

OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON

COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE

December 16, 1948

MEMORANDUM TO: ALL CONCERNED

SUBJECT: Attached Notebook Entitled "Comments on a Uniform Code of Military Justice"

This notebook has been prepared for members of the Committee on a Uniform Code of Military Justice, its Working Group, its Staff and other persons directly concerned.

The material in this notebook contains the comments and views of interested individuals and organizations received from both solicited and unsolicited sources.

The material is arranged alphabetically and represents all comments received to date. Additional comments are forthcoming and will be furnished you from time to time with filing instructions.

FELIX E. LARKIN
Executive Secretary

For Information Call:

J. Joseph Whelan
Room 3D-745, Pentagon
Ext. 6952

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ROOT, BALLANTINE, HARLAN, BUSHBY & PALMER

31 Nassau Street

New York 5

September 28, 1948

Edmund M. Morgan, Jr., Esq.,
Chairman, Committee on a Uniform
Code of Military Justice,
Office of the Secretary of Defense,
Washington, D.C.

Dear Mr. Morgan:

I am greatly interested to have your letter in regard to work on the Code of Military Justice.

I shall be only too glad to be of any possible assistance to the Committee. I may be somewhat limited in coming down to sit with you in Washington but shall hope not to be completely out on that.

I had given a good deal of thought to possible testimony on the bill for naval justice which had been worked out in the office of the Judge Advocate General of the Navy, to which your Committee must have given consideration. I am wondering whether instead of my writing you a report, which might unnecessarily cover matters already thrashed out by the Committee, it would not be possible for you to send me some memorandum as to what the Committee now proposes, permitting me to react on that. That course might save time all around.

Pending hearing from you further, I shall be getting together my papers on the subject.

Sincerely yours,

/s/ Arthur A. Ballantine

Arthur A. Ballantine
31 Nassau Street
New York

October , 1948

Edmund M. Morgan, Jr., Esq.
Chairman, Committee on a Uniform
Code of Military Justice,
Office of the Secretary of Defense,
Washington, D. C.

Dear Mr. Morgan:

On further consideration, I thought it might possibly be helpful for me to send in a memorandum about legislation on naval justice as I had thought it should be up to the time of unification. Here is such a memorandum. As you see, I had copies made for individual members of the Committee.

Of course I shall be glad to react upon any plan which the Committee may be considering under conditions just as they exist today. What I am now trying to submit is what I would say to the Committee if I sat down with them today without having the benefit of their own thinking up to date.

Sincerely yours,

/s/ ARTHUR A. BALLANTINE

Enclosures

October 7, 1948

NAVY COURTS AND DISCIPLINEProposed LegislationBrief Memorandum by Arthur A. Ballantine

My views are closely in accord with H.R. 3687 before the 80th Congress prepared in the Navy Department - "A Bill to Amend the Articles for the Government of the Navy and Improve the Administration of Naval Justice."

That bill was the result of a number of special studies and much thought and work on the part of the Judge Advocate General and his associates. The measure proceeds upon the basis of retaining the system of discipline and courts as developed in the Navy through the years but effecting improvements in the light of experience, particularly during the last war.

The changes expressed in the extensive amendment of the Articles would further the independence of the naval courts, further protect the rights of accused, facilitate the operation of the courts, supplement the provisions for the review of sentences, and also clarify the law.

The measure would retain courts made up of officers and does not proceed on the basis of substituting an entirely different system of courts modeled on civilian lines. It does not take the courts out of the chain of command or create a separate legal corps. Such steps, sometimes suggested, after

careful consideration were left aside as unsuited to the conditions of naval activity and not needed for the protection of naval personnel.

Formal punishment for offenses by naval personnel is necessarily part of the broad subject of naval discipline and morale. Punishment cannot be taken out of its setting but the reconciliation of the requirements of justice as generally conceived with the necessities of command may be further developed.

In considering the structure and procedure of the courts a basic fact is that most of the offenses calling for penal treatment - in the last war over 80% - are strictly military offenses, mainly unauthorized absence and desertion: Less than 40% were for what might be called ordinary crimes. In the absence cases 90% were dealt with on pleas of guilty. In time of peace or in domestic shore establishments at any time, civil courts may be used for trial of non-military offenses where that is not thought to interfere with naval operation. The nature of the cases to be dealt with in naval procedures does not suggest that adequate and just handling requires a radical change of method.

PERSONAL APPROACH

My own consideration of the subject of naval justice began in June 1943. By a letter from the late Secretary Knox, dated June 25, 1943, I, and such associates as should be approved by the Secretary, were requested to "prepare and submit a

report on the organization, methods and procedure of naval courts, with recommendations of possible improvement in procedure and practice." The request was prompted by the expansion of naval personnel from less than 100,000 to over 2,000,000 - ultimately over 4,000,000. Noel T. Dowling, Professor of Constitutional Law at the Columbia School of Law, was appointed at my suggestion as such an associate.

After study, Professor Dowling and I prepared such a report and filed it with the Secretary on September 24, 1943, together with copies of certain brief reports on improvements which could be recommended earlier. These include the steps to decentralize the power to convene General Courts-Martial in the United States - steps calculated to save, and which did save, more than 60% of the time of personnel concerned in such trials. These steps were adopted and later made permanent by law.

Specific recommendations in the report of September 24, 1943 were 34 in number and furnished the basis for other changes minimizing delay and affording safeguards for the rights of accused men. Included was the suggestion that "the whole subject be reviewed after the war with a view to effecting improvements which might be more far-reaching than those now practicable."

The Secretary of the Navy continued to provide for the study of naval justice as well as of means for minimizing naval offenses and dealing with offenders with a view to their prompt restoration to service.

On November 15, 1945, Secretary Forrestal created a Board to consider the administration of justice in the Navy during the war, and recommend any action deemed appropriate to improve the Navy's discipline system. I was made Chairman of that Board, which included Professor Dowling, Honorable Matthew F. McGuire, who had given much consideration to the subject, as well as qualified officers of the Navy.

After careful consideration of the subject and hearing informed witnesses, that Board filed with the Secretary a report dated April 24, 1946. That report is also before the Committee.

The most extensive report dealing with the subject is that of the Board of which Professor Arthur John O'Keefe was President, which made a study in 1946 and 1947.

Reference is made to the reports referred to for detailed discussion.

THE GENERAL PLAN

The changes designed to be put into effect by H.R. 3687 very largely conform to the recommendations made in the reports.

In the report of April 24, 1946, the Board expressed the conclusion that "the disciplinary system of the Navy is in general functioning well, but the recent war-time experience shows the need of changes in the court-martial system."

The Articles for the Government of the Navy are of course the fundamental legal provisions for the conduct of the Navy and provide for the setup and procedure of the courts,

By H.R. 3687, those articles would be freed from ambiguity and clarified - in itself an important improvement. The measure contemplates the use by the courts of new Rules of Procedure and simplified, up-to-date manuals for instruction and procedure, all of which have been in preparation under the Judge Advocate General, as recommended by the Board reports. A notable contribution to such literature is the text book "Naval Justice," worked out largely at the U.S. School of Naval Justice, at Port Hueneme, California.

The amended articles proceed on the basis, long developed, that penalties which can be administered by commanding officers are very sharply limited. Thus the only addition proposed is that in war or national emergency, or where specifically authorized by the Secretary of the Navy, in time of peace, an officer may impose as a punishment loss of not exceeding one-half of one month's pay.

Under the amended articles any substantial penalty must be formally imposed by court action on a reviewable record, as in the past. Minor penalties, may be by Deck Court, consisting of a single designated officer, which can reduce an enlisted man to the next inferior rating, or sentence him to confinement of not exceeding one month. A Summary Court, composed of three designated officers, can impose "a discharge with a bad conduct discharge," and under the new articles confinement not to exceed six months (the limit being extended from the present limit of two months) and loss of pay up to six months. The General Courts-Martial, composed of a larger number of designated officers, proposed

to be reduced from the present specification of 13, can impose most serious penalties, extending to death. The penalty of death or discharge cannot be imposed without approval of the President. No death sentence was actually imposed in the late war. Only General Courts may try a commissioned officer.

The changes proposed are designed to meet the criticism, sometimes made, that the courts lack ability to deal with cases because not made up of lawyers, and that they may be unduly under the control of commanding officers of the line, and also to minimize delay.

On the question of competence, bearing in mind that such a small percentage of cases deals with other than strictly military offenses, it has been the opinion that provision for more adequate legal assistance to General Courts is what is advisable. On the question of independence of the courts, it is believed that having the fitness reports of the legal officers taken out of the hands of commanding officers will be a sufficient step.

The important step proposed to strengthen the courts in legal matters is the provision that in the case of every general court-martial trial there shall be a capable Judge Advocate designated by the Judge Advocate General, who shall be strictly impartial, instead of a prosecutor as at present, and who shall guide the court on all legal questions. If the court shall refuse to accept any legal ruling of the Judge Advocate, the court must file a statement of its reasons. In addition to the Judge Advocate, there shall be in every case

a prosecutor and a defense counsel, adequately qualified to perform their duties. Defense counsel will be enabled to attach a brief to the record of any proceeding setting forth objection.

An adequate supply of well-trained Judge Advocates is expected to be provided from the group of legal specialists now being developed in the office of the Judge Advocate General. The School for Naval Justice developed by the Navy at Port Hueneme, California, during the war presents the kind of instruction needed.

It is contemplated that officers rendering legal service shall get credit or advancement for such service.

The Board reporting April 24, 1946 rejected the idea of establishing a separate legal corps. The opinion of the Board was that such a corps would tend to unduly compartmentalize the lawyers and that the establishment of legal specialists was more practical and likely to be an effective measure.

The Board felt that criticism of naval court procedure as unduly under the control of convening officers seemed to spring from an idea that commanding officers commonly or frequently insisted on excessive punishment. Their conclusion was that such attitude was rare and that the general rule was indeed to the contrary.

The Board did not find evidence that judgments of naval courts were slanted against enlisted men or that provision for service of enlisted men on such courts would tend

to improve the fairness or acceptability of their operation.

The procedure in all naval court cases contemplates the use of full pre-trial investigation. It would be provided that counsel for the accused can fully participate in this investigation. Investigating officers would not participate in the actual trial.

The new provisions make useful changes designed to simplify and facilitate procedure of the courts.

Changes increasing the power of sentence of Summary Courts will make possible the more extensive use of such courts and lessen the need for General Courts.

The measure provides that review of sentences, always a vital part of naval procedure, on legalities shall be divorced so far as possible from the officer who ordered the trial, without diminishing the clemency authority of that officer. Provision is also made that the accused shall have one year to file an appeal to a special board of appeals to be appointed by the Secretary of the Navy. Such special appeal would in no way lessen the review now provided for in the Office of the Judge Advocate General, in the Bureau of Personnel, and in the Office of the Secretary.

THE NEW PROBLEM

The measure heretofore proposed by the Navy, reflecting the results of careful studies, does not address itself to the problem of whether provisions for naval courts should be made part of provision for courts in all three branches of

unified naval defense. It would seem that the general basis appropriate for use in the Navy could be combined in a measure covering courts for the military and air branches as well.

Whether or not the provision for courts in all branches should be the change is a matter to which no considerable thought was given by any of the Boards mentioned above or by myself.

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RIEGELMAN, STRASSER, SCHWARZ & SPIEGELBERG
160 Broadway
New York 7

November 23, 1948

Felix Larkin, Esq.,
Committee on Uniform Code of Military Justice,
Office of the Secretary of Defense,
Washington, D. C.

Dear Mr. Larkin:

There will be mailed from this city to-
night to the attention of Prof. Morgan the letters of
the Chairmen of the various committees concerning the
reforms to court-martial deemed necessary by them.

I would greatly appreciate it if at
the appropriate moment you could inform me as far in ad-
vance as possible when the new Code of Military Justice
will be introduced into the Congress. I make this
request because we have been successful in persuading
the American Broadcasting Company to devote one of their
Forum sessions to a discussion of the subject, both on
television and Radio. It is their desire as well as ours
that the program should be scheduled to be coincident
as nearly as possible with the introduction of the new
legislation into the Congress. I hope you will be able to
remember this request.

Thanking you in advance, I am

Yours very truly,
/s/ GEORGE A. SPIEGELBERG

GAS:eo

Bar Assns.

November 22, 1948

Committee on a Uniform Code of Military Justice,
Office of the Secretary of Defense,
Washington, D.C.

Attention: Professor Edmund M. Morgan, Chairman

Gentlemen:

The Chairmen of the Committees on Military Justice of the American Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers' Association and the War Veterans Bar Association, take this opportunity to submit, on behalf of the Associations which they represent, their recommendations with respect to essential reforms in the judicial systems of the Armed Services.

Each of the Committees has made an intensive study of the various systems of military justice and their practical application. All of the undersigned and most of the members of their committees are veterans of World War II with extensive military experience in many branches of the various services and in many parts of the world. These veterans have had wide experience in the actual operation of the court-martial system either in the Army, the Navy or the Air Force or have had ample opportunity to observe its operation in the field.

The Armed Forces have a primary mission to perform, both in peace and in war. Any code of military justice must be calculated

to promote that mission and no reform of military justice, however attractive to the civilian mind, can or should be undertaken if its effect is to hamper that mission. It is our belief, based on actual experience in the field, that the recommendations which we make here will promote the morale of the Armed Forces and thus be of material aid in the effective conduct of their function.

Certain reforms have been effected for the Army, in the Elston Bill. Among these are:

- (1) The establishment of an independent Judge Advocate General's Department;
- (2) The requirement that the law member be a lawyer and be present throughout the trial;
- (3) The extension of the scope of review, to require Boards of Review to consider the weight of evidence in reviewing the judgment of the court.

It is our conviction that the reforms effected by the Elston Bill must be extended to all the Services. We deem it essential, however, that the following additional reforms be made, applicable to all Services:

- (1) That the judicial systems of the Armed Services be removed from command control;
- (2) That a simple system of review be adopted;
- (3) That in all general courts, and wherever possible in all other cases, both the Trial Judge Advocate and the assigned Defense Counsel be lawyers.

Of these the removal of command control from the courts is paramount and unless this be accomplished all other reforms will be ineffective.

COMMAND CONTROL

The maintenance of discipline is a function of command. It requires that command shall have the power to order the trial of all charges of breaches of military discipline; that it shall have the power to appoint the Trial Judge Advocate and control the prosecution; that upon the rendering of the Court's findings and sentence it shall have the right to exercise clemency.

There is a clear distinction between the right to order an accused to trial and to control the prosecution, which are undoubtedly command functions, and the right or power to influence the Court in determining the accused's guilt or innocence and the sentence to be imposed upon him. The latter are powers which command has expressly disavowed. Only by withdrawing from command the power to influence the Court can we be sure that it will not be exercised in the future as it has been in the past.

The War Department Advisory Committee on Military Justice on pp. 6 and 7 of its report, dated December 13, 1946, says:

"The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. * * * Not infrequently the members of the court were given to understand that in case of a

conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas."

A system which permits of such abuse can only result in a lowering of morale. It is as essential to the preservation of morale that the personnel of the Armed Forces believe the system to be fair, as that it be administered fairly. To achieve this wholly desirable result we advocate only that command, which controls the prosecution, should not also appoint and control the court and Defense Counsel. That morale may be maintained without interference with the proper functions of command, requires the appointment of the court and Defense Counsel by an independent judicial arm of the service.

