.

My alternative plan seeks to accomplish these two objectives. It puts civilians in the review stream and, I think, as a part of my proposal, the Advisory Council would accomplish the desired uniformity.

My plan is as follows:

I would make no change in the power presently exercised by the convening authority (reviewing authority) under the Army system.

I would create in the Office of each Department Judge Advocate General one or more Boards of Review, composed of three senior officers of the Judge Advocate General's Department (or two such officers and one senior line officer) and three especially qualified civilian lawyers, who would be well paid. All cases involving a general officer, a death sentence, dismissal, dishonorable discharge, bad conduct discharge, or penitentiary confinement would automatically be re-reviewed by a Board of Review, which would be authorized to determine the legality of the sentence, to consider the facts and to weigh the evidence, including the credibility of the witnesses.

After consideration by the Board of Review, each such case would be forwarded to the Judge Advocate General of the Department concerned.

Except as noted below, the determination of the Board of Review with regard to legality of the record of trial to support the sentence, in whole or in part, or with regard to the illegality of the conviction, if concurred in by the Judge Advocate General, would be final; and such determination would be communicated to the reviewing authority for appropriate action.

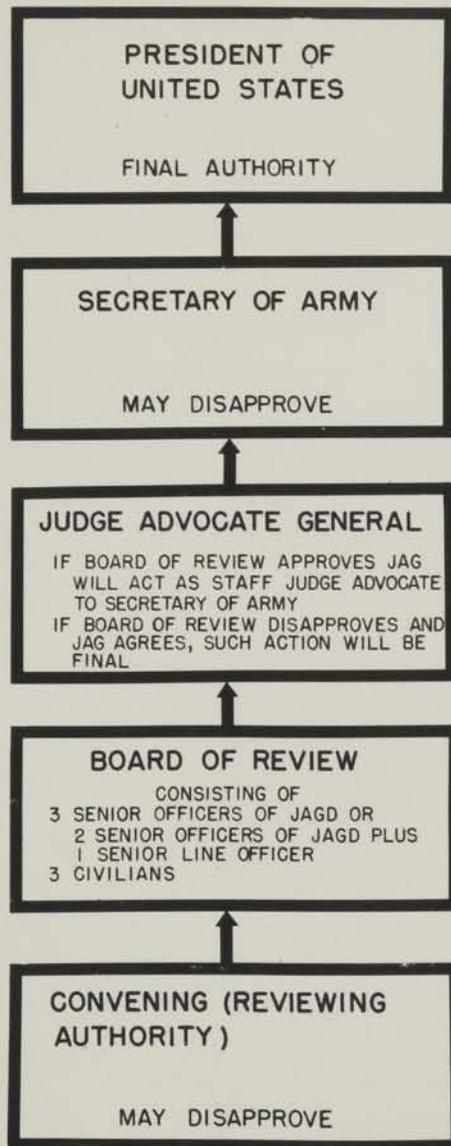
If the Judge Advocate General should disagree with the Board of Review, the case would be forwarded to the Secretary of the Department concerned, an Under Secretary or Assistant Secretary designated for that purpose, or a civilian assistant to the Secretary so designated, and the decision of the Secretary or his designee would be final.

Cases involving a general officer or a death sentence would follow the same procedure through the Board of Review and the Judge Advocate General. If the Board of Review, with the concurrence of the Judge Advocate General, should find any such case legally insufficient to support the sentence, such action would be final and the reviewing authority would be so notified. If, on the other hand, the Board of Review should find the case legally sufficient to support the sentence, the record would be forwarded through the Judge Advocate General (who

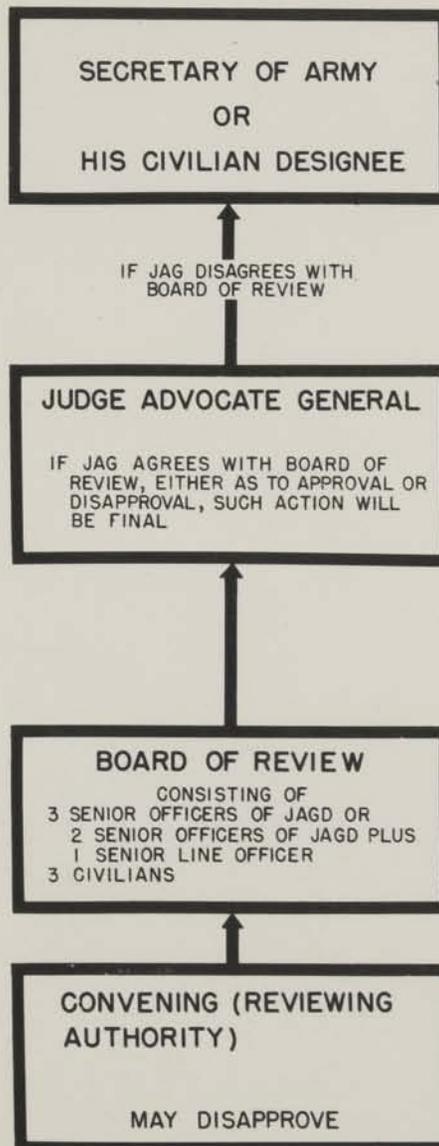
would then act as Staff Judge Advocate to the Secretary) to the Secretary of the Department concerned. If the Secretary of the Department should disapprove such a sentence, his action would be final but, if the Secretary should determine that the sentence should be approved, the record would be forwarded to the President for confirmation of the sentence, or such other action as the President may deem to be appropriate.

In order to coordinate the work of the three Departments in court-martial matters, there would be created an Advisory Council composed of the Judge Advocates General of the three Departments and a representative of the Secretary of Defense. This council would review court-martial procedures for adequacy and results, recommend policies, improvements, and means of avoiding or correcting any important differences which may develop in the several Departments.

CASES INVOLVING GENERAL OFFICERS
OR DEATH SENTENCES



CASES INVOLVING DISMISSAL,
DISHONORABLE DISCHARGE,
BAD CONDUCT DISCHARGE,
OR PENITENTIARY CONFINEMENT



ADVISORY COUNCIL

JAG OF EACH DEPT. PLUS
REPRESENTATIVE OF SECRETARY
OF NATIONAL DEFENSE

1. REVIEWS COURT-MARTIAL PROCEDURES FOR ADEQUACY AND RESULTS.
2. RECOMMENDS POLICIES AND IMPROVEMENTS.
3. RECOMMENDS MEANS OF AVOIDING OR CORRECTING ANY IMPORTANT DIFFERENCES WHICH MAY ARISE IN THE SEVERAL DEPARTMENTS.