

4 January 1949

Larkin

4 (6)

REC'D JAN 11 1949

MEMORANDUM FOR COLONEL CURRY

Subject: AW 107, 108 and 109, comparison with current naval law, regulations and practice.

1. There is a difference in form between AW 107-109 and naval law in that the Articles for the Government of the Navy do not contain comparable provisions.\*

2. AW 107.

(a) Statutory naval provisions comparable to AW 107 are 34 USC 183 and 183a.

(b) In substance, Army and naval provisions conform to each other in that enlisted personnel in both services are compelled to make good time lost in excess of one day through injury or disease the result of their own misconduct or through intemperate use of drugs or alcoholic liquor. Army and naval provisions, however, differ substantially in regard to time lost by enlisted personnel in excess of one day through unauthorized absence or confinement under sentence or while awaiting trial and disposition of the case if trial results in conviction; in the Army, soldiers are compelled to make good the time so lost, while in the Navy, enlisted personnel, upon their own application only, may be permitted to make good the time so lost.

(c) The comparable provisions read as follows:

AW 107. "Soldiers to Make Good Time Lost.--Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve."

\* CSAW 107, 108, and 109 refer to a memorandum from the Statutory Revision Group of the Office of the Army Comptroller to the Judge Advocate General of the Army of 6 August 1948 (letter CSACM-L) indicating that AW 107-109 might be eliminated from the code of military justice and placed elsewhere in the United States Code.

For a slight modification of par. 1, see, post, par. 4b, page 10.

34 USC 183. "Term as affected by absence from duty on account of sickness resulting from misconduct.--An enlistment in the Navy or Marine Corps shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of injury, sickness, or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct. (Aug. 29, 1916, ch. 417, 39 Stat. 580; July 1, 1918, ch. 114, 40 Stat. 717.)"

34 USC 183a. "Term as affected by unauthorized absence from duty or by confinement under sentence or pending trial. --Every enlisted man in the naval service who, without proper authority, absents himself from his ship, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, may be permitted to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such unauthorized absence or confinement, amount to the full term of his enlistment. (May 21, 1928, ch. 650, 45 Stat. 620.)"

(d) Art. C-10304(4) BuPers Manual 1948 explains the policy underlying, and application of, 34 USC 183a as follows:

"\* \* \* The application of this law permits personnel to make good such absences from duty during the current enlistment in order to receive, upon subsequent enlistment within 3 months after discharge, the reenlistment allowance to which they would have been entitled had such time not been lost. See reenlistment allowance, article C-1407. \* \* \* enlisted personnel \* \* \* shall make official application to their commanding officer for this privilege, \* \* \*. The commanding officer's action on the request shall be final unless there are unusual circumstances attendant which would justify referring the application to the Bureau. \* \* \* When enlisted personnel make such application \* \* \* and application is approved, they will be entitled, on subsequent enlistment within three months of date of discharge, to reenlistment allowance based on the full term of the enlistment from which discharged. Furthermore, such persons will be entitled to the reenlistment allowance even though they may be discharged within three months of date of expiration of enlistment as extended by adding the time lost to such enlistment or extension of enlistment."

(e) The following is an excerpt from a pertinent table in Art. C-7817 BuPers Manual 1948, "furnished as a handy reference":

"Table of Time Not Served"<sup>1</sup>

Effect of time not served For purpose of--	Sick--misconduct in excess of 1 day	Unauthor-ized ab-sence over 24 hours	Confined awaiting trial (if convicted)	Confined as result of sentence of court mar-tial (more than 1 day)	Absence while in civil arrest and while serving sentence
Discharge (by reason of exp. of enlistment).	Time must be made up. Op-tional for minority enlistment, C-7817(3) and C-10304(2)*	Optional --Time may be made up. C-7817(1) and C-10304(4).	Optional --Time may be made up. C-10304 (4).	Optional --Time may be made up. C-10304 (4).	Optional-- Time may be made up if convicted and retained in naval service. C-1030(4).

<sup>1</sup> Entries are to be used as a guide, but are not to be considered authoritative. Applicable Manual references should be consulted.

" \* \* \* "

(f) The following are comparable details of scope and application of AW 107 and 34 USC 183-183a:

(1) As far as AW 107 and 34 USC 183 refer to misconduct, this includes misconduct prior to enlistment; the decisive question is whether time in excess of one day is lost during the enlistment. Cf. Dig. JAG Army 1912-1940, p. 376, sec. 465(4); General Snedeker, Misconduct and Line of Duty (Revised), p. 14, fn. 175.

(2) The Act of 27 September 1944 (ch. 426, 58 Stat. 752) specifically provides that venereal disease shall not be presumed to be due to wilful misconduct if the person in service complies with the Army or Navy regulations requiring him to report and receive treatment for such disease. Cf. Navy

\* The interpretation of 34 USC 183 to the effect that making good time lost by misconduct is optional in case of minority enlistment deviates from CMO 2-1930, 19 (with further references.)

Department General Order 225; CMO 6-1946, 221; also 2-1945, 68, and 2-1947, 44.

(3) Neither AW 107 nor 34 USC (183-)183a refers expressly to confinement by civil authorities; the application in BuPers Manual of the rule of 34 USC 183a to civil confinement (cf., ante, p. 3, par. (e)) conforms to similar Army practice; cf. Dig. JAG Army 1912-1940, p. 376, sec. 465(3):

"The question whether a soldier released by civil authorities without trial is legally liable to make up time lost by his arrest and detention depends upon the cause of such arrest and detention. If a result of his own misbehavior or misconduct he must make up time so lost under A.W. 107; if not, there exists no such liability."