Using the Army organization as an example this may be accomplished in the following manner:

The convening authority will be the President of the United States, or the ranking member of the Judge Advocate General's Department who is attached to a territorial department, the Superintendent of the Military Academy, an Army group or Army, and, when empowered by the President, the Judge Advocate General of the Army or Theater Judge Advocate may designate the ranking member of the Judge Advocate General's Department of any district or of any force or body of troops as a convening authority. In the case of the Navy

or Air Force the equivalent unit of command may be substituted for those above enumerated.

The commanding officer to whose command a convening authority is attached shall designate to such convening authority the officers and enlisted men in his command available for service on courts-martial. The commanding officer may, as his requirements dictate, change the personnel so designated. From such panel the convening authority shall select the courts necessary to discharge the judicial function of the command.

Ordinarily the commanding generals at Army level will require the commanding generals of divisions and corps within his command to make available to the convening authority the requisite personnel. It is to be expected that in normal course the court appointed to try cases involving personnel of any division or corps headquarters will be selected from the personnel of that division or corps. But, when required in the interests of justice, the convening authority will have the power to order that the accused, be tried by a court composed of officers and men from a different division or corps.

The reason for empowering the Judge Advocate General of the Army or a Theater Judge Advocate to designate a convening authority at lower levels than Army is to take care of the situation where, due to geographical or other circumstances, a smaller unit

than an Army must have general court-martial jurisdiction.

The commanding officer, having referred the charges for trial and the Court having made its findings and pronounced its sentence, the record will then be forwarded to such commanding officer for his action with respect to mitigation or remission of sentence. The record will then be forwarded to the convening authority for review and his powers of review should be those given the appointing authority in the Elston Bill. The convening authority will prepare a written review which will become part of the record and he shall have the power to approve and order executed such findings and sentence, in whole or in part, as he believes warranted by the evidence and the applicable law. He shall also have the power to order a rehearing in the event that he shall disapprove the findings.

FINAL REVIEW

The final review of the case should be accomplished by a single Board of Review which shall have as many divisions as may be required. These divisions will sit either in Washington or in a Theater. This procedure should constitute final review, except in those cases which by law require confirmation by higher authority.

Present A.W. 50, contained in the Elston Bill, is so complicated as probably to be unworkable - and certainly it is unintelligible. It should be repealed.

COUNSEL

One of the principal, and we believe well justified, complaints against the administration of military justice during World War II was that the accused was inadequately represented. Defense Counsel were all too frequently untrained, both in the law and in military justice procedure. The Elston Bill does not make mandatory the appointment as counsel of men trained in the law even with respect to trials by general courts-martial. It provides merely that the Trial Judge Advocate and Defense Counsel shall "if available" be lawyers, and that if the Trial Judge Advocate be a lawyer then the Defense Counsel must also be a lawyer. It has been held repeatedly that the determination of whether an officer is "available" is not subject to review.

That counsel in military trials should be lawyers is not disputed. If this be so, surely the Armed Services should be required to make available the personnel necessary to assure the accused of a fair trial.

Further to preserve the rights of the accused Defense Counsel should be required to include as part of the record a statement of the errors which he believes were committed in the course of the court-martial proceedings and he should be afforded the opportunity to submit a brief in support of his contentions.

SPECIAL COURTS-MARTIAL

In so far as practicable the procedure of special courts-martial should be assimilated to that of general courts. As a minimum requirement, a law member who is either a lawyer or a member of the Judge Advocate General's Department should be designated in all cases except those involving a charge under A.W. 61 (absence without leave).

Commanders of the Armed Forces of this country must realize that they are dealing with men whose initiative, ingenuity and independent self-respect have made them the best soldiers, sailors and airmen in the world. Nothing can be worse for their morale than the belief that the game is not being played according to the rules. The foundation stone of the morale of the Armed Forces must be the conviction that when a member is charged with an offense his case will not rest entirely in the hands of his commander, but that he will be able to present his evidence to an impartial tribunal with assistance of competent counsel and that he will receive a fair and independent review. He is an integral part of the Armed Forces and the courts of those forces are his system of justice.

These considerations of justice are as important in time of peace as in time of war. As our outlook upon world affairs and our concepts of military service have broadened, national defense has become a matter of concern to every citizen. With the advent of peacetime selective service the

need to emphasize the fairness of the military justice system increases.

Our present system of military justice has proved sadly deficient in two wars. We cannot now be satisfied with half measures. Nothing less than the reforms which we here advocate can effect the true administration of justice in our court-martial system.

Very truly yours,

/s/ Geroge A. Spiegelberg
Chairman, Special Committee on Military
Justice, American Bar Association,
160 Broadway, New York 7, N.Y.

/s/ Frederick vP. Bryan
Chairman, Special Committee on Military
Justice, Association of the Bar of the
City of New York,
102 Maiden Lane, New York 5, N.Y.

/s/ Richard H. Wels
Chairman, Special Committee on Military
Justice, New York County Lawyers'
Association,
551 Fifth Avenue, New York 17, N.Y.

/s/ Arthur E. Farmer
Chairman, Committee on Military Law,
War Veterans' Bar Association,
551 Fifth Avenue, New York 17, N.Y.

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AMERICAN BAR ASSOCIATION
Organized 1878
Section of Criminal Law
1947-1948

September 23, 1948

Mr. Felix E. Larkin
Office of the Secretary of Defense
Room 3-E-732, The Pentagon
Washington, D.C.

My dear Mr. Larkin:

I appreciate very much the opportunity you gave me the other day to discuss with you the work of the committee seeking to revise and integrate the court-martial systems of the Army, Navy and Air Force. It certainly is a most worthwhile objective and you may be sure that our committee on Naval and Military Justice will be happy to cooperate in every way possible.

I have written to the chairman of our section and to Colonel Shattuck of the visit and of your kind invitation to submit our views on some of the policy phases at least of the task you face. I think they will have some suggestions with regard to appellate procedure, sentencing methods, the desirability of permitting defendants to waive some of their rights presently making for delay in disposition of their cases, representation by counsel, the desirability of allowing enlisted personnel to serve on the court-martial, and other questions on which your committee must reach a decision. I hope that we will have some comments along these lines in the not too distant future.

During the course of our conversation you asked how many writs of habeas corpus were being filed by military prisoners in our institutions. From July 1, 1947 to July 1, 1948 a total of 55 cases were filed. From January 1, 1948 to date 59 cases have been filed. Not only has the number of such writs increased in the aggregate during the last year, but they have also increased considerably in proportion to the number of military prisoners we have in our institutions, since they have been dropping in number gradually during the past year. It would be difficult to give you the exact number of writs by type of question raised, but from information that I have obtained I can say that about 90 per cent of them would be in the following categories:

Jurisdiction of Court-Martial
Lack of effective counsel
Perjured testimony
Lack of compliance with Article of War No. 70
(Proper investigation prior to prosecution)
Insanity at time of trial
Authority to commit or transfer to civil federal
penal institutions
Miscellaneous

Bennett

If you would care to have me do so I can run these cases down in more detail.

I also promised to send you a copy of the interim report of our committee on Naval Confinement policies.¹ If you have time to read the report you will note that we suggest among other things the desirability of a waiver procedure and several other matters affecting the Navy court-martial system.

I am sure you understand that whatever suggestions are made by our committee on Military and Naval Justice are not necessarily those of the Bar Association because at present there is some overlapping of jurisdiction with respect to this matter between our section and a special committee of which Mr. King is chairman. We have asked the Board of Governors to resolve this matter and I think they will do so in the very near future.

Please call upon me if I can be of further assistance to your committee either in my capacity as secretary of this section or as Director of the Federal Prison Bureau.

With kind personal regards,

Sincerely yours,

/s/ James V. Bennett
Secretary

Enclosure

1. Report on file in Mr. Whelan's office, Rm 3D-745. Copy available for loan by contacting Miss Carr, Ext. 6952.

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AMERICAN BAR ASSOCIATION
Organized 1878
Section of Criminal Law
1947-1948

Washington, D. C.
October 14, 1948

Mr. Felix B. Larkin
Office of the Secretary of Defense
Room 3-E-732, The Pentagon
Washington, D. C.

My dear Mr. Larkin:

You will perhaps recall that when we discussed the revision of the court martial procedure I suggested to you that present sentencing policies and methods of military courts martial and their method of executing these sentences might be reconsidered. As you know, I am strongly in favor of the indeterminate sentencing procedure as applies not only to civil prisoners but military offenders as well.

In this connection, it occurred to me that your committee might be interested in a study I have heard about through some of my friends in the military establishment. It deals, among other things, with the advisability of committing to the civilian branch of the government all persons convicted by military courts martial. I have not seen the study myself and I do not know its contents, but if it interests you, you might inquire about it of either the Chief of the Corrections Division of the Army or of the Navy. I have had a number of informal talks from time to time with the chief of both of these branches, as I presume you realize, and I think their views with respect to sentencing and the effect of Article of War 42 on the military establishment are worth considering.

It is my hope that consideration can be given to a sentencing procedure which in effect would authorize the courts martial to commit all persons found guilty to a sort of diagnostic center where their cases can be thoroughly studied and at the end, say, of a six-months period a final decision made as to the length of sentence, where it is to be served, whether the defendant is restorable material, and the type of discharge to be awarded. This, in effect, is the procedure now followed by the State of California for all offenders and by the State of New York for all of the younger violators of New York State statutes. If some such procedure or policy of this kind were put into effect by the military establishment, I think a great deal of

the difficulties and criticisms of court martial procedures would be eliminated and at the same time the Army, Navy and Air Corps could be relieved of much of the onerous and distasteful task of operating prisons and reformatories. To effectuate such a plan would require, I presume, more than one diagnostic center and perhaps several sentencing boards, or authorities, as they are called in California. It seems to me, however, that it would be quite possible for the heads of the Corrections Divisions of the Army, Navy and Air Force to give you specific suggestions as to how these could be worked out in detail if you care to call upon them for this purpose. In this connection you may be interested in a study of a similar idea made by a committee of Senior Federal Judges which I am enclosing.*

Incidentally, the Chairman of the Section of Criminal Law of the American Bar Association has not yet heard from the members of our Committee on Military and Naval Justice as to how they plan to make available to you their thoughts on the problem on which you are working. I hope they will have some comments for you in the not too distant future.

I hope you are well and with kindest regards,

Sincerely yours,

/s/ JAMES V. BENNETT
Secretary

* Report to the Judicial Conference (Senior Circuit Judges), of the Committee on Punishment for Crime. Copy available for loan in Mr. Whelan's office, 3D-745 Pentagon, Extension 6952.

UNITED STATES DISTRICT COURT
CHICAGO

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Chambers of
Judge William J. Campbell

November 24, 1948

Hon. Felix Larkin,
Office of the Secretary of Defense,
3E-733 Pentagon Building,
Washington, D. C.

Dear Mr. Larkin:

In accordance with your request when I visited you recently, in company with Mr. Bennett, Mr. McCormick, Mr. Wright and Captain Maginn as a Committee of the Secretary of the Navy, I submit herewith my suggestions concerning modernizing courts-martial procedure to permit speed disposition of pleas of guilty, following a procedure now used in the District Courts of the United States under the new Rules of Criminal Procedure.

It has come to the attention of our Committee in our inspection of various Naval Brigs and interviewing of prisoners confined therein that the vast majority of cases in the Naval courts concern leave violations, either A.O.L. or A.W.O.L. In practically all of these cases there is no genuine issue of fact to be tried by the court. The man was not there when he was supposed to be there and has subsequently either voluntarily surrendered or been apprehended. Thus the only question to be determined by the court is the reason for the absence and what, if anything, the man has to offer in mitigation. Most of the men now incarcerated awaiting trial for A.O.L. or A.W.O.L. are willing and anxious to plead guilty and get started serving their sentence. However, under existing practice they are required to wait long periods of time in jail for records and procedures to catch up with them before they can plead guilty at a duly constituted summary or general court.

It is, therefore, the suggestion of our Committee that your new draft of the law governing courts-martial permit a defendant immediately upon his reporting or being arrested, to appear before a proper Court Officer and plead guilty if he desires to do so; thus enabling him to start on the service of his sentence within a short time of his arrest or surrender. The proper procedure should then be to require him to execute a waiver and enter a plea of guilty. This follows the procedure now used in the District Courts of the United States and known as Waiver of Indictment which you will find in Rule 7(b) of the Federal Rules of Criminal Procedure. We suggest that some proper adaptation of this Rule be included in your draft of the new law to cover courts-martial of leave offenses cases, and minor offenses where the defendant desires to plead guilty immediately and is willing to waive regular Court-Martial and the presence of his formal record.

Campbell

The manner in which comparable offenders are now tried under this procedure in the Federal Civil Courts is substantially as follows:-

A defendant upon being arrested by or upon surrendering to the United States Marshal for an offense which he knows he has committed and to which he desires to plead guilty and start service of his sentence as soon as possible, makes known to the Marshal that he desires to plead guilty. The Marshal so advises the United States Attorney and the defendant is promptly brought before the Court and pursuant to Rule 7(b) above referred to, is fully advised of his rights by the Court. He then consents to waiver of indictment and to prosecution by an information then and there filed by the United States Attorney. He is permitted assistance of counsel if he desires it. He pleads guilty to the information. He or his attorney, or both, state any facts they desire the Court to consider in mitigation of sentence. The United States Attorney states any facts he thinks the Court should know, the Court reads the questionnaire hereinafter referred to and imposes sentence. Long delays in jail are thus avoided and the defendant spends the time instead on the service of his sentence. Usually in such cases the sentence is less than after a trial since the Court takes into consideration the fact that the defendant by this procedure is saving the government the expense of trial and of indictment by the Grand Jury.

In order that the Court might have full information before it at the time of imposition of sentence, we require in this district that the defendant complete in the office of our Probation Officer before his Court appearance the attached form U.S.P. Form 2 captioned "QUESTIONNAIRE". The defendant is warned that this questionnaire constitutes a representation to the Court and that any deliberate misstatement placed therein would constitute a separate criminal offense for which he might later be punished. We have experienced no difficulty in having these forms correctly completed. The form contains all essential information which the sentencing judge should have before pronouncing sentence. It probably contains much information which would not be necessary in a courts-martial proceeding, but something similar to this form suitable for the armed services could readily be devised.

I also attach Criminal Form No. 18, which is the waiver of indictment referred to above.

I shall be pleased at your request to elaborate on any of the foregoing and to furnish any additional information which you might require during your consideration of these suggestions.

May I also take this opportunity of expressing my genuine admiration of the splendid and lawyerlike way in which you and your associates are approaching the monumental task entrusted to you. You have my best wishes for your continued success.

Sincerely yours,

/s/ WILLIAM J. CAMPBELL

THE UNITED STATES PROBATION SYSTEM
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

QUESTIONNAIRE

DATE _____

The purpose of this office is to help you. In order to do so it is necessary that you supply us with the following information. Answer each question as accurately and completely as possible.

Name as given on Court record _____

True Name _____ Aliases _____

Birth Date _____ Age _____ Height _____ Weight _____

U. S. Citizen _____ Race _____ Color Eyes _____ Color Hair _____

Birth Place _____ Scars, Markings _____

Military Service _____ Religion _____ Sex _____

MARITAL STATUS

Single _____ Married _____ Separated _____ Divorced _____ Widower _____ Widow _____

Present Address	Apartment Number	Floor Number	Number of Rooms	Rent Paid	Date of Moving in	Phone No.

