



E. M. Morgan

Memo on legality of judicial council  
in appellate system and drafts of  
letters to Secretary of Defense on  
points of difference etc.

I Legality of Judicial Council Under National Security Act in Office of Secretary of Defense

The declaration of policy in the National Security Act of 1947 states the intent of Congress to include provisions for

- (1) "the establishment of integrated policies and procedures for the departments, agencies, and functions (which includes functions, powers and duties) of the Government relating to the national security."
- (2) "three military departments for the operation and administration" of the Army, Navy and Air Force
- (3) "their authoritative coordination and unified direction under civilian control" - but not their merger
- (4) their "effective strategic direction" and "their operation under unified control"-
- (5) "their integration into an efficient team of land, naval and air forces".

Specifically the Secretary of Defense is to "perform the following duties":

- (1) Establish general policies and programs for the National Military Establishment and for all departments and agencies therein.(The Army, Navy and Air Force are departments.)
- (2) Exercise general direction, authority and control over such departments and agencies.

It is important to note that both policies and procedures are to be integrated, and that the Secretary of Defense has imposed on him the duty of establishing general programs for the Army, Navy and Air Force, and of exercising general authority and control. It seems too clear for argument that, in establishing a general program and exercising general authority and control in furtherance of the objective of integrating policies and procedures, the Secretary of Defense may set up a uniform system of military justice, and establish as the instrument for exercising his control a tribunal of civilians for the uniform construction and application of the substantive and procedural provisions of a code of military justice. It would be possible to argue that this legislative language authorizes

the establishment of one court-martial system for all three departments, a single Judge Advocate General's office of the National Military Establishment; but because the enforcement of the provisions of the articles of war and of the articles for the government of the Navy has been and necessarily will continue to be, to a large degree, an attribute of command closely connected in some aspects with discipline and operations, the more reasonable interpretation under present conditions is that the separate judge advocate departments be continued in the same manner as ordinary courts, and that there be a central tribunal as an appellate court of last resort, functioning somewhat in the manner provided for the judicial council in Public Law 759, 80th Congress, but composed of civilians in the office of the Secretary of Defense. This tribunal would be the final interpreter of the law for the National Military Establishment as embodied in the Articles for the Government of the Armed Services. It would be like a court of last resort over a group of states, applying a uniform statute governing matters as to which their separate state courts had theretofore not been in harmony. It would closely resemble a Circuit Court of Appeals of the United States.

In my opinion there is nothing in the National Security Act of 1947 which either in letter or in spirit is antagonistic to the above view. Quite the contrary - indeed, it seems to me imperative that there be a central integrating authority; otherwise, there will be uniformity only in the written word, and diversity in interpretation and application. There will be reiterations of claims of discrimination as between the services and as between various branches of the same service; there will be continuing complaints of disregard by the military of the mandates of a civilian Congress with no check by a tribunal having the qualifications of a civil court.

The Act emphasizes the objective of authoritative coordination and

unified direction of the three military Departments under civilian control. This emphasis is as applicable to the administration of military justice as to any other aspect of the establishment. Indeed it is in this respect that the necessity for the imposition of civilian, as distinguished from military, concepts has been most strenuously advocated. The creation of such a tribunal will tend not only to accomplish one of the specific objectives of the Act but will do much to restore public confidence in the administration of military justice.

## II Board of Review, and Judicial Council

The Judge Advocate General of each Military Department of the National Military Establishment shall set up in his office a Board of Review composed of not less than three officers of the Judge Advocate General's Corps of said Department.

Similar provision for additional Boards of Review to that in Sec. 226(b) of Public Law 759; and for branch offices, to that in 226(c).

The Secretary of Defense shall set up in his office a Judicial Council composed of not less than three members, who shall [state qualifications. (Lawyers of ten years experience.)]

Similar provisions for additional councils and branch officers to those in 226(b) and (c) of Public Law 759.