There is, of course, the difference that additional service is compulsory under AW 107 while it is optional under 34 USC 183a and depends upon retention of the man in the service.

(4) There is a difference between AW 107 and 34 USC 183a in that the former mentions desertion as well as unauthorized absence while the latter mentions, in this connection, unauthorized absence only. This difference is probably linked to the other, more basic, difference between the two provisions, AW 107 providing for compulsory additional service while 34 USC 183a provides for additional service only upon application by the enlisted man and only upon approval of the application by the commanding officer (or BuPers). The approval of the application depends probably upon the question whether the applicant can be recommended for reenlistment; cf. Art. C-7821(18) BuPers Manual 1948.

(5) A discharge issued a soldier by competent authority constitutes a waiver by the Government of his liability, under AW 107, for further service by way of compensation for time lost; Dig. JAG Army 1912-1940, p. 377, sec. 465(6), and (1946) 5 Bull. JAG Army, p. 93. Art. C-10304(5)(b) BuPers Manual 1948 declares that the extension of enlistment for time lost by misconduct (34 USC 183) is automatic, except that personnel if found not physically fit for service or reenlistment by a board of medical survey should be discharged, type and character of discharge based upon consideration of their medical and service records. Cf. also (1943) 2 Bull. JAG Army 429 and CMO 1-1940, 68, for situations in which enlisted personnel who had to make good time lost were not in a full-duty status.

(6) The Department of the Army regards a soldier as being compelled to make good the time lost by unauthorized absence (or desertion) although prosecution and punishment may be barred by the statute of limitations; Dig. JAG Army 1912-1940, p. 376, sec. 465(2); 1 Bull. JAG Army, p. 27. (1942).

(7) It may be observed that, prior to the enactment of 34 USC 183a, the Attorney General held, in 1922, in regard to a deserter from the naval service

"that the period of desertion must be deducted from the contract period of enlistment, and the latter accordingly extended until the enlisted man has fully served the term for which he contracted. The provisions to that effect which have for a long time been a part of the Articles of War (see e.g., section 1342, Revised Statutes, Article 43; Act of August 29, 1916, c. 418, sec. 3, Article 107, 39 Stat. 667) are merely declaratory of general principles and the common military law." (33 Op. Atty. Gen. 121, 128.)

The syllabus of this part of the Attorney General's opinion in CMO 4-1922, 11, reads as follows:

"The period of desertion must be deducted from the contract period of enlistment and the latter extended (if desired by the Navy Department) until the enlisted man has fully served the term for which he contracted."

This view, however, was apparently overruled by CMO 5-1925, 16 (about three years prior to enactment of 34 USC 183a):

"Held: The conclusion supported by law and precedents seems to be that all enlisted men regardless of the term for which enlisted are required to make up the time lost by absence on account of 'injury, sickness, or disease' resulting from their own misconduct, and that no enlisted man of the Navy or Marine Corps may be required to make up any time otherwise lost (J.A.G. Memo: April 17, 1925)."

3. AW 108.\*

\* "Article of War 108, relating to separation of soldiers from the service, is changed in terminology to eliminate some archaic provisions and to conform to the method of prescribing the manner and type of discharge which is now followed and has been followed for many years. \* \* \*

"\* \* \* I may say, also, the changes in article 108 expressly authorize the bad conduct discharge by a special court martial. Without the change, the special court martial would be prohibited from adjudging the discharge in any form." (General Hoover, Subcommittee Hearings on H.R. 2575 (No. 125), p. 2134.)

(a) There is no statutory naval provision similar to that part of AW 108 which prescribes that

"No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge \* \* \*"

although there are statutory and regulative provisions which, in effect, amount to the same. Cf. 33 Op. Atty. Gen. 121, 129:

"It is true that the Articles of War (e.g., Act of August 29, 1916, c. 418, sec. 3, article 108, 39 Stat. 668) require a formal certificate of discharge in the case of an enlisted man in the Army, while there does not seem to be any such provision relative to the Navy (although such a method of evidencing the discharge would probably be adopted, without statutory requirements, from reasons of administrative convenience."

In line with this opinion, sec. 334 NC&B provides:

"The jurisdiction of courts martial over \* \* \* enlisted men ordinarily ends when they become regularly separated from the service by \* \* \* discharge. \* \* \* The mere expiration of the period of enlistment of an enlisted man, without the concurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offenses committed during the period of enlistment. Discharge by expiration of enlistment does not take effect notwithstanding delivery of the discharge certificate, until midnight of the last day of service. Discharge at any other time or for any other cause takes effect on delivery of the certificate."

Besides, there is a statutory provision (38 USC 693d, enacted in 1944 and amended in 1945) which applies, to all armed forces, the rule stated in the first part of AW 108:

"No person shall be discharged or released from active duty in the armed forces until his certificate of discharge or release from active duty and final pay, or a substantial portion thereof, are ready for delivery to him or to his next of kin or legal representative: \* \* \*."