Last two previous addresses:

1.						
2.						

RECORD OF PRESENT OFFENSE

Charge _____ Date of Plea _____

Where Committed _____ U. S. Judge _____

When Committed _____ Case Continued to _____

Where Arrested _____ Sentenced for _____

Where Detained before trial _____ Probation for _____

Date of Arrest _____ Fine _____ Restitution _____

Days in Jail _____ Where _____ Defense Attorney _____

Amount of Bond _____ Address _____ Phone _____

Where Tried _____ Plea _____ Co-defendants, if any _____

DISTRICT COURT OF THE UNITED STATES

For the
District of
Division

Criminal No.

UNITED STATES OF AMERICA

vs.

WAIVER OF INDICTMENT

the above named defendant,

who is accused of violating

being advised of the nature of the charge and of h__ rights, hereby waives
in open court prosecution by indictment and consents that the proceeding may
be by information instead of by indictment.

Defendant

Witness

Counsel for Defendant

Date _____

Original No. _____

UNITED STATES DISTRICT COURT

District of _____

UNITED STATES OF AMERICA

vs.

WAIVER OF JUDGMENT

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WAR DEPARTMENT
War Department Special Staff
National Guard Bureau
Washington 25, D. C.

November 3, 1948

Mr. Edmund M. Morgan, Jr. Chairman
Committee on a Uniform Code of Military Justice
Office of the Secretary of Defense
Washington 25, D. C.

Dear Mr. Morgan:

Acknowledgment is made of your letter dated 1 November 1948 regarding a Uniform Code of Military Justice.

It is requested that the Bureau be furnished a copy of the analysis which has been prepared to date, in order that a more intelligent and comprehensive comment may be submitted.

It is also the desire of the Bureau to correlate this analysis with studies now being conducted in several States in connection with a revision of their military codes for the government of their National Guard units when not in Federal service.

Very truly yours,

/s/ KENNETH F. CRAMER
Major General
Chief, National Guard Bureau

Cramer

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HOWARD E. CROUCH
Attorney at Law
31 W. Broad St., Pawcatuck, Connecticut

August 14, 1948

Professor Edmund Morgan
Harvard Law School
Cambridge, Mass.

Dear Professor Morgan:

I read in the Sunday New York Herald Tribune, that you are one of a committee of three, elected to go over the Courts Martial System of the armed forces.

May I make a suggestion as a former member of an infantry division during the last World War? Lawyers should be commissioned and allowed to administer the Courts Martial System and not laymen officers. You may set up a perfect system but if it is not staffed with lawyers for administration, it will fail to achieve justice.

For instance, in an infantry division, there are fifteen units of battalion size. Each battalion unit has a surgeon or doctor, a chaplain, but no lawyer from the judge advocate general department. There is only one Lt. Colonel and one warrant officer from the judge advocate general department in the entire division against sixteen (16) chaplains and sixteen (16) doctors. The legal system of the army will never succeed with its mission of justice until lawyers are used to staff it.

Many lawyers trained in some other branch of the service were placed upon special duty to handle Courts Martials but no Table of Organization positions for the judge advocate general department were allowed. If such specially assigned lawyers did not reflect the dictates of the commanding officers, they could be readily transferred and a layman officer substituted, whereas a member of the judge advocate general department in a T/O position could not be so easily coerced if under proper regulations.

I believe that you will find on investigation that through out the armed forces, legal talent is being wasted, especially in war times. All lawyers unless possessing prior training in other military fields, should be automatically assigned to the judge advocate general department and commissioned just like the doctors and clergymen are now commissioned. The Table of Organizations of the armed forces should require judge advocate general department officers in all units for carrying out Military Justice. The T/O of all units requiring contracting officers and the T/O of Military Government Units should require lawyers commissioned in the Judge Advocate General Department. The armed forces are wasting legal talent in times of emergency. The legal profession is just as necessary as the medical profession in the military forces and should be given the same treatment and position. The creation of your committee bears witness to this unavoidable fact.

Very truly yours,
/s/ HOWARD E. CROUCH

Crouch

THE ST. ANTHONY
San Antonio 5, Texas

January 31, 1948

Senator Tom Connally
Senate Office Building
Washington, D.C.

Dear Senator Connally:

* * * * *

While I was stationed in Washington in the office of The Judge Advocate General I intended to discuss with you a subject in which I am vitally interested and which I consider of tremendous importance to our country at this time; the subject is our army court-martial system, more especially trials by general courts-martial. My four years' experience as Judge Advocate of the Third Service Command at Baltimore, during that time and my later experience as a chairman of a Board of Review in the office of The Judge Advocate General, and my long experience in the practice of law in civil life, causes me to feel that I am in some measure qualified to speak on this subject.

Before I went to the Walter Reed General Hospital I did have the opportunity to present my views on this subject very briefly to Congressman Kilday, who, as you know, is the ranking minority member of the House subcommittee which drafted H.R. 2575, the purposes of which is "to amend the Articles of War to improve the administration of military justice, to provide more effective appellate review, to insure the equalization of sentences, and for other purposes." I also discussed this subject briefly one night with Senator Glenn Taylor shortly after he attended a hearing before the Board of Review of which I was a member, involving a case of a young soldier from Senator Taylor's state who had been tried by a general court-martial in Japan and sentenced to death. However, I did not have the opportunity of presenting my views on this subject to you.

I am just in receipt of a letter from Paul Kilday informing me that the House has already passed H.R. 2575 and that on January 16 this bill was read twice before the Senate and referred to the Senate Committee on Armed Services. Paul says that when this bill was under consideration by the House he handled the minority time on the floor and that the Record of the days the bill was under consideration will reveal that he made reference to a "sincere member of a Board of Review" by which (though my name was not mentioned) he was referring to me.

I have carefully examined H.R. 2575 and I am of the opinion that this bill, in its present form, will improve the administration of military justice and it can be argued that the bill provides "for

January 31, 1948

some effective appellate revision," but in this latter respect I do not believe there is much, if any, improvement in the machinery provided for appellate review of trials by general courts-martial. In truth and in fact I am convinced beyond all doubt that the law as it exists today and as provided in H.R. 2575 is fatally defective and that it is vital to our national security that this fatal defect be remedied by Congress without further delay. This lack of "effective appellate review" is one of the main contributing causes of the wide-spread ill-will that exists throughout our country, not only against our army court-martial system but against all army officers as well as the Army as a whole. This hurricane of ill-will is having a weakening effect upon our Armed Forces. Voluntary enlistments are at an extremely low ebb and compulsory military training lies dormant in a committee and, apparently, during this national election year, cannot be brought to the floor of either House for consideration and passage. The ill-will toward army officers as a class is so strong that apparently "the rule by generals" will be an issue very much in the spotlight during the presidential campaign -- it is so strong that the Senate has already refused to confirm an appointment of a General in the Army to a very high civil office, not because the individual nominated by the President did not possess the necessary qualifications (because, it seems, that the individual nominated was the best qualified individual available), but this individual was rejected by the Senate for the sole reason that he was an army officer.

Boards of Review are mere adjuncts of the Office of The Judge Advocate General. As I recall, they were provided for by Congress shortly after World War I to meet the hue and cry that arose against the court-martial system at that time. The failure of Boards of Review to provide a "more effective appellate review" of convictions by general courts-martial is due to several fundamental causes, namely, (1) the members of such Boards are army officers "under the command" of The Adjutant General. Their appointment and removal are at the will of the individual who happens to be The Judge Advocate General. Their military ratings and their promotions are in the hands of The Judge Advocate General and, in most cases, their findings of fact as well as their findings of law, are merely advisory to The Judge Advocate General and the President. There is no finality to the action and decision of a Board of Review, and to make the action of a Board of Review final and authoritative requires further executive action by The Judge Advocate General, The Secretary of War (now, I believe, The Secretary of the Army), and, finally, in some cases, by the President himself. While hostilities were still on during World War II, the President's time was so occupied with other matters of national concern that it was physically impossible for him to properly consider and take final action upon the sentences by general courts-martial in thousands of cases of enlisted men, army officers, and even civilians who were subject to military law. Several times the President was in foreign lands conferring with the chief executives of our principal allies and, as a result, records of trial by general courts-martial piled up to the ceiling awaiting the return of our Chief Executive to the White House, and during all of this time American soldiers by the hundreds,

January 31, 1948

and probably thousands, and American army officers were in confinement or under severe restrictions at a dead expense to the Federal government, having nothing to do except to brood over their disgrace of having been convicted by a general court-martial. In a very large percent of these cases, the sentences by general courts-martial to dishonorable discharge, long terms of imprisonment, or death, were just and were finally approved or confirmed by the President, but in too many cases (even though they be few in number) the sentences were outrageous and regrettable mischarges of justice. I know from actual experience that in most of these cases justice finally prevailed through our existing defective appellate review system.

The "Judicial Council" set up in H.R. 2575 is new but has most of the objections that exist in Boards of Review. In fact, I am inclined to believe that the creation of these "Judicial Councils" will further impair the effectiveness of appellate review.

In my thinking there is only one remedy for this evil, and it is relatively simple: The remedy is to amend H.R. 2575 by eliminating therefrom all provisions relating to "Judicial Councils" and all provisions requiring the President to approve or confirm sentences by general courts-martial (the President should have power to grant executive clemency as in civil cases), and abolish all Boards of Review, and then create an entirely new and separate tribunal in the nature of an "Armed Forces Supreme Court" and confer upon this Court full and final appellate jurisdiction in cases involving sentences by general courts-martial; and further empower this Supreme Court, for military cases, to adopt and promulgate rules of procedure governing the trials of cases by general courts-martial and make the decisions of this military Supreme Court absolutely final in such cases, regardless of whether such decision is to approve modify, or reverse the action of the trial court. And, finally, make the duties and powers of The Judge Advocate General in military cases correspond with the duties and powers of The Attorney General in civil cases.

The members of the "Armed Forces Supreme Court" should be nominated by the President and confirmed by the Senate in the same manner as is now done in the cases of members of the Supreme Court of the United States.

Army officers in command of troops must have ample authority and power to enforce discipline and I see no objection to increasing such powers of a Commanding Officer but the authority and power to command troops for combat purposes is a wholly separate and distinct thing from a judicial procedure to determine the guilt or innocence of one of our own citizens who is charged with violation of a military or civil law, subjecting such citizen to the loss of his reputation, or his liberty or his life. All soldiers, whether privates, army officers or generals must be subject to command for purposes of combating the enemy. An army without the power in the officers to command and the corresponding duty of the soldier to obey ceases to be an army, and becomes a mob. On the other hand, a judicial body empowered to administer justice to the individual citizen charged with crime should not be

January 31, 1948

under the domination or command of anyone, not even the President of the United States. A Judge who is subject to command from any source is not a judge.

The above briefly embodies my views on this vital subject and I hope that the burdens now resting upon you by virtue of your office are not so heavy that you cannot find time to give this subject your immediate consideration.

I am so intensely interested in this subject that I recently sent an airmail, special delivery, letter embodying my views, to our Fellow-Texan Tom Clark.

Assuring you of my highest regard and best wishes, I am,

Sincerely your friend,

/s/ Charles
Charles M. Dickson

cmd:ll

Via:
Air Mail, Special Delivery

1655 Preston Road
Alexandria, Virginia
September 1, 1948

Professor Edmund M. Morgan
Law School of Harvard University
Cambridge 38, Massachusetts

Dear Sir:

I have received your letter of August 19, 1948, sent in reply to my letter of August 16, 1948. I am pleased to note your Committee is to consider the Ballantine and Keefe Committee Reports. I beg to advise you of the report of the McGuire Committee, which did the spadework in the field of Navy Justice and which you did not mention. Furthermore, my views were thoroughly aired in the minority report of two members of the Ballantine Committee, copies of which minority report I trust you have been furnished. This minority report is the only report drawn up, I believe I can safely say, by the only two lawyers who sat on Boards, who had had previous legal experience in civil life, and who had also served in the Navy on the operating level on Courts Martials.

At the time of the filing of the Ballantine Report the Armed Forces had not been merged. Consideration of this consolidation and additional reflection lead to a conclusion on my part that I would now recommend a different Review set-up than previously suggested. I would create one Board, with provision for expansion in wartime to as many Boards as needed, responsible only to the Secretary of Defense and consisting solely of civilian lawyers, which would review the law, facts and sentences and have power and authority to reverse, remand, or set aside any conviction in all cases of men severed from the service by means other than honorably, or who receive sentences of one year or more or death.

The members of this Board should be appointed for sufficiently long periods of time, and be paid salaries substantial enough, to afford them that independence of the military, in the performance of their functions, which I deem to be essential if we are ever to have a system completely fair to the services and to the men and one in accord with the American spirit.

The provisions for review, in the recently passed Draft Act, in the Army do not eliminate, in my opinion, the underlying difficulty which has previously existed in the services. One who reviews cases

should be as impartial as is humanly possible. It is unusual and difficult to be impartial, completely, if one is aspiring to higher office or rank and his promotion is dependent upon his personal standing with his superiors. The new law does not eradicate this fault in so far as the Army is concerned and, of course, the fault still exists in the Navy's system of review.

I would be pleased to elaborate upon the foregoing and to furnish concrete illustrations of why I deem such a step necessary either before your Board, in conference with you personally or anyone whom you delegate.

Sincerely yours,

/s/ John J. Finn
John J. Finn

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State of Alabama
Executive Office
Montgomery

James E. Folsom
Governor

November 5, 1948

Mr. Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

Dear Mr. Morgan:

In reply to your letter of November 1,
1948, the following is my opinion:

When an officer orders a soldier court-
martialed, before court-martial he is automatically
convicted. I have one recommendation to make, that
enlisted men try enlisted men and that officers try
officers. This is an old common law, which has been
handed down for hundreds of years, that every man
is entitled to be tried by his peers.

Sincerely yours,

/s/ JIM. FOLSOM
JAMES E. FOLSOM

JEF:V

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MILITARY DEPARTMENT
410 State Office Building
ATLANTA 3, GA.

LSO

Brig. Gen. Alpha A. Fowler, Jr.
The Adjutant General

10 November 1948

Honorable Edmund M. Morgan, Jr., Chairman
Committee on a Uniform Code of
Military Justice
Office of the Secretary of Defense
Washington, D.C.

Dear Mr. Morgan:

Thank you very much for your letter of 1 November with reference to military justice.

Governor Thompson has referred your request to this office for answer and after an expression from leaders of the National Guard throughout the State and other competent military and civilian authorities, we have the following observations:

As written and set up, although very highly technical, we feel if the rules are followed, soldiers and officers cannot complain of failing to obtain fair trials. The very great trouble is the control of boards and courts by higher authority. In the main, such boards and courts are often dominated by the appointing authority. In short, the only necessary change we feel is in the spirit of those who enforce military justice.

Thanking you for the opportunity for this expression, and with kindest personal regards, I am

Yours very sincerely,

S/ ALPHA A. FOWLER, JR.,
Alpha A. Fowler, Jr.,
The Adjutant General.

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YState of Vermont
Executive Department
Montpelier

November 18, 1948

Mr. Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

Dear Mr. Morgan:

I have delayed answering your letter of November 3rd -- your request for my comments on military justice. It has been a busy time.