## III Independence of J. A. G. Corps

The constant reiteration in all the investigations and reports of the actual or potential subordination of the court and the law member to the appointing authority, and of the judge advocate and law member to the presiding line officer of the court, and the testimony before, and conclusions of the House Committee on Armed Services -- all make it highly important, if not essential, that the J.A.G. Corps in each Department be set up as an independent corps as

provided in Secs. 246-249 of Public Law 759; but with the establishment of the Judicial Council in the office of the Secretary of Defense, there need be no such provision for so many high-ranking officers. Indeed, a good argument can be made for making members of J.A.G. a professional non-military corps like the chaplains.

IV System of Review

My tentative proposal for the review of records and sentences of general court-martial is as follows:

1. Appointing Authority

- (a) Final decision setting aside any finding or sentence, or any part of any finding or sentence.
- (b) Final decision as to remission of sentence.
- (c) Final decision in fixing by mitigating maximum of sentence which may be imposed after review, if any.
- (d) Final approval of finding and sentence where sentence does not impose punishment specified in provision for review by Board of Review.

*11/23/54  
Making new findings*

*Any number of appointing authority - ~~proposed~~*

*Keefe  
11/23/54*

2. Board of Review

Record, findings and sentence where sentence imposed and approved is

- Death
- Any penalty affecting a general officer
- Dismissal of officer or cadet
- Suspension of cadet
- Dishonorable discharge
- Bad conduct "
- Imprisonment in penitentiary.

*except on plea guilty where the sentence is not death. Desm. dish, b.c.d. or Conf. in penitentiary*

3. Judicial Council

Every decision by Board of Review affirming finding and sentence

- Death
- Any penalty affecting general officer
- Dismissal of officer or cadet
- Dishonorable discharge
- Bad conduct "
- Imprisonment in penitentiary for 5 years or more
- Any other decision of Board of Review which J.A.G. requests the Council to review.

*President*

*The J.A.G. may certify / Def. may petition / like cert.*

*Sec 230 for newly discovered evd. Final Review by Pres authority to order new trials for newly discovered evidence*

Query - Should Board of Review or Judicial Council have authority to mitigate the sentence?

My present view is that if the Board of Review believes the sentence excessive or out of line, it should forward record of Judicial Council, for opinion and advice to be made to the Secretary of the Department, who should have power to mitigate or commute.

All decisions requiring action should be transmitted to the proper authority by the J.A.G.

#### Preliminary Reviews

1. The record of every trial by general court-martial should be forwarded to the appointing authority for review who
  - (a) shall set aside all or part of any finding or sentence which he finds unsupported by sufficient evidence, or
  - (b) shall return the case for rehearing if he finds error which injuriously affected the substantial rights of the accused, or
  - (c) may remit or mitigate, but not commute all or any part of a sentence if he deems such action for the best interests of the service, or
  - (d) may approve the finding and sentence, but the approval shall not be final where the record is reviewable by the Board of Review.
  
2. The record of every trial by general court-martial in each Military Department in which the appointing authority has not returned the case for rehearing or has not set aside or remitted the entire sentence shall be forwarded to the office of the Judge Advocate General of the Department for examination or review, and every other record of trial by general court-martial shall be forwarded to that office for filing or other proper disposition.

1. Appointing Authority

A.W.A.S. 8 <sup>a</sup> seems O.K. to me, but I think that the provision of P.L. 759 prohibiting accuser from appointing is necessary.

2. Law Officer -- Jurisdictional requisite

a. Must be member of J.A. corps, certified by J.A.G. of Department as competent and qualified to serve as law member.

b. Functions

1. Presides at trial but is not a member of the court in the sense that he has the right to vote. If given status of member of court, there must be the required minimum of 5 or 3 in addition.

X 2. Rules finally on all objections and all interlocutory motions, <sup>as</sup> including challenges.

X 3. Charges court before retirement on the applicable law including always burden of proof and presumption of innocence.

4. Retires with court. On request advises as to law including <sup>law officer</sup> *while court in retirement, available so* legal sufficiency of evidence, but not on issue of guilt *that why court decides further light* or innocence. *on legal questions it may reconvene* All questions put to him and all statements *for his advice* by him to be recorded.