Statutory naval references to discharge certificates are:

- 34 USC 193 The Secretary of the Navy prescribes the form of honorable discharge.
- 34 USC 194 "'Honorable discharge' as a testimonial of fidelity and obedience" to be granted by commanding officer of a vessel.
- 34 USC 205-206 Certificates of honorable discharge to be granted to persons who were discharged for fraudulent enlistment because of misrepresentation of age or minority during Spanish-American War or World War I.
- 34 USC 597 The Secretary of the Navy is authorized and directed to issue discharge certificates in the true names of persons who served under assumed names and were honorably discharged.
- 34 USC 598 The Secretary of the Navy is authorized to issue duplicate of lost or destroyed certificate of discharge.

BuPers Manual 1948 provisions relating to certificates of discharge are Articles C-10501 et seq., H-6208.

(b) There is no statutory naval provision similar to that part of AW 108 which provides that

"no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Army, or by sentence of a general or special court martial."

But there are several statutory and regulative naval provisions which, in effect, although with certain modifications, amount to the same:\*

---

\* There was a substantial difference between old AW 108 and naval law in that the only discharge by court martial which AW 108 authorized was a (dishonorable) discharge by general court martial while naval law authorized, in addition, a (bad conduct) discharge by (general or) summary court martial; AGN 30, 35. After AW 12, 13, and 108 have been amended by P. L. 759, Army law conforms to naval law.

10 USC 651	Purchase of discharge	34 USC 196*
10 USC 652	Discharge on account of dependent relations	
10 USC 653, 653a, 654b, 655; 50 App. USC 1531	Discharge of minors, etc.	34 USC 202, 203, 205, 206, 900a
10 USC 656	Discharge of disabled men	
	Discharge within three months of expiration of term	34 USC 195
	DD, BCD, and discharge for the good of the service, payment of \$25 to men so discharged	34 USC 197, 197a
(50App.USC 732)	Discharge within 6 mos. after end of war	34 USC 186
Sec. 4(b), Selective Service Act of 1948	Discharge of inducted persons in accordance with standards and procedures prescribed by Secretary of Defense	Sec. 4(b), Selective Service Act of 1948 (cf. N.D.Bull.10/31/48, p. 18.)
(38 USC 693h)	(Review of discharges (except discharges by GCM) by board of review, discharges and dismissals. (Cf. also 5 USC 191a.))	(38 USC 693h)

AW 108 may cause the impression that the only cases in which a soldier may be discharged before his term of service has expired are those prescribed by the Secretary of the Army and those in which a court martial adjudges a discharge. There are, however, as foregoing list shows, some statutory provisions for discharge of soldiers prior to expiration of enlistment.

A provision of Navy Regulations 1920 comparable to the second part of AW 108 is Article 1686 (cf. Art. 1279, Navy Regulations 1948).

\* Cf. Art. C-10307(3), BuPers Manual 1948.

The statutory basis of Art. 1686, Navy Regulations 1920, is 34 USC 591, i.e., Sec. 1547 Revised Statutes. The provisions of the Army Regulations dealing with discharges are based upon 10 USC 16 (Patterson v. Lamb, 1947, 329 US 539, 542; cf. also Davis v. Woodring, C.A. D.C., 1940, 111 F.2d 523, 524). AW 108 could be cited as an additional statutory basis of regulations issued by the Secretary of the Army and dealing with discharges. It may be observed that AW 108 has been referred to as basis of the view that administrative discharges are not subject to review by civil courts; cf. Nordmann v. Woodring, 28 F.Supp. 573 (1939, D.C. Oklahoma) and cases just cited; the Supreme Court, in Patterson v. Lamb, mentioned the question, but did not determine it.

In addition, there are numerous provisions dealing with discharge in Parts C and H, BuPers Manual 1948 (cf. id., p. 411, heading "Separation").

(c) It appears that AW 108, at the beginning, uses the words "enlisted" and "inducted" as synonyms although there is a difference between induction and enlistment. According to CMO 1-1944, 105, the case of Billings v. Truesdell, 1944, 321 US 542, caused changes in induction procedure so that induction can be completed without administration of oath (see, post, par. 4a).

#### 4. AW 109.

(a) A statutory naval provision comparable to the first sentence of AW 109 is 34 USC 593, reading as follows:

"Oath of allegiance.--The oath of allegiance now provided for the officers and men of the Army and Marine Corps shall be administered hereafter to the officers and men of the Navy. (Mar. 3, 1899, c. 413, sec. 25, 30 Stat. 1009.)" Cf. LRNA 1945, p. 852; the provision concerning the oaths to be taken by officers and enlisted men of the Marine Corps is sec. 1609 Revised Statutes, 34 USC 694; LRNA 1945, p. 428.

Cf. also 5 USC 16 relating to the oath of office in the civil, military, or naval service.

The oaths of allegiance upon enlistment in the Army, Navy, Marine Corps or Coast Guard are identical except for their concluding portions\* and read as follows:

\* and except for the following details:

- (1) the Navy and Coast Guard oaths contain an "and" preceding the words "that I will serve \* \* \*";
- (2) the Navy and Coast Guard oaths use commas in lieu of semi-colons after "United States of America" and after "whomsoever";
- (3) the Marine Corps oath does not contain the name of the person, at the beginning, after "I".

"I, \_\_\_\_\_, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me

(Army:)

according to the rules and Articles of War."

(Navy:)

according to the rules and articles for the government of the Navy."

(Marine Corps:)

according to the Rules and Articles for the Government of the Army, Navy, and Marine Corps of the United States."

(Coast Guard:)

according to the laws of the United States and the regulations governing the Coast Guard."