I have some very strong convictions on this matter of military justice. My profession is that of the Law and I was a busy trial lawyer prior to America's entry into World War II. I had been State's Attorney (District Attorney) and a defender of alleged criminals. Also I was a Reserve Officer. I was assigned, in May of 1941, to the 43rd Infantry Division, then in training at Camp Blanding, Florida, as a Captain and was shortly thereafter placed on the General Court and made Law Member thereof. Incidentally, I may say I served with that Division through combat in the South Pacific and wound up with a relatively important position in the Military Intelligence Service in the Pentagon. I left the Service on Christmas, 1945.

My knowledge of military justice comes not only from serving on the General Court and as Law Member thereof, but also from close observation of its operation when not a member of the Court overseas. I may say that in military justice there is no justice as I had conceived it in a democratic country. I believe one of the fundamental reasons we were at war was to insist that justice should be the right of every individual, and such was certainly not the case under the military justice system.

So much for my intense, deep, somewhat bitter feeling about this matter -- a feeling I promised myself I would someday make perfectly clear to those who should make corrective steps.

In my opinion the Commanding General should not have the appointive powers over a General Court, nor should he have anything whatsoever to do with making out the Efficiency Ratings of those who serve on a General Court.

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Chairman, Committee of a
Uniform Code of Military Justice

November 18, 1948

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Second, the appointment of the trial lawyers, particularly the defense counsel, should not be within the control of the Commanding General of a unit, or of the Judge Advocate, and great care should be taken in the choice of the trial counsel, both prosecution and defense.

Third, we were advised, not once but many times on the Courts that I sat on, that if we adjudged a person guilty we should afflict the maximum sentence and leave it to the Commanding General to make any reduction. Such practice should be condemned and forbidden.

To preserve discipline, I feel that the Commanding General should have perhaps more summary authority in minor matters to make sentences up to sixty or ninety days.

I believe a Court appointed by some authority far removed from the unit and not responsible in any way, shape or manner to the unit, or possibly even the Army itself, would be a very wise thing.

I was dismissed as a Law Officer and Member of a General Court Martial because our General Court acquitted a colored man on a morals charge when the Commanding General wanted him convicted - yet the evidence didn't warrant it. I was called down and told that if I didn't convict in a greater number of cases I would be marked down in my Efficiency Rating; and I squared right off and said that wasn't my conception of justice and that they had better remove me, which was done forthwith.

I have seen an American soldier who was placed in ball and chains for a very minor offense over in the South Pacific - against all concept of justice. I hope from your study you will evolve a system of justice for the armed services that will merit having the word "justice" attached to it.

Most sincerely,
/s/ ERNEST W. GIBSON
Governor of Vermont

EWG/nh

Office of
The Governor

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE UNITED STATES

Charlotte Amalie, St. Thomas

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November 16, 1948

Mr. Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

Dear Mr. Morgan:

Thank you for your letter of November 1 inviting my suggestions concerning the undertaking of the Committee on a Uniform Code of Military Justice.

While I am not sure whether the matter is within the purview of the Committee, I believe the greatest improvement in the system of military justice can be achieved through change in the organization of military trial courts. Judges presiding over general courts-martial should be persons of the temperament and professional training considered essential for judges of civil courts. Moreover, through tenure and freedom from responsibility to field commanders, military judges should be relieved of pressures which now affect their work. I believe that the appointing authority should be of not less than Cabinet status and that selection of military judges should be made from panels set up after investigation similar to that which precedes the appointment of Federal civilian judges.

Similar general considerations apply to the problem of obtaining professionally competent trial judge advocates and defense counsel. These officers of military courts should at least be graduates of accredited schools of law. In addition, the spectacle of junior officers trying cases before superiors who exercise authority over them, and in many cases actual command, outside of the court room, is all too familiar. Such a relationship between judge and counsel should not be tolerated.

I am sorry that I have no more specific suggestions which might be helpful. However, I believe the general matters mentioned above merit consideration.

Sincerely yours,

S/ WILLIAM H. HASTIE

Governor

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H. C. HOLDRIDGE
Brigadier General, USA, Retired
2409 37th. Street Northwest
Washington 7, D.C.

August 23, 1948.

Professor Edmund Morris Morgan, Jr.,
Harvard School of Law,
Cambridge, Mass.

Dear Professor Morgan:

This morning's Washington Post carries a story about the appointment of a committee of outstanding lawyers who are given the task of codifying the laws of the Army, Navy and Air Force and of revising their system of justice, and states that you are head of that committee.

I have given the subject of military justice careful study, both during my 30 years of service and since my retirement. Hundreds of G. I.'s have appealed to me to assist them in obtaining revisions of their sentences. I feel, therefore, that I could be of assistance to the committee if given an opportunity to appear before it.

I should be pleased to appear before your committee at your convenience and render such assistance as you might desire. I feel that I can give you a point of view that you are not likely to receive from other ranking officers of the armed forces.

Very sincerely yours,

/s/ HERBERT C. HOLDRIDGE

COLONEL MELVIN J. MAAS
NATIONAL PRESIDENT
COLONEL HARVEY L. MILLER
NATIONAL VICE-PRESIDENT
MAJOR WILLIAM P. McCAHILL
EXECUTIVE DIRECTOR
MAJOR HELEN G. O'NEILL
NATIONAL SECRETARY
REV. PAUL J. REDMOND, O.P., CAPT., USNR
NATIONAL CHAPLAIN

EXECUTIVE COUNCIL
COLONEL JUSTICE M. CHAMBERS
MAJOR JACK C. McDERMOTT
CAPTAIN ALFRED J. RICHARD
CAPTAIN EDWARD M. ENGLISH
CAPTAIN JOHN A. DeCHANT
CAPTAIN EDGAR S. PROCHNIK
FIRST LT. ETTA W. LONG

MARINE CORPS RESERVE OFFICERS ASSOCIATION

1543 EYE STREET, N.W.

WASHINGTON 5, D.C.

Metropolitan 4257

Nov. 9, 1948

Mr. Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of Secretary of Defense
Washington D. C.

Dear Mr. Morgan:

This will acknowledge receipt of your letter of October 8, 1948 relative to the draft of a Code of Military Justice which will be submitted to the 81st Congress. Our organization is cognizant of the tremendous task that faces your committee. We are appreciative of your request for criticisms and suggestions from the Marine Corps Reserve Officers Association.

We suggest that provision be made so that members of the courts are instructed that it is their duty to give sentences that are governed by the facts of the case and be advised that they necessarily do not have to give maximum sentences and leave leniency up to the Commanding Officer or the convening authority.

Our organization is of the belief that enlisted men should not be members of courts before which officers are being tried.

It is suggested that a legal officer be added to all courts as an independent legal advisor to such courts.

Sincerely yours,

MELVIN J. MAAS
National President

MJM:mm

COPY

Marine Corps Reserve

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CHADBOURNE, HUNT, JAECKEL & BROWN

70 Pine Street

New York 5

August 13, 1948

MILITARY JUSTICE CODE

Dear Professor Morgan:

It was with considerable interest that I read of your appointment as Chairman of a new Committee intended to draft a Code to integrate Military Justice among all branches of the Service.

I, as well as other officers in the New York Area with considerable wartime experience in the JAGD, feel quite strongly that the practical approach must be used in the preparation of a new Military Justice Code. We have noted the resolutions of the Vanderbilt Committee, and the suggestions of other lawyers' committees composed of lawyers, many of whom never spent a day in the Army, much less a day involved in Military Justice matters, and we are quite concerned lest over emphasis of the individual's rights as an approach to Military Justice undermine the paramount purpose, that is, administrative control in a war organization as the chief mission of a disciplinary Code. We would welcome the opportunity to assist in any way that we might be able, in the work of this new committee.

Professor Edmund Morgan, Jr. - 2 - August 13, 1948

I am a graduate of Harvard Law School, 1932, and served during the War as a Sergeant in the Infantry, then as 2nd and 1st Lieutenant in the Military Police with a Combat Unit, First Infantry Division, performing primarily the functions of a criminal investigating official, and a Trial Judge Advocate in at least one hundred General Court Martials. I later served as Captain, Major, Lieutenant Colonel and Colonel in the JAGD, when my duties included, among other things, acting as Staff Judge Advocate of a large Air Corps unit.

In speaking for myself, I also speak specifically for Colonel Robert H. Kilroe, JAGD, who is presently a trial attorney with offices at 36 West 44th. Street, New York City. Colonel Kilroe is probably as experienced an officer in such matters as can be found in the Reserve Corps. In substantiation of this last statement, I refer you to Brigadier General Hubert Hoover, who has recently retired from the JAGD.

Hoping to hear from you, and that we may be of service to you, I remain

Very truly yours,

/s/ ALLEN GORDON MILLER
Colonel, JAGD
0375191

Professor Edmund Morgan, Jr.
Harvard Law School
Cambridge, Massachusetts

McGuire

DISTRICT COURT OF THE UNITED STATES

For the District of Columbia

Matthew F. McGuire
Associate Justice

Dear Professor Morgan:

I have your letter of September 27th, in which you were kind enough to ask my assistance in your work of drafting a Uniform Code of Military Justice.

I am afraid that I cannot add anything to the report of November 1945, which you state you have. I might say parenthetically, that the Navy is in possession of a complete transcript of the discussions had before the Committee, that antedated the report. Nothing has occurred in the meantime which has caused me in any fashion to change my views, and while I would be very glad under any circumstances to assist you and your Committee in any manner in which you might possibly think I could, the volume of court business precludes any allotment of time on my part to such an enterprise.

The report was directed to basic reforms, which seem to me apply with equal emphasis to both services, and now that we have a separate Air Force, to that arm also.

Sincerely,
/s/ MATTHEW F. MCGUIRE

Honorable Edmund M. Morgan, Jr.,
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

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THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street

The Special Committee on Military Justice

October 5, 1948

Edmund M. Morgan, Jr., Esq.,
Chairman, Committee on a Uniform
Code of Military Justice,
Office of the Secretary of Defense,
Washington, D.C.

Dear Professor Morgan:

Judge Patterson, President of The Association of The Bar of the City of New York, has sent me your letter to him of September 29, 1948, and a copy of his reply.

The Special Committee on Military Justice of the Association is working on recommendations with respect to a Uniform Code of Military Justice and with respect to revision of the present Articles of War and Articles for the Government of the Navy. We shall be very glad to submit them to you as soon as they are completed.

These recommendations will be supplementary to our report of February 27, 1948, on the Elston Bill for revision of the Army Court-Martial System, the provisions of which have now become law. We feel strongly that this legislation failed to accomplish the reform of the Army Court-Martial System which is vitally necessary. We enclose five copies of this report in the event that your Committee does not have the report before them.

We should also be grateful for an opportunity to appear before your Committee, if that is possible, to present our views in person.

Faithfully yours,

/s/ Frederick W.P. Bryan

FvPB:GRB
Enc.

Also see Tab "Bar Associations"
for views of this association

Copy of attachment referred to
in letter may be obtained from
Miss Carr, Room 3D-745, Pentagon,
Ext. 6952.

NYC Bar Assn.

New York County Lawyers Association
Office of the Secretary

November 19, 1948

Felix Larkin, Esq.
Special Assistant to Secretary of
Defense Forrestal
The Pentagon
Washington, D.C.

My dear Felix:

At the request of Richard H. Wels, Esq., Chairman of our Committee on Military Justice, I am forwarding herewith six (6) copies of the report of that Committee, which report has not yet been acted upon by our Board of Directors. When action thereon has been taken, you will be formally notified.

I hope things are going well with you in Washington, that you like your new job and with all good wishes, I remain

Cordially yours,

/s/ Terence J. McManus

Secretary

TJM:b
Enclosure

NEW YORK COUNTY LAWYERS' ASSOCIATION

SUMMARY OF REPORT OF THE COMMITTEE ON MILITARY JUSTICE

The Committee finds that:

1. The basic reform necessary is the separation of the control of the courts-martial systems from command. Although this is reported in the press to have been accomplished by the Elston Bill, that is not the fact. The Elston bill provides for a Judge Advocate General's Department in the Army, but leaves complete control of the courts-martial system in the hands of command. This should be corrected by placing the power of review in the Judge Advocate General rather than in the officer convening the court, and by requiring that law members of courts, and defense counsel be qualified lawyers assigned by the Judge Advocate General. Such officers should have their assignments, promotions, fitness reports, and leaves controlled by the Judge Advocate General.

2. The provisions of the Elston Bill establishing a Judge Advocate General's Department presently relate only to the Army. The creation of such departments and legal corps for the Navy and Air Force should be provided for.

3. The reforms which have been proposed should be applicable to summary courts-martial in the Navy and to special courts-martial in the Army as well as to general courts-martial.

4. A uniform terminology and code should be adopted for all of the armed services.

5. Officers should be made responsible for the commission of lesser offenses (as they now are not) and should be triable by the inferior courts.

6. A co-ordination of the courts-martial systems of all the services should be made a specific responsibility of the Secretary of Defense.

REPORT OF THE COMMITTEE ON MILITARY JUSTICE OF
THE NEW YORK COUNTY LAWYERS' ASSOCIATION

Earlier this year Secretary of Defense James V. Forrestal appointed a committee consisting of Professor Edmund M. Morgan, Jr., of the Harvard Law School as chairman, Under Secretary of the Navy W. John Kenney, Assistant Secretary of the Army Gordon Gray, Assistant Secretary of the Air Force Eugene M. Zuckert, and Felix E. Larkin, assistant general counsel of the Department of Defense, as executive secretary, to draft a Code of Military Justice uniform in substance and uniform in interpretation and application to all of the armed services. In his precept establishing this committee, the Secretary indicated that this uniform code should protect the rights of those subject to the code without impairing the performance of military functions.

Having noted the previous activities of this Association in the field of military and naval justice, the Morgan Committee on September 27, 1948, invited the Association to submit our recommendations with respect to deficiencies in the present Articles of War and Articles for the Government of the Navy. Upon referral of Professor Morgan's letter to our committee, we have carefully reviewed our earlier reports on military justice, the changes effected by the Elston Bill enacted in the closing days of the second session of the Eightieth Congress, and the proceedings before the House and Senate Committees on the Armed Services, and have generally studied the problems of military and naval justice.

The limitations and inadequacies of our systems of military and naval justice were graphically portrayed to the public and to members of Congress during and after World War II by many service men and women, lawyers and laymen alike, who had had first hand experience with the operation of such systems, and found that resemblance between them and the courts which they knew as civilians was largely coincidental. It was disturbing to them to find that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command, to choose the members of the court, to review and alter their decision, and to change any sentence imposed. They were shocked to learn that an offense committed by an officer was subject to different treatment and punishment than the identical offense committed by an enlisted man. They were surprised to find that many of the judges, prosecutors, and defense counsel participating in courts martial were neither lawyers nor trained in the law, and that, in the naval services, there was not even the minimum requirement that a single law member be on a court.

The reports that came back of these things to the civilian community, together with specific instances of abuse in the court martial process, initiated a flow of bills into the Congressional hopper and an expression of aroused public opinion which gave promise that reforms would be accomplished. The Secretary of War and the Secretary of the Navy each appointed boards of distinguished citizens to review the court martial systems of their respective services, and to make recommendations for a thorough-going revision of military and naval justice. The famous Vanderbilt Report, made to Secretary Patterson, and the Ballantine and Keefe Reports, made to Secretary Forrestal, all found substance to the charges which had been levelled at the court martial systems, and presented definitive recommendations for the elimination of the conditions which made such charges possible.