## GENERAL COURTS MARTIAL

### 1. Review by Convening Authority

The entire record, including findings and sentences of every trial by general court martial, whether sentence follows a plea of guilty or findings after a plea of not guilty, shall be forwarded to the convening authority for review. He shall have the record examined by his staff judge advocate, and after receiving his advice,

- (a) shall set aside any finding or sentence which he finds to be unsupported by sufficient evidence, or such part of any finding or sentence as he finds thus unsupported, or
- (b) shall return the case for rehearing if he finds that the court committed error which injuriously affected the substantial rights of the accused, or
- (c) may remit or mitigate, but not commute, all or any part of a sentence, if he deems such action for the best interests of the service,
- (d) may take action combining two or more of the foregoing, or
- (e) may approve the finding or sentence.

### 2. Review by Board of Review

If the convening authority does not set aside the entire sentence, or does not return the case for rehearing, the record including findings, sentence and action ordered by the convening authority shall be forwarded to the office of the Judge Advocate General, and shall there be reviewed by a (the) Board of Review if the sentence was imposed after trial upon a plea of guilty, or if after a plea of guilty the sentence includes death, or dismissal of an officer or cadet, or dishonorable discharge or bad conduct discharge, or imprisonment in a penitentiary.

The Board of Review shall examine the whole record to ascertain whether the court has committed any error which has injuriously affected the substantial rights of the accused; it shall have the authority to weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, bearing in mind that the court

saw and heard the witnesses who testified before it, and the Board shall determine whether the findings or sentence or both in so far as theretofore approved by the convening authority shall be set aside in whole or in part or affirmed in whole or in part, or modified, and whether the charges shall be dismissed or the case reheard.

If the Board determines that any action other than affirmance of any part of the sentence should be taken, the Judge Advocate General shall return the case to the convening authority for appropriate action, except in case where a further review by the Judicial Council is provided for

3. In all the following cases the entire record, including findings, sentence, action by the convening authority and the opinion of the Board of Review, shall be forwarded to the Judicial Council for further review:

(1) All cases in which <sup>as approved by the Bd of Review</sup> the sentence affects a general officer, or in which the sentence <sup>thus approved</sup> is death;

✓ (2) all cases which the Judge Advocate General orders forwarded to the Judicial Council for review;

(3) all cases in which a petition for review by the Council is filed by or on behalf of the accused and in which after considering the petition the Council determines that the petitioner has shown that there is reasonable ground to believe injustice has been done to the accused or that the determination of the Board of Review is in conflict with that of a Board of Review of another service; or that the best interests of the service will for some other reason be furthered by a review.

In its review the Council shall have authority to weigh evidence, judge the credibility of witnesses, determine controverted questions of fact and to order such disposition of the case as the demands of justice and the best interests of the service require.

In all cases in which the Council shall affirm any sentence or part of a sentence affecting a general officer or a sentence of death, the record shall be sent to the President, and the execution of the sentence shall not be ordered unless and until affirmed by the President.

4. At any time within one year after a sentence which includes dismissal, or dishonorable discharge or bad conduct discharge has been executed, the accused may move the Judicial Council to order a new trial on the ground of newly discovered evidence; and if such motion is made the Council shall hear and determine it in accord with the rules usually applied in such motions in the District Courts of the United States.

Query - Should all sentences which include dismissal, dishonorable discharge or bad conduct discharge be subject to confirmation by the Secretary of the service in question, before final execution?

1. The Judge Advocate General shall constitute in his office one or more Boards of Review, each composed of not less than three officers of the Judge Advocate General's Department.

2. The Judge Advocate General shall appoint in his office one or more members of the Judge Advocate General's Department as Defense Counsel whose duty it shall be to represent the accused in all cases before the Judicial Council, and in such cases before the Board of Review as the Judge Advocate General shall direct.

3. The Secretary of Defense shall constitute in his office a Judicial Council composed of not less than three members, each of whom shall be a member of the bar admitted to practice before the Supreme Court of the United States (and of at least ten years experience in the practice of the profession of law. Each member shall be nominated by the Secretary of Defense and be appointed by the President and shall receive a salary equal to that of a United States Circuit Judge.

4. Provisions for additional members of the Judicial Council in emergencies. These could be designated as members for the period of the emergency or for a fixed term.

The term of a regular member should be long, probably for life.

5. Provision for Boards of Review and Judicial Councils in Branch Offices should be made.