(The Army oath appears in AW 109; the Navy oath appears in the "Shipping Articles" (NavPers 603, Rev. 12-44); the Marine Corps oath appears in the "Enlistment-Induction Contract and Record (NavMC 118(2)-PD); the Coast Guard oath appears in the "Enlistment Contract" (NCG 2500, Rev. June, 1942). It may be observed, in this connection, that the Marine Corps form, just mentioned, contains the oath twice, once for induction and once for enlistment.)

(b) A statutory naval provision comparable to the second sentence of AW 109 is AGN 69, authorizing recruiting officers to administer oaths. Cf. also Art. 1682, Navy Regulations 1920, (deleted in Navy Regulations 1948) providing that the recruiting officer shall, on enlisting a person, administer to him the oath of allegiance if authorized by law to do so. (According to telephone information received from the Recruiting Division, Bureau of Naval Personnel, it is expected that a new naval recruiting manual will be issued at or after 1 February 1949.)

Very respectfully,

*K. Hallgarten*

K. HALLGARTEN

Lieutenant, USNR

*Mr. Larkin*

NAVY DEPARTMENT  
Office of the Judge Advocate General  
Washington 25, D.C.

REC'D JAN 11 1949  
48

JAG:NLM:JEC:nep

7 January 1949

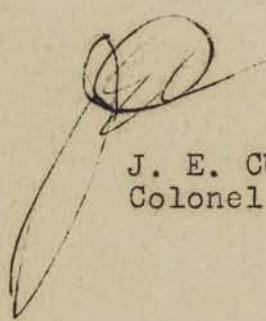
MEMORANDUM TO MR. LARKIN:

Subject: Proposed legislation "To authorize commissioned officers of the Army, Navy, Air Force and Marine Corps, including the reserve components thereof, to administer the oath required by Section 1757, Revised Statutes, and for other purposes."

Reference: (a) Discussion with Col. Dinsmore 6 January 1949 re bill authorizing all commissioned officers to administer oaths to appointee.

Enclosures: (A) Copy of undated letter SecNav to Speaker, House of Representatives.  
(B) Copy of bill.

1. The enclosures are furnished to complete your files on UCMJ.

  
J. E. CURRY  
Colonel, USMC

The Honorable,  
The Speaker of the  
House of Representatives,  
Washington, D. C.

My dear Mr. Speaker:

There is transmitted herewith a draft of proposed legislation "To authorize commissioned officers of the Army, Navy, Air Force and Marine Corps, including the reserve components thereof, to administer the oath required by Section 1757, Revised Statutes, and for other purposes."

The purpose of Section 1 of the proposed bill is to authorize any commissioned officer of the Army, Navy, Air Force, and Marine Corps, including the reserve components thereof, to administer the oath required by Section 1757, Revised Statutes, in connection with the appointment of any person to commissioned officer grade in a regular or reserve component of any of the aforesaid services. Section 2 provides that each officer of the Navy and Marine Corps shall be presumed to have accepted a promotion to a higher grade from the date of appointment thereto unless such promotion is expressly declined by the officer concerned. In addition, this Section provides that officers who have subscribed to the oath contained in Section 1757, Revised Statutes, shall not be required to renew said oath or to take a new oath upon promotion to a higher grade if they have been on continuous active duty.

The Navy Department frequently receives the oath of office of appointees to officer grades in the Navy and Naval Reserve which have been subscribed and sworn to before officers of the Army and Air Force. There is no authority

for this practice, and it is necessary to return the oaths to the appointees in order that they can be subscribed and sworn to before a person having general authority to administer oaths.

Under Article 114 of the Articles of War (10 U.S.C. 1586), certain designated officers of the Army are authorized to administer oaths "for the purposes of the administration of military justice and for other purposes of military administration". The Comptroller General has held that this authority does not extend to non-military activities (10 Comp. Gen. 357). Article 69 of the Articles for the Government of the Navy (34 U.S.C. 1200, art, 69), authorizes certain designated officers of the Navy and Marine Corps to administer oaths "for the purposes of the administration of naval justice and for other purposes of naval administration". This authority has also been held by the Comptroller General to extend only to matters of naval justice and naval administration (12 Com. Gen. 489).

In addition to the foregoing, the Act of April 25, 1935 (49 Stat. 161), authorizes certain designated officers of the Navy and Marine Corps to administer oaths in places beyond the continental limits of the United States, and under the Act of April 9, 1943 (57 Stat. 58), various Naval and Marine Corps officers are authorized to administer oaths within the United States during time of war or national emergency. There is no peacetime authority whereby a commissioned officer of one of the Departments of the National Military Establishment, within the continental limits of the United States, may administer the oath of office to a person appointed to commissioned officer grade in a component of any other of the said Departments. Section 1 of the proposed bill would provide such authority and is considered very desirable especially in view of the current coordination of activities of the Departments of the National Military Establishment.

Section 2 of the proposed bill would be applicable only to officers of the Navy and Marine Corps, including the reserve components thereof. The Act of

October 14, 1942 (56 Stat. 787), contains authority with respect to officers of the Army of the United States which is substantially similar to the authority contained in Section 2 of the proposed bill.

The Navy Department has been designated by the Office of the Secretary of Defense to sponsor this proposal on behalf of the National Military Establishment and accordingly recommends its enactment.

This report has been coordinated within the National Military Establishment in accordance with procedures prescribed by the Secretary of Defense.