The jugular vein at which all such Boards aimed their recommendations was the domination and control of the courts-martial systems by command. All such boards concluded that amendments to the Articles of War and the Articles for the Government of the Navy which correct other inadequacies of military and naval justice, but which fail to check command control, effect only secondary reforms which become meaningless in the absence of the rooting out of the major sources of abuse and injustice. As to this, the Vanderbilt Committee said:

"The system of military justice laid down in the Manual for Courts-Martial not infrequently broke down because of the denial to the courts of independence of action in many instances by the commanding officers who appointed the courts and reviewed their judgements; and who conceived it the duty of command to interfere for disciplinary purposes. Indeed, the general attitude is expressed by the maxim that discipline is a function of command. Undoubtedly, there was in many instances an honest conviction that since the appointing authority was responsible for the welfare and lives of his men, he also had the power to punish them, and consequently the courts appointed by him should carry out his will. We think that this attitude is completely wrong and subversive of morale, and that it is necessary to take steps to guard against the break-down of the system at this point by making such action contrary to the Articles of War or regulations and by protecting the courts from the influence of the officers who authorize and conduct the prosecution."

Implementing this finding, the Vanderbilt Committee recommended (a) the appointment of courts by the Judge Advocate General's Department, instead of by command; (b) the assignment of defense counsel by the Judge Advocate General's Department, and the requirement that defense counsel be a trained lawyer; and (c) that the initial review of decisions, except for purposes of clemency, be in the hands of the Judge Advocate General's Department, instead of in the commanding officer who initiated the proceedings and convened the court. Corollary proposals provided that the officers in the Judge Advocate General's Department should be qualified lawyers insulated from the indirect influence of command by having their promotions, assignments, leaves, and fitness reports emanating from the Judge Advocate General's Department rather than from command.

It was felt that once command had filed its accusations and placed a man on trial, the judicial machinery should be in the hands of an independent judicial system within the service which, not subject to pressures and influence from command would insure the accused the same fair trial by competent personnel that he would receive in our criminal courts if he were a civilian. In this recommendation and belief our Association concurred, as well as the American Bar Association, the Association of the Bar of the City of New York, The War Veterans Bar Association and many other veterans and bar groups.

On February 20, 1947, the War Department completely rejected these recommendations. The position of the Army with respect to them was summarized by Secretary of the Army Kenneth Royall in the Virginia Law Review for May, 1947, where he said:

"The War Department feels that the Committee received a rather exaggerated impression of the prevalence or seriousness of pressure exerted on courts-martial. However, there were doubtless instances where appointing authorities entirely misconceived their duties and functions and over-stepped the bounds of propriety."

Extended hearings on the bills relating to the Army court-martial system were held by the House Committee on Armed Services, but no House hearings have been held on the Navy Bills. No hearings at all have been held by the Senate Committee. The House Committee reported out H.R. 2575, introduced by Representative Elston of Ohio at the request of the Army, and this bill in amended form was passed by the House. In the closing days of the second session of the Eightieth Congress, the entire Elston Bill was introduced by Senator Kem of Missouri as a rider to the Selective Service Act of 1948, and, without the benefit of any Senate hearings, was accepted by the Senate, and signed by the President as Public Law 759 of the Eightieth Congress. It becomes effective on February 1, 1949.

The passage of the Elston Bill was hailed on the floor of Congress and in the press as the accomplishment of the reforms in military justice which had been sought by our Association, among others. A label of "Court Martial Reform" was placed upon the bill which was scarcely indicative of its contents. Such labelling was highly dangerous in that it gave the public and the press the impression that substantial reforms had been accomplished, and thus reduced the possibility of further Congressional action to effect the real reforms which are still lacking. Accordingly, it is important to make clear just what the Elston Bill accomplished.

First of all, it must be noted that even such reforms as are affected by the Elston Bill have no application to the Navy, the Marine Corps, the Coast Guard, and, probably, the Air Force. Just as the changes in military justice which were adopted in 1921 were restricted in their application to the Army, so the Elston Bill is piece-meal legislation.

The most important phase of the Elston Bill to our mind is such change as it has effected in the relation of command to the courts-martial systems. Such change is reflected by Section 246 of the bill, amending Section 8 of the National Defense Act (10 U.S.C. 61) to provide for a Judge Advocate General's Corps. This provides for a separate corps, headed by a Major-General and three Brigadier-Generals, which shall have a strength of not less than $1\frac{1}{2}\%$ of the authorized active commissioned officer strength of the Army, together with such warrant officers and enlisted personnel as may be assigned by the Secretary of the Army. This corps is given its own promotion list, similar to that of the Medical Corps and Chaplains Corps, independent of the line. This was vigorously opposed before Congress by the Army on the ground that thereby too great a preference was given to officers performing legal duties over line officers. It may be significant that the Army has not yet moved to put into operation this or other provisions of the Elston Bill.

The establishment of such a corps, with its own promotion list, has been widely hailed as having established "an independent Judge Advocate General's Department," but this is far from the fact. As was said in an editorial appearing in the August, 1948, issue of the American Bar Association Journal:

"The new statute accomplishes some desirable improvements in military justice, supplementing those which the Secretary had power to introduce by his own action, along lines recommended by the Vanderbilt Committee nominated by our Association and appointed by the War Department. The Elston Bill creates a Judge Advocate General's Department which is independent in the sense that it has authority to handle its own administrative matters, but, as has been

pointed out several times in these columns, (33 A.B.A.J. 40, 45, January 1947; 33 A.B.A.J. 319, April 1947; 33 A.B.A.J. 898, September 1947), command remains completely in control of the operation of the Army's courts-martial system."

Under the Elston Bill the power to appoint courts remains in command. Under the Elston Bill the power to review, in all its aspects, the decisions of courts-martial remains in the commanding officer who convened the court. Under the Elston Bill prosecutors and defense counsel are required to be members of the Judge Advocate-General's Department or otherwise qualified lawyers only "if available" -- a qualification which realistically leaves the situation in status quo. We believe that in all instances and in all the services, the prosecutor and defense counsel should be members of the Judge Advocate General's Department or otherwise qualified lawyers. So far as the basic fundamental matters at which the movement for court martial reform has been aimed, little is accomplished by the Elston Bill.

We have reviewed the history and background of these provisions to clear away the confusion that has been created as a result of the enactment of the Elston Bill. We come now to our recommendations with respect to the position of command in the court-martial system.

We do not question that discipline is a proper concern of command, just as the commissions of crime in the civilian community is a concern of the executive authority, represented by the District Attorney and the Governor. We believe that where a commanding officer has reason to believe that an individual has committed an offense, he must have the authority to file charges against that individual and to order him tried by a court of competent jurisdiction, and to be responsible for the prosecution of the offense, such responsibility including designation of a qualified prosecutor. We believe that it should continue to be the prerogative of command to evaluate the seriousness of the crime, and determine whether the case shall go before a general court-martial, or a court with lesser powers of punishment. We further believe that, just as the civilian executive, the commanding officer should have the power of clemency.

But once the judicial proceedings have been placed in motion, we agree with the opinion expressed by Hamilton in Number 78 of The Federalist that "There is no liberty, if the power of judging be not separated from the legislative and executive powers."

We feel that, once the case has been referred by command for trial, the powers and control of command must end, save for the right to exercise clemency. Accordingly, we recommend

that (1) the power of appointing the court, and the defense counsel must rest with the Judge Advocate General's Department; (2) that the personnel serving in such capacity must be free from the authority of command directly, or indirectly in matters of appointment, fitness reports, promotions, leaves, etc.; and (3) that judicial review of court-martial proceedings shall be in higher echelons of the Judge Advocate General's Department.

A practical problem of major proportions arises with respect to these recommendations. By law a Judge Advocate General's Department exists in the Regular Army, and the Judge Advocate General, as well as the other officers in the Department, are professional lawyers. Such is not the case in the naval services or in the Air Force.

While there is a Judge Advocate General of the Navy, neither he nor other officers performing legal duties are required to be lawyers. Traditionally, officers assigned to legal duties in the naval services are line officers whose tour of duty in the Judge Advocate General's office generally comes between other assignments.

If there is to be a real system of military or naval justice, it must be administered within each of the services by a corps of legal specialists from whom each Judge Advocate General shall be required to be appointed, and which will provide the law members of the courts, the prosecutors, and the defense counsel, all of whom ought to be trained lawyers. Such a corps is already established by law in the Army, but it has never existed in the Navy and the Air Force, since its division from the Army, has followed Navy practice in this regard.

Establishment of such a specialist corps in the Navy and in the Air Force is not such a departure from precedent as might be imagined. While the legal systems of those services are today administered by officers who, notwithstanding their distinguished records and high professional competence as line officers and aviators, are generally not trained and experienced in the technical duties assigned them, other specialist functions are performed only by specialists. The Bureau of Medicine and Surgery of the Navy and the Office of the Air Surgeon General are manned and headed by physicians and surgeons, who may not be so appointed without a civilian license, and whose life work lies in medicine. The dental corps of the services are composed of dentists, and the Chaplains Corps are headed and manned by ordained ministers. There are doctors, dentists, and chaplains who are Major-Generals, Rear Admirals, and are accepted as an integral part of the service without ever having commanded a regiment or a naval vessel. In addition, as the result of the specialization which comes from modern warfare, in all services there are specialists such as

communicators who are trained throughout their careers for a particular specialty. Only in the specialties of law and of intelligence has there been some hesitancy in providing for a specialist corps. Those two specialties have been largely considered as part time jobs to which senior officers, regardless of their lack of professional training as lawyers or intelligence experts, may be assigned for a brief tour of duty, to return to sea or to aircraft after a few years.

The Navy has never seen fit to establish a legal corps, although in recent years it has taken tentative steps in this direction. During wartime it had a group of reserve officers classified as legal specialists. Commendably, since the end of World War II it has sent a selected group of regular naval officers to first line law schools for legal education, and has made such officers the nucleus of its post-war legal program.

If the Navy's hesitation to create such a legal corps stems from a desire, with which we could concur, to have its legal officers deeply imbued with its traditions and needs, the obstacle is not insurmountable. We would endorse a program which would insure that the Navy's lawyers have duty with Fleet units, and be as cognizant of and sympathetic with the problems and requirements of the service as its general duty officers. Such has, in fact, been the history of medical officers, chaplains, and other specialists. We can see no reason why such a program would not be practicable with respect to legal specialists. But we are firmly convinced of the necessity in all services of having billets concerned with legal duties filled by trained and competent personnel. If there is to be any uniformity in the courts-martial systems of the various services, the professional lawyers of the Army must be balanced by professional opposite numbers in the Navy and in the Air Force. Accordingly, we recommend that amendments to the law be adopted providing for a truly independent legal corps within each of the services. The chiefs of such corps should be appointed from the corps, and not, as at present, from general duty officers. The assignments, leaves, promotions, and fitness reports of officers in such corps should emanate from their superiors within the corps, and the decisions of the courts on which they sit should be reviewed by higher echelons within the corps and not by command. To our mind, such provision is the basic need of military and naval justice. Once it is accomplished, other reforms become mere refinements.

The Elston bill largely restricts its application to general courts-martial, and not special courts, which are the Army equivalent to summary courts-martial in the Navy. It is our experience that the greater part of the abuses which have occurred in military and naval justice have occurred in Navy summary and Army special courts, rather than in general courts martial. This is so because the commanding officer who has convened the summary or special court does so not because he has any doubt as to the guilt of the accused, but because he feels that

he cannot impose a sufficiently severe punishment at mast or company punishment. Frequently, this is conveyed to the court which the commanding officer appoints from his own command and whose decision he reviews. Too often the court is told that it is expected to find a verdict of guilty, and to impose a particular sentence, regardless of the oath that it takes "to well and truly try, without prejudice or partiality, the case now depending, according to the evidence which shall be adduced, the laws for the Government of the Navy, and your own conscience." The result is that, although the court is by statute required to enter upon its duties with an open mind as to the guilt of the accused, its judgment is foreclosed in advance, and there is little question as to the ultimate result. This is much less likely to happen in a general court-martial, which is not ordinarily convened by the commanding officer who has instituted the proceedings and is not subject to his control. General courts-martial are normally under the control of a general or flag officer senior to the commanding officer who has initiated the proceedings, and the officers at his headquarters who participate in the proceeding are unlikely to be affected by the views of the subordinate commander who has recommended the court.

We are strongly of the opinion that all that we have said before as to the necessity of independent, competent lawyers serving as law members, prosecutors, and defense counsel on general courts martial is equally as applicable to Navy summary and Army special courts martial. Those who oppose this find it particularly impracticable in the Navy, where commanding officers of smaller units and ships have the power to convene summary courts martial. Actually, however, a large percentage of such courts are convened on larger vessels such as battleships, cruisers, and aircraft carriers (all of which have several thousand personnel aboard) and on bases where there are many thousands of men. In such ships and on such bases there should be no difficulty about providing adequate legal specialists, just as other specialist officers are provided in the allowance list.

At first blush, it sounds convincing that smaller vessels such as landing craft, minesweepers, destroyers, and other vessels which may have no more than half a dozen officers aboard cannot provide and cannot justify such legal specialists. If such smaller craft normally travelled alone, that might well be so. Normally, however, they travel and function in squadrons and divisions, each of which has a flagship aboard which is a squadron commander with a staff duplicating the staff of a fleet commander in miniature. There is no reason why legal specialists cannot be attached to such staffs as are other specialists, and be available for duties in all units of the squadron. We believe that any reform of military and naval justice will be incomplete if it is not applicable to the inferior courts, as well as to the general courts, to the fullest extent practicable.

In the development of a uniform code for all the services, we recommend that a uniform terminology be adopted. Only confusion results from the fact that an Army special court is known to the Navy as a summary court-martial; that an Army trial judge advocate may find as his opposite number a recorder. Adoption of a common terminology will do much towards the development of a uniform approach. Similarly, we recommend that uniform definitions of offenses, and a uniform system of punishments be adopted which will be applicable to all the services.

The Elston bill, in Section 210, has made it possible to discipline an officer who has committed an offense by trying him at a special court martial, as well as at a general court martial. This is not as yet true in the Navy where the only punishment that can be meted out to an officer is trial by a general court-martial or a private reprimand from his commanding officer. The effect of this is that where an officer commits a minor offense, he in effect goes unpunished, although an enlisted man committing the same offense is subjected to punishment. Similarly, in the Navy as an administrative measure courts-martial are cautioned against confining a petty officer, although a seaman committing an identical offense may and frequently does receive punishment of confinement. We believe that these practices negative our basic concept of "Equal Justice Under Law," and we recommend that the law be amended so as to equalize punishments for all service personnel. Such a provision would improve morale and discipline.

The Elston bill has set up a comprehensive and tortuous system of review insofar as Army courts-martial are concerned. That system is defective in that it preserves the right of review as to all phases of the case in the commanding officer who convened the court. This is completely at odds with American concepts of justice.