Enactment of the proposed legislation would not result in any cost to the Government.

Lt. Cdr. J. Boyle  
Extension 2532, Rm. 2324  
Office of Legislative Counsel

A B I L L

To authorize commissioned officers of the Army, Navy, Air Force, and Marine Corps, including the reserve components thereof, to administer the oath required by Section 1757, Revised Statutes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any commissioned officer of any component of the Army of the United States (including commissioned officers of the National Guard of the United States), the United States Navy and Marine Corps (including the reserve components thereof), and the United States Air Force (including the Reserve Components thereof), whether or not on active duty, is hereby authorized to administer the oath required by Section 1757, Revised Statutes, incident to the appointment of any person to commissioned officer grade in any component of any of the aforesaid services, or any other oath required by law in connection with appointment to such commissioned officer grade.

SEC. 2. Each officer of the United States Navy and Marine Corps, including the reserve components thereof, hereafter promoted to a higher grade, shall be deemed for all purposes to have accepted his promotion

to such higher grade upon the date of his appointment thereto unless he shall expressly decline such promotion, and shall receive the pay and allowances of the higher grade from such date unless he is entitled under some other provision of law to receive the pay and allowances of the higher grade from an earlier date. No such officer who shall have subscribed to the oath of office required by Section 1757, Revised Statutes, shall be required to renew such oath or to take a new oath upon his promotion to a higher grade if his service after the taking of such oath shall have been continuous.

NAVY DEPARTMENT  
Office of the Judge Advocate General  
Washington 25, D.C.

*Mr. Larkin*

REC'D JAN 11 1949

4 (2)

JAG:NLM:JEC:nep

10 January 1949

MEMORANDUM TO MR. LARKIN:

Subject: Substitution of word "grade" for "rating" in Proposed Article 15 UCMJ (12/23/48).

1. I have recommended to Mr. Haydock that the word "grade" be substituted for the word "rating" in two places in proposed article 15 (b) (4), first line, "Commanding Officers Non-Judicial Punishment." Mr. Haydock agreed and I understand that he gave the necessary instructions.

*JEC*

J. E. CURRY  
Colonel, USMC

*Mr. Larkin*

NAVY DEPARTMENT  
Office of the Judge Advocate General  
Washington 25, D.C.

REC'D JAN 11 1949

4 (9)

10 January 1949

MEMORANDUM TO MR. LARKIN:

Subject: Current A.W. 105.

- References: (a) Navy Personnel Claims Act of 1945, 31 U.S.C. 223d, extends to SecNav the authority of SecArmy under the Military Personnel Claims Act of 1945, 31 U.S.C. 222c-h, 223 b,c.  
(b) Foreign Claims Act, 31 U.S.C. 224d.  
(c) Claims for damages occasioned by vessels, 34 U.S.C. 599, copy attached.  
(d) Claims for damages not occasioned by vessels, 34 U.S.C. 600, copy attached.  
(e) Federal Tort Claims, administrative provisions, 28 U.S.C. 2401, 2671-2674, 2678, and 2680.

Enclosures: (A) Copy of references (c) & (d).

1. The Navy has found the various Code provisions (listed as references above) to be adequate for the satisfactory settlement of minor claims without serious complaint.

2. It is my own opinion that these references, in the aggregate, have served to protect the Government against a flood of unwarranted claims.

3. Since the enclosures are fairly brief they are attached for your convenience.

*JEC*

J. E. CURRY  
Colonel, USMC

§ 599. Claims for damages occasioned by vessels.

The Secretary of the Navy is authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages occasioned since the 6th day of April, 1917, where the amount of the claim does not exceed the sum of \$3,000, occasioned by collisions or damages incident to the operation of vessels for which collisions or other damage vessels of the Navy or vessels in the naval service shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to the Congress through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. (June 24, 1910, ch. 378, 36 Stat. 607; Dec. 28, 1922, ch. 16, 42 Stat. 1066.)

§ 600. Claims for damages not occasioned by vessels.

The Secretary of the Navy is authorized to consider, ascertain, adjust, determine, and pay the amounts due in all claims for damages (other than such as are occasioned by vessels of the Navy); to and loss of privately owned property, occurring subsequent to April 6, 1917, where the amount of the claim does not exceed \$500, for which damage or loss men in the naval service or Marine Corps are found to be responsible, all payments in settlement of said Claims to be made out of the appropriation "Pay, miscellaneous." (July 1, 1918, ch. 114, 40 Stat. 705; July 11, 1919, ch. 9 41 Stat. 132; May 29, 1928, ch. 901, § 1 (60), 45 Stat. 990.)

C  
O  
P  
Y

10  
SC

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

Nov 30  
Dec 4

411

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 Forrester, 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 be 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  
INZEN B. WYATT

12

C  
O  
P  
Y

Ernest W. Gibson  
Governor

State 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 Elanding, 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.

C  
O  
P  
Y

Chairman, Committee on a  
Uniform Code of Military Justice

November 18, 1948

- 2 -

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,

(Signed) ERNEST W. GIBSON

Ernest W. Gibson  
Governor of Vermont

EWG/mh

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 Forrester, 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 be 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. WELLS, Chairman  
LOUIS C. FIELAND  
JOHN M. MURTAGH  
SIDNEY A. WOLFF  
INZER B. WYATT

November 22, 1948

4 (13)

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 New

*J.A.G. convening authority*

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.

C  
O  
P  
Y

4 (14)

Ernest W. Gibson  
Governor

State 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.

C  
O  
P  
Y

Chairman, Committee on a  
Uniform Code of Military Justice

November 18, 1948

- 2 -

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,

(Signed)

ERNEST W. GIBSON

Ernest W. Gibson  
Governor of Vermont

EWG/mh



OFFICE OF THE GENERAL COUNSEL  
DEPARTMENT OF THE NAVY  
WASHINGTON 25, D. C.

4 (15)

27 October 1948

MEMORANDUM

To: Mr. Felix E. Larkin, Chairman, Working Group  
Committee on a Uniform Code of Military Justice

Subj: Uniform Code of Military Justice - Proposed Articles  
54 to 59.

I. PROPOSED CORRECTIONS

1. Article 56(d) - suggest that this be revised to read:

"The Judicial Council shall determine whether, by reason of legal insufficiency, the findings or sentence, as theretofore approved, shall be set aside in whole or in part, or modified, and whether in any case where the findings and sentence are set aside in whole, the charges shall be dismissed or a new trial ordered."

As the section now reads it seems to permit a new trial where the findings or sentence have been set aside in part and approved in part. This was clearly not intended.

2. Article 59 - suggest that this be changed to read:

"Art. 59. Confirmation by President:

"(a) No sentence extending to death or involving a general officer shall be executed unless and until execution of the sentence has been approved by the President.

"(b) In any case in which the sentence extends to death, the President shall have the power to commute or remit such sentence.

"(c) In any case of a sentence involving a general officer the President shall have the power to commute, remit, mitigate or suspend such sentence."

The section as drafted provides for Presidential review of sentences affecting general officers but does not refer any clemency power which seems anomalous.

*include*

II. SCOPE OF SECTIONS

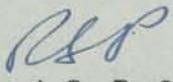
I think it would be well to bring out in any discussion that these sections are intended to cover only the appellate review of general court martial cases and do not attempt to cover the following topics:

1. Subsequent clemency, suspension of sentence, remission of unexecuted portion of sentence, restoration to duty, vacation of suspension previously granted, etc. This entire subject could be covered in a separate section which would be applicable to inferior courts as well as general courts.

2. Review of special and summary court proceedings.

3. Finality of court martial judgments. I think the Uniform Code should contain some provisions similar to the new A.W. 50(h), but again this would apply to inferior courts as well as general courts and should therefore be treated elsewhere.

<sup>TTL</sup>  
~~4~~ Finally in connection with the Judicial Council (Art. 56(a)) I think some further consideration might be given to the question whether military personnel should be eligible for membership and if so whether they should, upon appointment to the Council, be removed from the control of their respective departments.

  
Robert S. Pasley

Before attempt is made at the compilation of a single code for courts-martial, it is imperative that two premises be clearly distinguished.

#### FIRST

Article I, Section 8 of the Constitution of the United States provides: "Congress shall have the power to make rules for the Government and regulation of the land and Naval forces."

Under this Constitutional grant of power, in the Articles of War for the Army, and Articles for the Government of the Navy, Congress has provided for the trial and punishment by courts-martial, without indictment or intervention of a jury, of offenses against the internal or municipal law of the United States.

In order for a court-martial validly to try an accused for violation of these laws, conditions precedent to jurisdiction must be met. For example, the accused must be subject to the internal or municipal military or Naval laws of the United States, and the conduct complained of must be in violation of such internal or municipal law.

Such laws regulate the conduct of members (actual and constructive) of the Armed Forces in their relationships with the Government of the United States and their relationships with others.

These laws are penal in character and legal consequences internal in character result from violation thereof. Under this Constitutional grant of power and the laws of Congress enacted thereunder, a courts-martial functions as a court, administering the domestic or municipal laws of the United States. The protection afforded the accused by the internal or municipal laws of the United States, as for example, the fifth and sixth

amendments to the Constitution of the United States, are given full effect.

## SECOND

Article VI, Paragraph 2 of the Constitution of the United States provides: "This Constitution and the (valid) laws of the United States which shall be made in pursuance thereof, and on treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land."

Under this second Constitutional grant of power, by treaties made by the United States, notably the Hague and Geneva Conventions, recognition has been given by the United States to the rules of the family of nations applicable in time of war in the impact of our Armed Forces upon the Armed Forces and peoples of enemy or other sovereignties.

For convenience these rules of the family of nations may be catalogued under two headings:

1. Those which bring to bear upon our Armed Forces.
2. Those which bring to bear upon others not a part of our Armed Forces.

An observation pertinent to the first heading is in order. Those rules of the family of nations having their origin in treaties made by the United States - notably the Hague and Geneva Conventions - which bring to bear upon our Armed Forces, for the most part, if not wholly, have been adopted into and made penal acts under the internal or municipal laws of the United States. Such legislation was a valid exercise of the Constitutional power to make rules for the government and regulation of (our) land and Naval forces. (See, also Article 1, Section 8, Clause 10, Constitution of the United States). Obviously, persons actively or constructively a part of our Armed Forces, subject to such laws, who offend against such rules,

offend against the internal or municipal laws of the United States. This is true without regard to whether the violation also offends against the law of the family of nations. The discussion under this second power is not concerned with offenders under the first power.