We recommend that a uniform system of review be established within all of the services, under which the commanding officer shall retain the right to review the case only for the purposes of exercising clemency. This, of course, parallels our civilian procedures under which the right of clemency is exercised by the President in Federal offenses, and by the Governor in State offenses. The initial review of the case as to legality and as to all aspects other than clemency should vest in the theatre area or Fleet representative of the Judge Advocate General. Thereafter, further review should be had by a Board of Review established in the office of the Judge Advocate General and appointed by him, as provided in the Elston Bill.

Under present practice, in none of the services do the accused or his counsel participate as a matter of right in review of courts-martial decisions. They rarely file briefs, and rarely do they have an opportunity to argue their case on review.

They have no knowledge of the questions that are being raised and discussed by the reviewing officers, and have no opportunity of presenting their point of view.

We recommend that the record of proceedings in any court martial shall include, when forwarded for review, a summary of all objections prepared by defense counsel, and that defense counsel be permitted to submit briefs or other argument to the reviewing authority. If the accused desires, at his own expense, to present oral argument through civilian counsel to the reviewing authority, he should be permitted to do so.

The goal of a uniform code uniformly applied and interpreted in all of the services is obviously difficult of achievement without some to-level co-ordinating agency. Ideally, when real unification of the military services is finally accomplished, there should be a single Judge Advocate General performing all legal duties for the Army, Navy, Air Force, Marine Corps, and Coast Guard. Unification as provided in the National Defense act falls far short of the unification under which such ideal can be realized. We must gear our recommendations accordingly to the existing situation, and to the advances that are realistically possible.

Accordingly, we recommend that there be established a Board of Review in the office of the Secretary of Defense, which shall have final power of review in all court-martial cases in all the services, and which will be charged with the development of uniform practices and procedures, much as the Supreme Court of the United States controls the decisions of the Federal Courts of Appeals. The Secretary of Defense should have the further duty of closely supervising the operations of the various Judge Advocate General Departments, and should have the power of recommending legislation to the Congress and of issuing directives to the services in matters pertaining to military and naval justice. He should have the specific responsibility of advancing unification of the legal functions of the armed services.

Today our country has for the first time a peacetime draft. Large numbers of our young men will in the years ahead serve in a peacetime army, navy and air force whose mission is the preservation of our American democracy. Under such circumstances it seems to us that there is a paramount obligation to those young men, to their anxious families, and to the basic principles of that American democracy to make full provision for the protection of those young men and to insure that their right to fair trials before qualified and independent courts is not impaired. We have every confidence that the adoption of the proposals made by us will strengthen the morale and discipline of our armed services, in time of war as well as in peace time.

Respectfully submitted,
RICHARD H. WELS, Chairman
LOUIS C. FIELAND
JOHN M. MURTAGH
SIDNEY A. WOLFF
JINZER B. WYATT

NEW YORK COUNTY LAWYERS ASSOCIATION

Office of the Secretary
170 Broadway
New York 7, N. Y.

December 14, 1948.

Felix E. Larkin, Esq.,
Assistant General Counsel,
Office of the Secretary of Defense
Washington, D. C.

Dear Felix:

This is to notify you officially that the Board of Directors at its regular meeting held on December 13, 1948, approved the report of the Special Committee on Military Justice of this Association. Copies of the report were sent to you in mid-November and the text has not been changed.

Cordially yours,

/s/ Terence J. McManus
Secretary.

FEB 10 1949

Date _____

TO: ✓ Mr. Edmund M. Morgan, Jr., Chairman
Mr. Gordon Gray, 4E 808
Mr. W. John Kenney, 4E 664
Mr. Eugene M. Zuckert, 4E 856
Mr. Felix E. Larkin, 3E 732

Col. John P. Dinsmore, 3C 886
Col. John E. Curry, Rm 2143,
Main Navy Bldg.
Lt. Col. Stewart S. Maxey 5E 271
Cdr. Halmar J. Webb, Rm 2126
1300 E St. NW.

Mr. Robert S. Pasley, Rm 1813,
Navy Bldg. T-3
Mr. Robert W. Smart, Rm 313, Old
House Office Bldg.

Mr. Robert Haydock, 3D 735
Mr. Joseph D. Sullivan, 3D 739
Mr. Edward M. Shafer, 3D 739
Mr. Samuel Moskowitz, 3D 739

FOR: Information _____

Inc. in Notebooks _____

Other _____

FROM: J. Joseph Whelan
Rm 3D 745 Pentagon, Ext. 73951

The attached should be inserted in the binder entitled "Comments on a Uniform Code of Military Justice", between tabs "NY Co. Lawyers Assn." and "Reserve Officers Assn."

DELAFIELD, MARSH & HOPE
Counsellors at Law
15 William Street
New York 5, N.Y.

January 29, 1949

Committee on Uniform Code of Military Justice,
Office of the Secretary of Defense,
Washington, D.C.

Attention: Professor Edmund M. Morgan,
Chairman

Gentlemen:

Some months ago, in reply to your courteous invitation, you were referred by the New York State Bar Association's Special Committee on Military Justice to material issued by our Association, and we advised that we would postpone criticism or suggestion pending further developments. Since then, with the knowledge and approval of our President, Mason H. Bigelow, Esq., a subcommittee of our Military Justice Committee was appointed consisting of the undersigned, Messrs. Niall Oran Meagher, Abel I. Smith, Jr., and Philip J. McCook, for the purpose of carrying into effect the Association's previously declared wishes. Mr. McCook served in World War II in the Judge Advocate General's Department, headquarters Washington, D. C. as Colonel AUS. His tour of duty took him widely over the United States and also into the North African, Middle East and European theatres and the Pacific areas. Mr. Smith served as Lt. Commander, U.S.N.R. and was assistant to the Legal Officer, Headquarters Third Naval District (New York City and vicinity) in World War II. Mr. Meagher served in World War II as a Major AUS and was Trial Judge Advocate of the Atlantic Base Section, Assistant Judge Advocate of the North African Division ATC and Legal Officer of both North African and European Divisions ATC. At present he is Acting Judge Advocate General of the XVI Air Force Service Command, Air Corps Reserve.

It is to be noted from the above that our subcommittee is representative of the Army, Navy and Air Corps, with wide legal experience in World War II.

Our attention has recently been called to a letter addressed to your Committee under date of November 22, 1948, purporting to express the views of the American Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers' Association and the War Veterans Bar Association. This communication supplies at once a convenient occasion for restating in summary form the position of the New York State Bar Association and of answering the major arguments put forward in the letter itself. We submit:

NY State Bar

That the judicial system of the Armed Services should not be removed from Command control.

The military justice system recommended to an early Congress by Jefferson and Adams remains generally and fundamentally, though not in detail, the same after 160 years. In its original theory, which has stood the test of time, it differed so radically from the conceptions of civilian justice as to be expressly declared an exception to the general application of the Constitution itself, by the language of that document. To win a war the military commander must remain supreme in responsibility under the civilian president, his commander-in-chief. The logical consequence is that military discipline, upon which success in chief measure depends, is a function of command, and that the court-martial, which enforces discipline, is an instrument of discipline. This theory, and its consequences, now and then proved unpopular, but were realistically, if sometimes reluctantly, accepted by succeeding Congresses.

Among the first conclusions reached by the Vanderbilt Committee whose findings and conclusions are in other respects heavily relied on by the present advocates of a fundamental change, as well as ourselves, was this:

"Almost without exception our informants said that the Army system of justice in general and as written in the books is a good one; that it is excellent in theory and designed to secure swift and sure justice; and that the innocent are almost never convicted and the guilty seldom acquitted. With these conclusions the Committee agrees. We were struck by the lack of testimony as to the conviction and punishment of innocent men."

That assertion, never afterwards, as far as we know, factually disputed, has been overlooked in subsequent debates by the critics of the system and, strangely enough, by some of its defenders as well.

It is thus seen at the outset that the authors of the November 22nd letter to your honorable body do not and cannot rely on any failure of the military justice system in World War II as applicable to the findings of the courts-martial, but only as to the sentences.

Whether or not one fully agrees with the summary of the Vanderbilt Committee criticizing the sentences, Robert P. Patterson, former Secretary of War is our authority for the statement that following the close of hostilities, the routine and automatic operation of clemency provided by the military law and code was so supplemented by the use of

special boards as to correct the disparity and severity of the sentences referred to by the Vanderbilt Committee.

We thus see through the findings of the highest authority that the issue which we are here discussing already has been severely narrowed. Assuming that under the present system innocent men were rarely found guilty, does the existence of a period during actual hostilities when there was "such disparity and severity in the impact of the system on the guilty as to bring many military courts into disrepute both among the law-breaking element and the law-abiding element, and a serious impairment of the morale of the troops ensued where such a situation existed" justify the fundamental change now demanded?

Those who demand this fundamental change have not quoted any man or group charged with the task of winning a war. We propose to show that the persons and groups so charged not merely deny the existence of a necessity for such a change but strongly oppose it on the ground not merely that it will not work but that it is contrary to the whole theory and practice of discipline in the United States Army. We submit that if the system of military justice is to be made uniform so as to apply also to the Navy and Air Corps, the same considerations must be held to apply. While awaiting the views of the responsible heads of the Navy and the Air Corps, we shall continue to hold the belief we have just expressed.

The first impulse of lawyers, trained in the tradition of social and civilian justice, is to emulate and follow the pattern of social and civilian justice and procedure prescribed and set forth in the Constitution of the United States and of the several States, applying to civilian tribunals. However, any lawyer who has been a member of the Armed Services, particularly under combat conditions overseas, is at least given pause, not merely by his own experience but by the views of such men as former Secretary of War Patterson and former General of the Armies and Allied Commander, Dwight D. Eisenhower.

In reply to the query "What does Command have to say about the problem before us?", Judge Patterson said: "Our job is to win the war. We are responsible for the discipline of the Army in time of war". His personal conclusion was "It would be unwise to have particular functions within the Army carried out by officers who are independent and separate from Command and the responsibilities which go with Command". This view was expressed by Judge Patterson in refutation of the view of the Vanderbilt Committee advocating separation of the Judge Advocate General's Department from Command responsibility. He was compelled by his own convictions to take this position even though he himself had

appointed that Committee while Secretary of War as the "War Department Advisory Committee".

Hundreds of members of the New York Bar who attended the great luncheon at the Lawyers' Club on November 17, 1948, addressed by General Eisenhower as sole speaker, heard him say:

"For example, I know that groups of lawyers in examining the legal procedures in the Army have believed that it would be very wise indeed to observe, in the Army and in the Armed Services in general, that great distinction that is made in our Governmental organization, of a division of power, a system of checks and balances that retains in the hands of those who are legally trained, and only in those, the eventual and final decision as to what shall be done about an offender in a particular offense that he may have committed against our Government.

"Now, no one can, I believe, be more devoted, more sincere in his devotion to the idea of theoretical justice among a people, among whom a Government was set up, among other things, to insure justice. But I should like to call your attention to one fact about the Army, about the Armed Services:

"It was never set up to insure justice. It is set up as your servant, a servant of the civilian population of this country to do a particular job, to perform a particular function; and that function, in its successful performance, demands within the Army somewhat, almost of a violation of the very concepts upon which our Government is established.

* * * * *

"Therefore, it is impossible to conceive of the Army as an institution that completely parallels our democracy all the way through. It is a group that is given a job, in emergency, conducted under conditions of the greatest terror, of the greatest kind of fright and privation at times, to do a particular job.

"So this division of command responsibility and the responsibility for the adjudication of offenses and of accused offenders, cannot be as separate as it is in our own democratic government.

"Somewhere along the line - and I don't care particularly where it is - but somewhere the man who makes the final decision must have also on his shoulders responsibility for winning a war; and please never forget that."

These two gentlemen might have added, for of course they must know the fact, that approximately 80 percent of offenses actually tried under the Articles of War would not be treated as crimes in civil life; absence without leave, desertion, disobedience, mutiny, conduct to the prejudice of good order and military discipline, and the like. To this 80 percent the abstractions, refinements and technicalities of civilian practice do not fully apply - perhaps should not, in logic, apply at all. This point alone, since it is not possible to separate in practice strictly military offenses from others, probably explains a historic attempt at compromise. While always recognizing and emphasizing the need of administering the Army's law with justice, and the importance of courts to that end, Congress has hitherto declined to separate the powers of the combat command group and the advisory law group.

Our conclusion does not reflect on lawyers, whether civilian or military. It merely observes that they, like clergymen, doctors, engineers and the many other groups who supplied their several civilian aptitudes in time of war, are not military experts, in fact. With regard to this fundamental and vital controversy, they should hesitate before rejecting, especially in times like these, the advice of the seeded professional combat soldier.

We repeat for the purposes of this memorandum to you that nothing should be done to change the existing system in its application to any of the three Armed Services which will violate the principle we are here defending. For this reason we have omitted discussion of several of the matters in controversy upon which we fail to agree wholly or in part in the letter of November 22, 1948. The Elston Bill carried out most of the reforms which we considered essential. To condemn that Act, which our opponents have sometimes done, as useless and indeed no reform at all, strikes us as shockingly unfair and incorrect. We particularly object to any change which takes the judicial systems of the Armed Services out of Command control.

DeLafield, Marsh & Hope

Committee on Uniform Code of Military Justice -6- January 29, 1949.

While considering legislation which has already conferred upon the Army's Law Department many and great new powers, most of them plainly beneficial to the service, true friends of the Judge Advocate General's Corps of the Army and corresponding groups in the other Armed Services will do well to be discriminating in their further demands. We lawyers have become leaders in many non-legal pursuits, by virtue of supposed far-sightedness and objectivity. Some, we think, have mistaken on occasion doctrinal preoccupations for true legal principles. The public is entitled to a broader and more modest approach than that from experts in justice.

We agree on this subject with Command. The success of any Army depends on its commander. No one but he can be responsible for justice and discipline within his command. Because some commanders in the Second World War abused their authority is no reason for ignoring fundamentals like unity of command and responsibility in the chain of command.

We take the liberty of enclosing, although you may have seen them before, the report of the Special Committee on Military Justice, New York State Bar Association, dated January 23, 1947 and an article by the Committee's Chairman entitled "Reform in Military Justice" being a reprint from the "Bulletin" of the New York State Bar Association for April, 1948.

Very truly yours,

/s/ Abel I. Smith, Jr.
Abel I. Smith, Jr.

/s/ Miall Oran Meagher(g)
Miall Oran Meagher

/s/ P. J. McCook
P. J. McCook, Chairman.

encs.

Copies of enclosures available for loan
in Mr. Whelan's office, 3D-739, ext. 6952, Pentagon.

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES
National Headquarters: 2517 Connecticut Avenue, N.W., Washington 8, D.C.

October 1st, 1948

Honorable James Forrestal
The Secretary of Defense
Pentagon
Washington 25, D.C.

Dear Mr. Secretary:

We are informed that a committee under your direction, is preparing a code of Justice for the three services, Army, Navy, and Air Force.

In the second session of the 80th Congress, HR 2575, a bill to amend the Articles of War, previously passed by the House of Representatives, was passed by the Senate and became Title II of Public Law 759 - 80th Congress, "The Selective Service Act of 1948."

HR 2575, while not perfect, perhaps, had the wholehearted support of most of the lawyers of the United States who had served in the Judge Advocate Generals Department during the war.

Even while this bill was in the process of enactment in the Senate, the National Convention of the Reserve Officers Association passed a resolution approving the substance of its provisions.