We are here concerned with persons who are not actively or constructively a part of our Armed Forces, as for example enemy prisoners of war, enemy spies and saboteurs, war traitors, etc., - who in time of war offend against the rules of the family of nations. These persons are as much bound to observe the rule of war as are our Armed Forces, but, unlike our Armed Forces, they are not, in addition, subject to our internal or municipal laws.

Acting under another Constitutional grant of power, Congress has authority to provide for the enforcement of such bilateral rules of the family of nations which are applicable to persons who are not actual or constructive members of our land and Naval forces. (See Article 1, Section 8, Clause 10). For acts and offenses for which death may be inflicted or imposed or other punishment awarded as to such persons who are not actively or constructively members of our Armed Forces, ample provision is contained in International law and Treaty Conventions for their enforcement. For violation in time of war of these recognized treaty-made and common law rules of war, laws of the family of nations, - by persons who are not actual or constructive members of our Armed Forces, Congress, has provided for the enforcement of such rules through courts-martials, military commissions, provost courts, and occupational military government courts, etc.

*legislative enactment*

Under this ~~grant of Constitutional power~~, a courts-martial, military commission, provost court, or occupational military Government court, etc., is not an organism enforcing the internal or municipal laws of the United States. The law being administered is the law of the family of nations. Jurisdiction thereover by courts-martials, military commissions, provost courts, and occupational military government courts result from treaty adoption or the common law rules of war. It is external law, not internal or municipal law. When functioning within the permitted boundaries of such international rules and treaties, courts-martials, provost courts, military commissions, and occupational courts, etc., are not circumscribed by the protective provisions of internal or municipal law, such as the Fifth and Sixth Amendments, unless such protective provisions are voluntarily self-imposed by provisions of internal law. Extreme care should be taken in the voluntary extension of such self-imposed provisions, in time of war to alien peoples beyond our internal borders.

The Articles of War for the Army recognize these distinctions. In Article 2, the persons subject to internal or municipal military law are clearly defined. Article 2 does not include therein enemy spies, enemy saboteurs, enemy prisoners of war, or enemy war traitors; such persons are made to answer to external law only under the provisions of Articles 12, 48, 81, 82. See *Yamashita v. United States* 327 U.S. 1.

Under this Constitutional grant of power, a courts-martial, military commission, or occupational military government court may and frequently does pass upon and determine conduct which is admittedly lawful.

For example, in "Rules of Land Warfare" War Department Field Manual 27-10, it is set out in Paragraph 203 as follows:

"Employment of spies lawful.—The foregoing H.R. 29 (par.202a) and H.R. 24 (par. 37) tacitly recognize the well-established right of belligerents to employ spies and other secret agents for obtaining information of the enemy. Resort to that practice involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult and ineffective as possible for the enemy."

Thus, just as it is a lawful act of belligerency to kill in battle an enemy soldier, to keep him from overwhelming you, so also it is a lawful act of belligerency to execute a proven enemy spy, to keep the enemy from overwhelming you and in order to render that method of obtaining information as dangerous, difficult and ineffective as possible. In cases involving enemy spies, courts-martials, military commissions, provost courts or occupational military government courts, etc., do not function as courts in the legal sense of the word. Actually they function as fact finding bodies. Nor in "suffering death" does the accused "suffer punishment" in the legal sense of the word. No legal consequences, such as for example, "Corruption of the blood" flows from his execution any more than from the death of any enemy soldier slain in battle.

If power exists to make rules for persons who are not in our land and Naval forces, such power has its source in a Constitutional grant other than "to make rules and regulations for (our) land and Naval Forces."

If these premises be true, and they cannot be seriously denied, (See Article 1, Section 8, Clause 10) it is highly improper to stretch the power

to make rules for the government and regulation of our land and Naval forces to include the power to make rules for the government and regulation of all men everywhere.

Under the Hague and Geneva conventions which the United States has adopted, enemy spying is a lawful act. If it is a lawful act it cannot be an unlawful act. Under the Constitution, enemy spying cannot be unlawful under the first power and lawful under the second power, at one and the same time. This would be a legal absurdity.

For example, under the Hague Regulations to which by treaty adoption under Constitution Article VI, Paragraph 2, The United States is a party, spying by an enemy is not an offense against the provisions of these Conventions. While death may be inflicted on a proven enemy spy, the imposition of death is a lawful act of belligerency and not punishment penal in character. Further, "a spy who, after rejoining the Army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility, for his previous acts of espionage." (Hague Regulations Article 31, Rules of Land Warfare, Paragraph 212.) Such treaties and conventions may not be extended beyond their boundaries; nor may their provisions be altered or nullified by internal penal legislation. These treaty provisions are expressly declared to be the supreme law of the land.

It is submitted that not only is it unnecessary but it is improper to subject to internal or municipal law persons who are not actively or constructively members of our Armed Forces. See *Yamishita v Styler* 327 US 1.

Indeed, from the very nature of things, if an accused was a citizen subject to internal or municipal law of the United States, and was charged with

being a spy or a saboteur, the offense would be that of 'treason' under internal or municipal law of the United States, without regard to being as well an offense against the laws of families of nations. Jurisdiction to try the internal or municipal law offense of 'treason' would not lie in a military commission, provost court, or occupational military government court, etc., but in a courts-martial or civil courts organized and constituted in conformity with the provisions of the Constitution and internal or municipal laws of the United States for trial of persons who are subject to its jurisdiction over such offenses. Military commissions, provost courts, or occupational military government courts are speedily available for persons who are not actual or constructive members of our Armed Forces and who offend against the rules of war announced in international treaties and conventions or the common law rules of war.