We have heard rumors in the Pentagon that the present law never will go into effect. These rumors we are prepared to discount, pending the report of your committee.

While our views have not been requested by your committee during the drafting of the proposed Military Justice Code, we firmly are of the opinion that any attempt to weaken or destroy the beneficial effects of the present law will meet with vigorous opposition from the lawyers of this country, as well as, from the Reserve Officers of all branches of the services.

Hoping that the new Code will measure up to the standard of the present law, we remain

Respectfully yours,

/s/ John P. Oliver

John P. Oliver

Colonel, JAG-Res.

Legislative Counsel, ROA

/s/ Thomas H. King

Thomas H. King

Lt. Col., JAG-Res.

National Judge Advocate, ROA

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RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES
National Headquarters: 2517 Connecticut Avenue, N. W., Washington 8, D. C.

Mr. Edmond M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

1 November 1948

Dear Mr. Morgan:

Your letter of 8 October 1948, addressed to Colonel Clarence E. Barnes, National President of the Reserve Officers Association of the United States, has been referred to the writer for reply.

It is impossible to express views on a subject about which one does not have detailed information. There has been proposed a uniform code of military justice for the three services. This association at its convention in Denver in June of 1948 strongly endorsed H.R. 2575, which has now been incorporated in the Selective Service Act of 1948, (PL 759 80th Congress). This association vigorously urged the adoption of this code for the Army, and at the time it was under consideration, there was no separate military code for the Air Force, as it was operating under the articles of War. Frankly, it was anticipated that this code would be applicable to the Air Force. It is the opinion of the writer that it is presently applicable to the Air Force.

In any event it appears that what is needed is primarily a new code for the Navy, which should be brought up to a parallel to the new Articles of War. It is my view, and I believe substantially the view of the other members of our association, that the basic provisions of the articles of War, which go into effect February 1, can be made applicable to the Navy.

It may be argued that the new Articles of War, not having been tried, should be completely overhauled for the purpose of making them fit all three services. With this view I do not agree. If compromise is necessary in matters that are basic principles, then I an

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opposed to compromise. I have discussed this in great detail with many Judge Advocates who served in the war, and they agree with me that we should try out the new Articles of War, particularly the new Corps, the rule with respect to the improper interference by "command" with the judicial functions of the courts, and the new rules for procedure by way of review. I can definitely state that this association would strenuously oppose receding from the gains that have been made in military justice as evidenced by the law which Congress passed in 1948.

As we do not know the proposals that are pending before your committee, it is requested that we be furnished with the recommendations of the three services, particularly the recommendations of the Judge Advocates General, in order that we may intelligently comment and endeavour to be of assistance to your committee.

Sincerely yours,

/s/ THOMAS H. KING
Lt. Col., JAG-Res
National Judge Advocate

THK:al

State of Oklahoma
OFFICE OF THE GOVERNOR
Oklahoma City

Roy J. Turner
Governor

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November 12, 1948

Mr. Edmund M. Morgan, Jr., Chairman
Committee on a Uniform Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

Dear Mr. Morgan:

Since receiving your letter of November 1, requesting suggestions as to matters to be considered in preparation of a code of military justice, I have consulted with members of my staff and other individuals, whose experiences during the late war were along the lines necessarily involved in this matter.

It would appear that basically the lack of uniformity in the administration of military justice stems from the following:

- (a) Inadequate investigations.
- (b) Incompetent prosecution and defenses, especially the latter.
- (c) Tribunals composed of officers without legal training, and whose primary interest remains in their principal duties and assignments.

As a suggested solution to the three problems presented above, the following is offered:

- (a) In each headquarters exercising general court-martial jurisdiction, there to be provided a staff of legally trained officers to make all investigations within the command. One officer to be assigned to the investigations arising in each infantry regiment or comparable unit.
- (b) Trial Judge Advocates and Defense Counsels to be chosen, in all cases, from the above group of investigating officers, with the limitation that no investigating officer should prosecute or defend a case which he has investigated.

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Mr. Edmund M. Morgan, Jr., Chairman
Committee on a Uniform Code of Military Justice
November 12, 1948

- (c) General Courts-martial to consist of three officers in capital cases and one officer in all other cases. Such courts to be appointed by army or comparable command, from members of the Judge Advocate's Department made available to them. These courts to sit at designated places within geographical areas in time of peace and with designated units outside territorial limits of the United States in time of war.

The above type of suggestions are made rather than those which might be made relative to certain offenses, as it appears that most criticism stems from the administration of the law rather than from the particular laws themselves.

Sincerely yours,

S/ ROY J. TURNER

Roy J. Turner

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SUPREME COURT OF NEW JERSEY

ARTHUR T. VANDERBILT
Chief Justice

744 Broad Street
Newark 2, New Jersey

September 30, 1948

Dear Eddie:

Your good letter comes in just as I am in the midst of the most hectic period of getting our new court system organized. I not only have my judicial responsibilities in the Supreme Court to carry on, but I am designated under the new Constitution as "the administrative head of all courts in the State," and, believe me, it is no idle phrase when you have a new system of courts and a brand new system of procedure. In addition thereto I find that for the present a considerable portion of my time is taken up with what I might call the ceremonial aspects of my job - attending bar association dinners and telling them that they will survive the new rules just as the Federal courts have, and also in bidding hail and farewell to our older retiring judges. It is this pressure of my work that prevented my getting over to New York yesterday to greet you at the sessions of the David Dudley Field Centenary.

I want to be helpful and I have this very practical suggestion to make: I would suggest that you get in touch with Judge Alexander Holtzoff of the United States District Court for the District of Columbia. He was the secretary of the War Department Advisory Committee on Military Justice and I think knew more about the subject than any of us. At any rate our views happen to coincide all along the line. I am sure that he will be very glad to help you if you write him.

Please omit the business of calling me 'judge'. I am most anxious to remain an individual rather than a title to my old friends.

As ever,

Very sincerely yours,

/s/ Arthur T. Vanderbilt

Professor Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D. C.

Vanderbilt

VETERANS OF FOREIGN WARS OF THE UNITED STATES

NATIONAL LEGISLATIVE SERVICE
Defense Building Washington, D.C.

15 April 1947

PRELIMINARY REPORT OF COMMITTEE OF VETERANS OF FOREIGN
WARS OF THE UNITED STATES TO STUDY AND REPORT
ON COURTS-MARTIAL PROCEDURE

MEMBERSHIP OF COMMITTEE

Judge Donald E. Long, Chairman, Post #907, Portland, Oregon.
Harry B. Novak, Post #1575, Brooklyn, New York.
John E. Stone, Post #6473, Jackson, Mississippi.
Anthony P. Nugent, Post #18, Kansas City, Missouri.
Neal T. Shea, Post #801, Holyoke, Massachusetts.
S. H. Hunsicker, Post #609, Alexandria, Virginia.
Charles P. Sullivan, Post #284, Washington, D.C.

Pursuant to resolution number 534, adopted at the 47th National Encampment, the Veterans of Foreign Wars of the United States, at Boston, Massachusetts, in September, 1946, the above named committee has met, and after months of individual investigation, and from personal experiences, arrived at the following conclusions, relating to improvement of Courts-Martial Procedure, amendments of Articles of War and Administration of Military Justice:

1. That the Army and Navy have uniform manuals of Courts-Martial, and that the administration in both Army and Navy be the same as far as practicable.
2. That the appointive authority for general courts be removed from immediate command.
3. That it should be a military offense for any Commanding Officer, Officer, or other persons to directly or indirectly influence or attempt to influence the report of any investigating Officer or the findings of any court, whether it be general, special, or summary.
4. If the accused does not select his own attorney, a qualified Defense Counsel would be designated from a pool.
There would be a similar pool from which the accused could have Defense Counsel in all special courts of the Army and summary courts of the Navy. (A summary court in the Navy has the same jurisdiction as a special court in the Army.)
5. The pool of Defense Counsel would channel through the Judge Advocate General's Department in all general court cases, and special courts, if practicable.
6. All Defense Counsel should have special training in Military Law.

7. In all general and special court cases, Defense Counsel should be selected or appointed after the arrest of the accused, and in the Navy "on report" placed in serious cases, so that he could be present at time the investigating officer interrogated witnesses and that he have an opportunity to cross-examine. (This right the accused already has, so far as it is practicable, but the soldier, sailor, or marine hardly ever avails himself of the right.)

8. We are unanimous in our opinion that the accused should have a copy of the investigating officer's report.

9. Apparently, the Navy had no problem regarding qualified court reporters. This was not true in the Army. It was the opinion of the committee that well qualified reporters be available from a pool, so that the reviewing authority would have the benefit of accurate records.

10. Article of War #104 should be amended to include Field Officers.

11. More comparable punishment for officers and enlisted men was favored.

12. Enlisted men should be encouraged to attend general and special Courts-Martial trials and a notice of the time and place be posted on the unit bulletin board.

13. The Judge Advocate General's Department should have their own channel for promotion purposes and efficiency ratings.

14. That the law member of a general court be well qualified and not have the right to vote. ✓

15. That a qualified law member be detailed to all special courts, whenever practicable. ✓

16. That the deck court of the Navy be abolished, and the Captain's Mast be expanded.

17. That the Articles of War applicable, be better interpreted, by qualified personnel, to all enlisted men and not Just read, as at present.

18. That all obsolete articles of war be repealed.

19. That the Articles of War be amended, making it mandatory that qualified enlisted men be detailed as members of both general and special courts.

20. If, at the trial of any general court case, it is impractical to have a qualified law member and Defense Counsel selected from a pool, then on appeal or review, all questions of law may be considered and the case considered on the facts.

21. Members of general courts be deprived of the privilege of asking questions directly of the accused. That all questions be submitted in writing to the law member, and if the question appears to be competent, relevant and material, then the law member will ask the question. In the absence of a qualified law member, then the questions will be submitted to and asked by the Trial Judge Advocate.

22. That the Trial Judge Advocate and the accused, both, have the right of exercising two peremptory challenges.

23. That proper safe-guards in the way of qualified personnel be detailed to all places of confinement, both in the Navy and the Army, so as to prevent harsh and cruel treatment of prisoners, so as to avert any recurrence of what happened at Lichfield, England.

The above recommendations and suggestions will be made to the Commander-in-Chief of the Veterans of Foreign Wars of the United States, Louis E. Starr, and it was the opinion of the committee that its chairman submit in writing this statement to members of the Senate and House Committees on Armed Services.

/s/ Donald E. Long
DONALD E. LONG,
Chairman, Committee on Military
Justice.

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CIRCUIT COURT OF OREGON
Fourth Judicial District
Department No. Eleven
Portland 4, Oregon

DONALD E. LONG
Judge

October 7, 1948

Mr. Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform
Code of Military Justice
Office of the Secretary of Defense
Washington, D.C.

Dear Mr. Morgan:

This will acknowledge receipt of your letter of September 27 which has reference to the work of the Committee on a Uniform Code of Military Justice.

You have access to the report submitted by my committee in behalf of the Veterans of Foreign Wars of the United States. I have gone over our suggestions and recommendations, and at the present time do not have any additional suggestions to make.

In view of the fact that my committee has not been called upon to make any further study or recommendations since our last meeting in Washington, D. C., I am forwarding your letter to the National Commander of the Veterans of Foreign Wars for his information. It may be that he has a new committee on Military Justice.

With my best wishes, I am

Sincerely yours,

/s/ Donald E. Long
Judge

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c.c. Commander-in-Chief
Veterans of Foreign Wars

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VETERANS OF FOREIGN WARS
OF THE UNITED STATES

National Headquarters

October 15, 1948.

Mr. Edmund M. Morgan, Jr.,
Chairman, Committee on a Uniform
Code of Military Justice,
Office of the Secretary of Defense,
Washington, D.C.

Dear Mr. Morgan:

Your letter of September 27, 1948 to Judge Donald E. Long, Chairman, Special Committee on Military Justice, Veterans of Foreign Wars, has been referred to me together with a copy of the latter's reply of October 7, 1948.

I am enclosing herewith the report of the VFW Committee on Court-Martial Reform which I believe has already come to your attention. This report has been under study by our staff here in Washington with the end in view of affixing such modification as would be warranted by events of the last eighteen months.

As a result of this study it is our opinion that the twenty points set out in the attached report still represent the position of the Veterans of Foreign Wars with respect to military justice.

Our organization has long urged the formulation of a uniform code of military justice applicable to all branches of the armed services, and we shall be pleased to lend our support to such a code should one be submitted to the 81st Congress.

If there is any assistance that I may render in this regard please do not hesitate calling on me at any time.

Sincerely yours,

/s/ Omar B. Ketchum
OMAR B. KETCHUM, Director

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Enclosure

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LEONARD M. WALLSTEIN, JR.
Counsellor at Law

233 Broadway, New York 7

October 14, 1948.

Prof. Edmund M. Morgan, Jr.
Chairman, Committee on a Uniform Code
of Military Justice
Office of the Secretary of Defense
Washington, D.C.

My dear Professor Morgan:

I am forwarding under separate cover for
the use of your Committee five reprints of my article
"The Revision of the Army Court-Martial System" which
appeared in 48 Columbia Law Review (March 1948).

I hope you will find them helpful.

Very truly yours,

/s/ Leonard M. Wallstein, Jr.

Copy of attachment referred to
in letter may be obtained from
Miss Carr, Room 3D-745, Pentagon,
Ext. 6952.

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WAR DEPARTMENT
War Department Special Staff
Office of the Executive for Reserve and ROTC Affairs
Washington 25, D.C.

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CSRES 334

18 November 1948

Mr. Edmund M. Morgan, Jr., Chairman
Committee on Military Code of Uniform Justice
Office of the Secretary of Defense
Room 3 E 733 Pentagon
Washington 25, D.C.

Dear Mr. Morgan:

The following comments regarding the proposed Code of Military Justice now being drafted by your Committee are submitted in response to your letter of 1 November 1948:

a. The code should apply with equal force to members of the Organized Reserve Corps serving on extended active duty in time of war or during a declared state of emergency as it applies to members of the Regular Army.

b. Similarly, the code should apply to members of the Organized Reserve Corps while serving on an active duty status under competent orders in time of peace.

c. The code should include the provisions of Title II, Public Law 759 (80th Congress).

Attention is specifically invited to the last sentence of Section 37 of the National Defense Act of 1916 as amended, which reads as follows:

"Members of the Officers Reserve Corps, while not on active duty, shall not, by reason solely of their appointments, orders, commission or status as such, or any duties or functions performed or pay or allowances received as such, be held or deemed to be officers or employees of the United States or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States."

The status of members of the Organized Reserve Corps, while not on active duty, as defined above, should not be impaired in any manner whatsoever by any provisions of the proposed Code of Military Justice.

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It is requested that this office be given the opportunity of reviewing and commenting upon the proposed Code of Military Justice before it is submitted to the 81st Congress.

Very truly yours,

S/ WENDELL WESTOVER

Wendell Westover
Brigadier General, GSC
Executive for Reserve & ROTC Affairs

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13 August 1948

Professor Edmund M. Morgan, Jr.,
Harvard Law School,
Cambridge, Massachusetts.

Dear Professor Morgan:

For more than a year now I have been employing every means of persuasion upon the Judge Advocates General of the several services, and upon the legal staff of the Department of Defense, to institute the drafting of a new code of military justice for the armed forces, symbolizing and greatly furthering the purposes of their real unification. It is therefore a great pleasure to observe in the public press that you have been named Chairman of the Committee appointed for that purpose. Please accept my congratulations and best wishes.

It is with some hesitation that I venture further to offer suggestions in the matter of the organization and content of such code. You would probably prefer that I should make any suggestions I may have through the Army representative on your Committee. My persistence in pressing the matter upon the Army JAG Office has, however, rendered me officially somewhat "persona non grata" with regard to the matter, I fear, for my suggestions have not been invited. I hope, therefore, you will permit me to outline briefly to yourself my idea of the general organization of such a code, based upon my keen interest in the matter, a great deal of practical experience in the JAGD of the Regular Army, and comparative studies of the codes of other countries that I have made.

You do not have to be told, of course, that our present Articles of War are basically a collection of criminal provisions--much after the order of the "Military Laws of Rufus" which I found to be the only Roman code now extant--taken over virtually intact from colonial English law and amended from time to time by Congress through addition of a patch-work of procedural provisions inserted here and there, under half-numbered articles, or added to existing punitive articles. There appears to have been no consideration at any time of a completely new draft of the code since the founding of the Government. One of the less gratifying features of my persistence with the JAGO has been, in fact, to stress the total lack of scholarly research of any character in our Department as a basis of any comprehensive new work, pointing out that Winthrop's "Military Law and Precedents", the most recent and practically only work on military law of any worth that our Department has produced, was published in 1886--long before the advent of not only radar and the atomic bomb, but also of the airplane or the battleship, or even the automobile. Our present system therefore belongs quite literally to the horse-and-buggy age of massed foot-soldiers armed with muzzle-loading muskets!

The point I wish to make here, as I am sure you understand, is that the present Articles of War and Articles for the Government of the Navy cannot be "revised" and combined into a modern code with much more success than could be expected, for example, from efforts to convert Robert Fulton's steamboat into an aircraft carrier. * * * * *

In addition to inserting the major provisions recommended by the Bar Association as a result of experience in the recent war, we were able to remove the confusing half-numbered Article 50 $\frac{1}{2}$ (which the Bar Association Committee had declared to be unintelligible), to transfer the pre-trial investigation from the midst of punitive Article 70, and to make a few other such improvements in the superstructure of our ancient vessel; but the Robert Fulton fundamental design and ultimate capacity remain the same. Neither I nor the Department can claim much credit for such superficial improvements.

On the positive side, I think the new code should be drafted in as broad and general terms as will serve its purpose, leaving as many details as possible -- which may vary with circumstances -- to implementing regulations of the several services. This will make for a maximum of flexibility, within the broad limitations and requirements considered essential by Congress as a matter of basic law, and it will dispel the fears of the separate services that the combined code may impose upon them all restrictions and requirements which are properly applicable to but one and which may therefore result in unnecessary and crippling confusion to the others.

To promote the same purposes of flexibility and reassurance to the separate services, I believe the drafting of the code should be broken down into more or less independent separable parts, which will greatly assist in segregating non-controversial sections and their assignment to sub-committees for the intensive research and study which they require. The "Punitive Articles" are a good example; and these may be further divided into "Ordinary Crimes" and "Military Offenses". Both need extensive work. Use should be made of the modern criminal codes of states, such as Louisiana, for example, and military offenses should be re-defined and modernized. Criteria for maximum punishments should be indicated, for war and for peacetime, in and out of combat or other "emergency" areas.

Another project for separate study and trial-drafting is the definition of military jurisdiction, rules for the exercise of concurrent military and civil jurisdiction, and what I should call "auxiliary" civil (Federal) jurisdiction in the case of soldiers who committed murder in Germany, for example, and through some means were discharged from the service before apprehension (and who therefore literally "get away with murder" under the present state of the law), and to provide for Federal prosecution of civil offenders against the military service as now provided in effect by A.W. 117. This definition of military jurisdiction

should probably be the initial section of the new code. It presents little ground for controversy between the services, but would require necessary representation of the civil viewpoint to prevent improper encroachment of military jurisdiction upon civil liberties, while still providing the military with means of emergency control of civilians--for example, workmen accompanying the forces in foreign countries in time of war.

I believe the exercise of military jurisdiction should be treated under two distinct headings: (1) as a purely disciplinary prerogative of military commanders, which is essentially the coercitio or imperium exercised by ancient Roman magistrates and military commanders, and (2) as military justice administered through courts-martial. The confusion between these two means of the exercise of military jurisdiction is the underlying cause of much of the criticism of the administration of military justice in the Army. The plain fact is that an Army commander has practically no purely disciplinary authority over his command, and has therefore often sought to clothe his disciplinary actions with the appearance of legality through virtually directing the courts what to do. Navy commanders have more disciplinary authority, which may account for the absence of criticism of the Navy in that regard. In any event, I believe reasonable maximum purely disciplinary punishments should be set by law, subject to implementation through the assignment by executive and military orders of limitations to be observed (within the limitations set by Congress) down the chain of military command, varying in accordance with requirements of the particular service and situation.

The organization of trial and appellate courts and their operation will be made much easier, I believe, if the field of "criminology" in the services can be reasonably separated from the field of "disciplinary correctives", and the legal departments given jurisdiction over the "criminals" somewhat corresponding to the jurisdiction of the Medical Departments over the "sick". I would suggest that inferior courts be considered disciplinary in character and operate under "command" jurisdiction as they do now; but that general courts operate under the complete control of the legal corps, with provision, however, that combat commanders should have considerably increased disciplinary authority. This could be accomplished by giving inferior courts greatly increased powers of punishment, subject to supervision by higher commanders, in combat zones and with regard to combat offenses that require immediate suppression.

I do not wish unreasonably to burden you with further details of my ideas unless you should wish them. I inclose, however, a preliminary draft of a part of my conception of "Military Jurisdiction" in the definition stage, as illustrative of what I have in mind.

While I should be very happy to be of any possible service to you in this project, I must ask, since I am in active military service and have no official authority to advise in this matter, that my suggestions be considered as privately made to yourself, and not connected with my name in any consideration which they may receive by your Committee.

Name Withheld

MILITARY JURISDICTION

1. Sources.--Military jurisdiction shall be exercised by the President as Commander-in-Chief of the armed forces and his subordinate commanders as an inherent prerogative of military command, subject to these Articles and to the common law and custom of war.

2. Basis.--Military jurisdiction shall be based upon the personal status of persons herein defined as subject thereto, without regard to national boundaries or other considerations of physical location; but persons subject to such jurisdiction must be physically present under the command, custody or control of the commander exercising it.

3. Persons Subject to.--The following classes of persons shall be subject to military jurisdiction:

a. Persons legally enrolled in or serving in or with the armed forces and subject to the command of the President;

b. Persons accompanying or serving in or with the armed forces

(1) outside the United States or

(2) in the field or at sea in time of war;

such persons to include but not to be limited to persons voluntarily accompanying the forces, or serving with or near the same under contract with the United States or its agencies or with contractors or subcontractors in the service of the United States or its agencies, and persons otherwise found within any area under the territorial jurisdiction of a military commander of the United States;

c. Persons lawfully held in military custody, including prisoners of war, military convicts, persons held in temporary protective or preventive custody, and persons subject to punishment under the laws of war for offenses committed before or after being taken into custody;

d. Patients and inmates of hospitals and other institutions operated and administered by the armed forces;

e. Enemy and other civil populations over which military government or temporary military control has been established, subject to the laws of war, statutes of the United States, and the orders of the President;

f. Persons who expressly consent thereto.

4. Concurrent Jurisdictions.--Military jurisdiction shall not exclude concurrent civil jurisdiction of the United States or of any State. When two or more jurisdictions attach, custody of the accused shall determine the right of priority to proceed, subject to the rules set out following, and to any agreement between the authorities concerned not inconsistent with such rules:

a. When, in time of peace, civilian victims or vital interests of the civilian community are involved, military jurisdiction should defer to civil jurisdiction; and, conversely, in time of war, or when only military victims and military interests are involved, civil jurisdiction should defer to the military; but in case of conflicting interests any case may be disposed of by agreement.

b. Except for espionage or other offenses punishable under the laws of war, no person shall be punished through the exercise of military jurisdiction for any offense committed before he became subject thereto; but any such person will, in time of peace, be surrendered upon request to the appropriate authorities of the civil jurisdiction concerned, if not held by military authority for prosecution upon a serious offense, and he may in any event be so surrendered, in the discretion of the military authorities.

c. Members of the armed forces on inactive or retired status shall be subject to the exercise of military jurisdiction only with regard to offenses committed while on active duty, or while in uniform, and may be ordered upon active duty for the exercise of such jurisdiction.

5. Auxiliary Jurisdiction of Federal District Courts.--Upon request by any general or flag officer, or the commanding officer of any detached military unit, vessel, or installation, the local public prosecutor of the United States will assume responsibility for the prosecution of any person not subject to military jurisdiction who has committed a serious offense while subject thereto, or who has committed a serious offense against any person in the military service; and any district court of the United States shall have jurisdiction to hear and determine such a prosecution for violation of military law while the accused was subject thereto, or for violation of the criminal laws of the United States, without regard to territorial limitations therein contained, in the case of an offense against any member of the armed forces or any person subject to military jurisdiction.

6. Limitations.--a. Time within which Trial Must Begin.--Except for mutiny or murder or, in time of war, desertion or any case in which the President shall determine that considerations of national security require further postponement of the trial, no person subject to military jurisdiction shall be tried by court-martial for any offense committed more than two years before his arraignment, exclusive however of any time when accused was not amenable to military justice because in the custody of civil authorities, or by reason of other manifest impediment; but upon prosecution for any such excepted offense, accused may be found guilty of and punished for any lesser included offense.

b. Number of Trials.--No person subject to military jurisdiction shall be tried by court-martial for any offense for which he

has been formerly tried and acquitted, or formerly arraigned and evidence taken by another court-martial or by any other court of the United States or of any state, unless by agreement with accused, or unless the completion of the former trial was prevented by military necessity and the subsequent trial resumed with the least practicable delay; but in any case in which an accused person has been found guilty and sentence adjudged, a new trial may be ordered, either before or within one year after the sentence has been finally approved; provided, however, that upon such new trial the sentence finally approved shall not be more severe than any sentence theretofore approved upon conviction of the same offense.

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30 August 1948

Professor Edmund Morris Morgan
Harvard Law School
Cambridge, Massachusetts

Dear Professor Morgan:

Under date of 23 August 1948 an article appeared in the Stars and Stripes stating you were to head a committee to codify and equalize military law. An attorney and a member of the Officers Reserve Corps for several years past, and recently having completed approximately a year and a half service as law member on a General Court Martial as a member of the Judge Advocate General's Department, I have formulated certain ideas for reform of the procedure in General Courts which I am convinced would be definite improvements in the system of military justice. I set these forth simply, without argument, well realizing your committee could well anticipate any arguments I might present.

It has been my experience that the custom of having a "law member" and a "president," each exercising in the same court judicial functions, the demarcation line between which is seldom, if ever, clearly understood, even assuming that they are clearly defined in the manual (which seems doubtful), is entirely unsatisfactory, is cumbersome, and frequently results in a travesty of justice. In my considered opinion the law member and the president should be one and the same person at all times, a person learned and experienced in law. It has been my experience that the president is always from some branch of service other than the legal branch, has other things on his mind, other duties to perform, and has had little or no experience in legal procedures. He has perhaps "sat" on a court before, but generally in the distant past. In any event, being the senior officer and president, he presumes to take charge and blunders his way along, usually needing to be prompted by the law member as to his next move. However, frequently he sets out on his own, and, not knowing the judicial procedures, much less the rules of evidence, proceeds to dictate what should be done and how it should be done. The situation is comparable to that of any layman being placed in any position of authority, surrounded by technical considerations which he knows not of and feeling called upon to take a dictatorial attitude. If the president must listen for the promptings

of the law member there is no need for his being present as president. If he sets out in a dictatorial policy of his own, the administration of justice is a mockery, and, likewise, better he be not there. He is in a senior position of authority on the court, but contributes little to efficiency in the conduct of the trial or the administration of justice. On the contrary, he usually causes distress to the trial judge advocate, the defense counsel, and the law member, those charged with the performance of legal duties. The president and law member are usually separate individuals because regulations prescribe that the highest ranking member on the court shall be the president, and the law member is usually not the ranking member. The ranking officer therefore becomes president regardless of his knowledge, or lack of knowledge, of law and judicial procedures.

So now for the remedy. At no time since my first association with the Army Reserve some twenty-five years ago or during my approximately ten years on active duty have I ever observed an occasion where a member of the Judge Advocate's Department was called upon to exercise a command function. By nature of his duties, he is purely a staff officer. Why, then, should a Judge Advocate have rank? He is in no more need of rank than a Chaplain. The designation "Judge Advocate" should be sufficient to satisfy the requirements of dignity and pride. It should be not necessary that he be captain or colonel. Of course, among the group seniority benefits should prevail, such as salary based on length of service, etc. But rank he needs not. Nor does he need to wear assimilated rank on his shoulders. Why chaplains are still permitted to do so is still not understood by me.

So, having disposed of the inflexibility and traditional precedence of rank, there is nothing to prevent an enactment to prescribe that the president of a general court shall be a member of the Judge Advocate General's Department, thus to insure that established legal procedures be followed and dignity commensurate with the requirements of the proper administration of Military Justice prevail. I feel that what I have stated applies equally to the efficient administration of justice in the Navy and Air Force.

- Name Withheld -

Albany Law School
Albany, New York
7 December 1948

My dear Mr. President:

According to the newspapers, you are about to sign a document which will permit enlisted men to aid in a court martial trial.

This, Sir, is not correcting the faults of the courts martial system. For enlisted men are as corruptable as officers and are an easier target for duress from high grade officers than are junior officers. The fault, I feel, Sir, is in the qualifications of sitting as judges of a military trial.

I should like to suggest that:

1) Only men who have passed a state bar exam and are qualified to practice before a federal court be permitted to sit as a judge in a military trial.

2) That these qualified men be responsible to no one but their branch of service headquarters in Washington.

3) That these men move from post to post as does a circuit judge.

4) That these men try all cases and all grades of courts martial in which a soldier may be punished.

5) That these men wear robes (which would separate them from any specific sympathy within the trial) and that the Rules of Procedure be revamped, giving the military trial the dignity and justice found in our State and Federal courts.

6) That for findings of fact, a jury be enpanelled from among the soldiers of a post foreign to the locus of the trial.

These, sir, are merely suggestions hastily drawn for your consideration. I feel that I am somewhat qualified to offer them because:

1) I was an enlisted infantryman, 2) an infantry officer, 3) punished by Company Punishment 6 times as an enlisted man and 2 times as an officer, 4) I am now a law student.

Permitting enlisted men to sit among the panel of judges of a courts martial is very good politically to insure more enlistments but there is real need of justice in our system of military trials. As honest and well meaning as any soldier, officer or EM, might be who is chosen to pass judgement at a military trial, a lack of a legal background will result in a miscarriage of justice.

Very truly yours,

/s/ Ernest J. Wolfe, Jr.
ERNEST J. WOLFE, JR.

P.S. (To the clerk who bothers to read this letter) Please see that the president gets at least an inkling of the material in this letter. It was plenty tough to see my buddies "railroaded" on courts martial.