From all that has been said it is evident that it is not permissible under the Constitutional power.

"to make rules and regulations for (our) land and Naval forces."  
to change lawful acts of belligerency under treaty-made rules to internal penal law offenses punishable by death, by imprisonment, by fine, or by imprisonment and fine, nor to extend such offenses to "all places" - in conflict with the provisions of Article 42 of the Hague Regulations Convention, to which we are a party,--wherein our powers over hostile territory are limited to that part thereof only to which we have established our authority. (See "Rules of Land Warfare, Paragraph 271).

The proposed articles for the government of the Navy enacted under the first power include in our internal laws the act of spying by an enemy as an internal penal offense punishable by death or by

imprisonment or fine, and subject such enemy spy not only to such internal law penal offense (whether or not he subsequently is taken as a prisoner of war) but to all other provisions of our internal or municipal penal law applicable to our forces. Further it is provided that war traitors and prisoners of war are amendable not only to such spy provisions but to all other provisions of our internal or municipal penal laws applicable to our Naval forces.

It is pertinent here to observe the sharp distinction between "detention" and "arrest". "Detention" is restraint, for the convenience of government. Persons summoned for jury duty suffer detention. Persons drafted into the Army suffer detention. Prisoners of war and persons entitled to be treated as such during hostilities, suffer detention in order to foreclose their further useful service to the enemy. Acts of detention are for some profit to government; it is for governmental convenience and involves no violation of law by the person detained. No loss of civil rights accrue to the person detained.

Arrest on the other hand is detention, plus punishment. It is put in motion by the accused. The restraint of the person arrested is occasioned by a violation of law by such person. Serious loss of political rights may and do flow as a consequence of arrest.

Whereas a spy who is captured after rejoining the Army to which he belongs may suffer 'detention', as a prisoner of war, such detention cannot be "detention" and "arrest" at one and the same time under equal provisions of the laws of the United States. Such result is inevitable

when spying by an enemy is made a penal offense against our internal or municipal law, punishable by death, imprisonment and fine. Accurately spying under the conventions is a lawful act for which death may be imposed as a lawful act of belligerency; if a spy rejoins his Army and is thereafter captured he may only be detained as a prisoner of war. Further, if for any reason a spy is not ordered to be put to death as a lawful act of belligerency, (the only authorized procedure under International law) a sentence of imprisonment penal in character may not lie. The alleged spy may be "detained" however, as a prisoner of war or a person entitled to be treated as such, -as in the case of any person who is dangerous to our security. This is detention, however, not arrest, and ends when the war ends.

#### WARNING

Whereas under old Article of War 48 it was not necessary that the President confirm the lawful act of belligerency of executing a spy, under Article 48 as amended in H.R. 2575, all death sentences inflicted by "court martial" must be confirmed by the President. It is submitted that speedy execution for proven enemy spies in the zone of operations is highly desirable. This does not preclude the exercise by the President of his abundant powers of command and pardon without regard to confirmation, which he is free to exercise whenever and however he may choose. The provision as to spies as written in old Article 48 prior to H.R. 2575 should be retained.

/As an alternative, and to avoid "Appellate Review" mandatory in all court-martial cases, in spy cases where death may be inflicted, such cases

should be tried only by "Military Commissions, Provost Courts, Occupational  
Military Government Courts, etc.," for whose sentences "Appellate Review"  
does not apply.



OFFICE OF THE GENERAL COUNSEL  
DEPARTMENT OF THE NAVY  
WASHINGTON 25, D. C.

416

October 2, 1948

Dear Professor Morgan,

I find that I was in error in citing to you the Administrative Procedures

Act. The correct reference is to Section 207 of the Legislative Reorganization Act of 1946 (Public Law 601, 79th Congress, 2d Session, Chapter 753). (5 U. S. C. 191e, 275).

This authorizes each Secretary to establish a civilian board to consider any military or naval record where necessary to correct or remove an injustice. Section 103 of the same Act

eliminates private bills.

The Attorney General has held that this is applicable to discharges and dismissals

imposed by \* general courts - martial and  
authorizes the issuance of new discharges in  
lieu of those previously granted, but that no  
such correction should be regarded as an act  
of clemency or mitigation or as affecting the  
conclusiveness of the court - martial judgment.

(40 Op. Atty Gen., Feb. 24, 1947).

My thought is that this power  
should be given to the Judicial Council and  
that Section 207 of the Legislative  
Reorganization Act, insofar as it affects  
dismissals and discharges awarded by courts -  
martial, should be repealed.

Since our discussion last evening, it



OFFICE OF THE GENERAL COUNSEL  
DEPARTMENT OF THE NAVY  
WASHINGTON 25, D. C.

has occurred to me that perhaps dismissals and discharges should be made subject to confirmation by the Secretary of the respective Department, or a board appointed by him, before being finally executed. I realize that this complicates the picture but it does have certain advantages:

- (1) It keeps the Secretaries in the picture;
- (2) It follows the scheme of the former bills;
- (3) It affords an accused additional protection, on a clemency basis, beyond that afforded him by the Board of Review or Judicial

Council on a more strictly legal basis.

I merely throw this out for your  
consideration. In <sup>the</sup> meanwhile I will discuss  
it with Felix.

Sincerely,

Robert S. Pasley.